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CORRIGENDA

P. 53. THYNNE *v.* SALMON. Line E.5: for " entirely " read " *hardly*."

P. 113. *Re* CRAWSHAY. Line H.6: for " first testator " read " *Mrs. Williams*."

P. 139. MANN *v.* PHILLIPS. Lines G.1 and 2: for the words as printed read " the writ. You will then have to re-serve the writ, and, if the defendant makes default in appearance, you will have to re-file the statement of claim."

P. 140. REYNOLDS *v.* LLANELLY ASSOCIATED TINPLATE CO., LTD. Names of counsel should read " *Scholefield Allen, K.C.*, and *Ithel Davies* for the workman. *Dare* and *Wallis-Jones* for the employers." P. 145, Line C.: for " *Appeal dismissed* " read " *Appeal allowed*."

P. 254. *Re* COGHILL. Counsel: for " *D. H. Cohen* " read " *Victor Coen*."

P. 500. *Re* GEE. Counsel: after " *Armstrong Cowan* " read " *and Charles Emanuel*."

P. 562. PEGLER *v.* RAILWAY EXECUTIVE. Line 1: for " Jan. 1, 1940 " read " *July* 1, 1940."

P. 584. *Re* BLANDY-JENKINS (*deceased*). Counsel: for " *J. H. Lazarus* " read " *R. S. Lazarus*."

P. 748. MORRIS *v.* MINISTER OF PENSIONS. Line G.4: delete the words " and no layman." Line G.5: after the words " medical practitioners, and " read " a layman. The chairman . . ."

P. 839. ILLSTON & ROBSON, LTD. *v.* SMITH. Line E.4: for "sub-s. (1) (i)" read "sub-s. (*3*) (i)."

P. 938. Line 5: delete " other being the "

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PALSER v. GRINLING.
PROPERTY HOLDING CO., LTD. v. MISCHEFF.

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Porter, Lord Uthwatt, Lord MacDermott), June 9, 10, 13, 16, 17, 19, 20, 27, 30, December 19, 1947.]

Observations of VISCOUNT SIMON, at p. 9, *applied.* R. v. BLACKPOOL RENT TRIBUNAL. *Ex p.* ASHTON. [1948] 1 All E.R. 900.

Observations of VISCOUNT SIMON, at pp. 10, 11, *applied.* ROPPEL v. BENNETT. [1948] 2 All E.R. 627.

Landlord and Tenant—Rent restrictions—" Bona fide let at rent which includes payments in respect of attendance or use of furniture "—" Attendance "—" Furniture "—" Amount fairly attributable to attendance or use of furniture " —" Substantial portion " of " whole rent "—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), *s.* 10 (1) (*as amended by Sched. I to the Rent and Mortgage Interest Restrictions Act,* 1939)—*Rent and Mortgage Interest Restrictions Act,* 1939 (c. 71), *s.* 3 (2) (*b*).

By the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 : " (2) The principal Acts shall not, by virtue of this section, apply . . . (*b*) save as is expressly provided in the said Acts, as amended by virtue of this section, to any dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance or use of furniture. . ." By the Rent and Mortgage Interest Restrictions Act, 1923, s. 10 (as amended by sched. I to the Act of 1939) : " (1) For the purposes of s. 3 (2) (*b*) of the Rent and Mortgage Interest Restrictions Act, 1939 . . . a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent."

In the phrase " *bona fide* let at a rent which includes payments in respect of board, attendance or use of furniture," " *bona fide* " governs all the words which follow, and the phrase amounts to a stipulation that the rent to be paid genuinely includes payments in respect of board, attendance or use of furniture.

" Attendance " means service personal to the tenant performed by an attendant provided by the landlord in accordance with his covenant for the benefit or convenience of the individual tenant in his use or enjoyment of the demised premises. Services common to others (*e.g.*, heating of communal water supply or the provision of a porter or a housekeeper for a block of flats) will not constitute attendance, but a covenant by the landlord to supply someone to carry coals up to a flat or refuse down from it, or to provide a house-maid or valet to discharge duties in connection with the flat, is a covenant to provide attendance.

Dictum of LORD GREENE, M.R., in *Engvall* v. *Ideal Flats, Ltd.* ([1945] 1 All E.R. 233) *approved.*

A tenant who has contracted to pay rent for attendance which the landlord covenants to supply cannot reduce the proportion of the rent fairly attributable to such attendance by saying that, though he is entitled to have it, he does not want it.

"Furniture" has a statutory meaning which cannot be extended by a stipulation in the lease, and consists of articles in which the landlord has a proprietary interest. They must be commonly regarded as "furniture," and loose articles so regarded will be within the statutory meaning. If, however, the articles are fixed to the fabric of the demised premises, they should be regarded as part thereof unless they can be detached without appreciable damage to or alteration of the fabric or themselves. "Use of furniture" in s. 10 (1) of the Act of 1923 refers to articles provided solely for the use or enjoyment of the dwelling in question. Articles provided in common halls for the use of all the tenants in a block of flats are excluded.

In the phrase "amount of rent which is fairly attributable to attendance or the use of furniture, regard being had to the value of the same to the tenant," the words "amount of rent" are equivalent to "the portion of the whole rent," and the words "of the same" refer to the attendance or to the use of furniture or to both when both are provided. "Tenant" refers to the actual tenant whose lease is under examination, not to the average or normal tenant of that class of property. The judge of fact should take the furniture in the state that it is, and fix a fair rental for it having regard to its value to the tenant, but such value is not to govern the calculation absolutely. "The amount of rent fairly attributable" is not necessarily the amount actually attributed in the lease. It will depend on a number of considerations of which the chief is that, if and so far as the landlord does not provide furniture which the tenant would normally require to use, the tenant would have to provide it himself. It is the value to the tenant of the landlord's covenant which mainly controls the figure to be arrived at, and not the cost of the furniture to the landlord, although the latter may also be relevant.

What is a "substantial portion" of the whole rent must be left to the discretion of the judge of fact in each case, the onus being on the landlord. It must be a considerable part of the whole contractual rent, *i.e.* more than just enough to avoid the *de minimis* principle. Where payments are made both in respect of attendance and of the use of furniture, the better construction of s. 10 (1) of the Act of 1923 appears to be that the payments should be added together to determine whether the total forms a "substantial portion" of the whole rent.

"Whole rent" means the entire contractual rent payable by the tenant, including the rates if the landlord pays them.

Decisions of the Court of Appeal ([1946] 2 All E.R. 287, 294), *affirmed.*

[As to Dwelling-houses Let at a Rent including Attendance and use of furniture, see HALSBURY, Hailsham Edn., Vol. 20, p. 314, para. 370; and for Cases, see DIGEST, Vol. 31, pp. 559-561, Nos. *7068-7084.*]

Cases referred to:

(1) *Prout* v. *Hunter,* [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 31 Digest 557, *7040.*

(2) *Nye* v. *Davis,* [1922] 2 K.B. 56; 91 L.J.K.B. 545; 126 L.T. 537; 31 Digest 560, *7072.*

(3) *Engvall* v. *Ideal Flats, Ltd.,* [1945] 1 All E.R. 230; [1945] K.B. 205; 114 L.J.K.B. 249; 172 L.T. 134; Digest Supp.

(4) *King* v. *Millen,* [1922] 2 K.B. 647; 92 L.J.K.B. 123; 128 L.T. 280; 31 Digest 560, *7074.*

(5) *Wood* v. *Carwardine,* [1923] 2 K.B. 185; 129 L.T. 314; *sub nom. Carwardine* v. *Wood,* 92 L.J.K.B. 593; 31 Digest 560, *7075.*

(6) *Gray* v. *Fidler,* [1943] 2 All E.R. 289; [1943] K.B. 694; 112 L.J.K.B. 627; 169 L.T. 193; Digest Supp.

(7) *Newport Borough Council* v. *Monmouthshire County Council,* [1947] 1 All E.R. 900; [1947] A.C. 520; 177 L.T. 77; [1947] L.J.R. 913, 929.

(8) *Somershield* v. *Robin,* [1946] 1 All E.R. 218; [1946] K.B. 244; 115 L.J.K.B. 273; 174 L.T. 181; Digest Supp.

Appeals by the plaintiffs (the landlords) from decisions of the Court of Appeal.

In *Palser* v. *Grinling* the landlord demised to the tenant for a term of one year a flat together with the use in common with the landlord and persons authorised by the landlord of its entrance hall, staircases, landings and passages leading to the demised premises and the passenger lift in the building. The landlord covenanted to keep the entrance hall, staircases and passages of the building clean and the lift in working order, and also to provide and maintain a supply of hot water. By the general regulations, by which the tenant agreed to be bound, the main entrance door was in charge of the resident porter, any goods and parcels for the tenant were in the first instance to be delivered to the resident housekeeper to whom the tenant was to detail all orders for tradespeople, and all coal required was to be sent to the tenant's flat by the resident porter, who would also empty and return the receptacle provided by the tenant for refuse. In his defence to a claim for possession by the landlord on expiry of the lease the tenant pleaded that the flat was a dwelling-house to which the Rent Restrictions Acts, 1920-1939 applied. LORD GODDARD, C.J., who tried the case on Mar. 15, 1946, and the Court of Appeal ([1946] 2 All E.R. 287) decided that the flat was not *bona fide* let at a rent which included payment in respect of attendance so as to take the flat outside the Acts. The House of Lords now affirmed the decision of the Court of Appeal.

In *Property Holding Co., Ltd.* v. *Mischeff*, the landlords let a flat to one Trevor for 14 years from Mar. 25, 1937. Under licence from the landlords, Trevor sublet the flat for 1 year from Mar. 25, 1942, with an option to a sub-tenant (the respondent, Mischeff), to continue for a further period of 1 year, 6 months, from the expiry thereof. Pursuant to a provision in the lease, Trevor gave notice determining his term on Mar. 25, 1944, but, by a deed dated Oct. 18, 1943, his tenancy was extended to Sept. 29, 1944. The sub-tenant contended that as a result of the exercise by him of his option to continue the tenancy which he held from Trevor, coupled with Trevor's subsequent exercise of his option to determine his lease, the sub-lease operated as an assignment to the sub-tenant of Trevor's lease. The House of Lords held that there was no substance in this contention.

The sub-lease, which was, with minor amendments, a *verbatim* reproduction of the head-lease, provided that Trevor leased to the sub-tenant the flat together with a right to use in common with other persons the passages, stairs and doors of the said building, and the lifts. The lessor covenanted to cause to be lighted the staircase, etc., and cause it to be kept cleaned, but was not liable to remove any litter caused by the sub-tenant. He also undertook that there should be provided a resident porter and to use his best endeavours to procure the maintenance of a hot water supply and central heating system. The porter was to be under no obligation to furnish attendance to occupiers for their private convenience. Certain articles, including a kitchen cabinet, refrigerator, medicine chest and linoleum, were provided in the flat and in the common halls, etc., there were carpets, window hangings and a settee. The landlords claimed possession on the ground that their lease to Trevor had expired on Sept. 29, 1944, but the House of Lords held affirming a decision ([1946] 2 All E.R. 294) of the Court of Appeal by which an order of HENN COLLINS, J. ([1946] 1 All E.R. 406) was reversed that any payment that the rent included in respect of attendance and use of furniture did not form a substantial portion of the whole rent so as to exclude the operation of the Rent Restrictions Acts.

Sir Valentine Holmes, K.C., and *James MacMillan* for the appellant, Palser.
Sharp, K.C., *A. Karmel* and *Denis Murphy* for the respondent, Grinling.
Sir Valentine Holmes, K.C., *J. Scott Henderson, K.C.*, and *R. Stock* for the appellants, the Property Holding Co., Ltd.
Raeburn, K.C., and *C. Hackforth-Jones* for the respondent, Mischeff.

The House took time for consideration.

Dec. 19. **VISCOUNT SIMON :** My Lords, these two appeals were heard together. Both appeals involve the construction and application of certain provisions of the Rent Restrictions Acts, and especially of s. 3 (2) (*b*) of the Rent and Mortgage Interest Restrictions Act, 1939, and s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, as amended by sched. I to the said Act of 1939. Section 3 of the Act of 1939 provides :

> (2) The principal Acts (*i.e.*, the Rent and Mortgage Interest Restrictions Acts, 1920-1938) shall not, by virtue of this section, apply . . . (*b*) save as is expressly provided in the said Acts as amended by virtue of this section, to any dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance or use of furniture . . .

Section 10 of the Rent and Mortgage Interest Restrictions Act, 1923, as amended, provides :

> For the purposes of para. (*b*) of sub-s. (2) of s. 3 of the Rent and Mortgage Interest Restrictions Act, 1939 (which relates to the exclusion of dwelling-houses from the principal Act [the Act of 1920] in certain circumstances), a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent.

It is convenient also to recite, in connection with the second appeal, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, which provides :

> (3) Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sublet shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued.

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In this appeal, the appellant, Mrs. Palser, is the owner of a block of flats known as Chantrey House, Eccleston Street, in the county of London, and by a lease in writing dated Feb. 16, 1944, she demised to the respondent for a term of one year from Mar. 25, 1944, at a yearly rental of £175, payable quarterly, a flat numbered 13, situated on the fourth floor of the said block of flats. Flat No. 13 contained a sitting room, bedroom, kitchen and bathroom. The lease contained (*inter alia*) the following provisions :—(1) By cl. 1 the appellant demised to the respondent the said flat " together with the use in common with the landlord and persons authorised by her of the entrance hall staircases landings and passages leading to the demised premises and the passenger lift in the said building subject to the regulations in regard to such user set forth in the schedule." (2) By cl. 2 the respondent covenanted (*inter alia*) to " observe and strictly conform to such general regulations governing all flats in the said building as may from time to time be adopted by the landlord." (3) By cl. 3 (A) the appellant covenanted (*inter alia*) to " keep the entrance hall staircases and passages of the said building clean and the lift leading to the demised premises in working order " and subject to certain conditions to " provide and maintain a supply of hot water for reasonable domestic purposes " with a proviso that the appellant should " have complete discretion with regard to the appointment discharge or removal of any staff including that of a hall porter employed for the performance of the said services." (4) By cl. 3 (B) the appellant covenanted to " pay all general and water rates payable in respect of the demised premises." If the rates were increased during the tenancy, the respondent covenanted to " pay such sum by way of additional rent as shall be equivalent to the amount of such increase." (5) The general regulations referred to were appended to the said lease and included the following :—

> (1) The main entrance door of the building shall be in charge of the resident porter or other person deputed by the landlord . . . (5) Any goods or parcels to be delivered to the tenants shall in the first instance be delivered to the resident or other housekeeper on the premises to whom the tenants shall detail all orders for communications to the tradespeople . . . (6) All coal required by the tenants shall be sent up to the flats before 10 a.m. by the resident porter or such person as the landlord may instruct. Any refuse from each flat shall be placed in a suitable receptacle to be provided by the tenant which will be emptied and returned by the said porter or such other person as the landlord may instruct and no such receptacle shall be allowed to remain outside any flat.

The appellant commenced proceedings by a specially indorsed writ of summons issued on Apr. 30, 1945, and by her statement of claim thereon claimed possession of the said flat on the ground that the term of one year for which the appellant had demised it to the respondent had expired on Mar. 25, 1945. By her defence and counterclaim, the respondent pleaded that the said flat was a dwelling-house to which the Rent and Mortgage Interest Restrictions Acts, 1920-1939, applied. The respondent also counterclaimed £88 14s. 6d. as being rent paid above the standard rent. By her reply, the appellant pleaded that at all material times the said flat was *bona fide* let at a rent which included payment in respect of attendance and that the payment fairly attributable to the attendance, regard being had to the value of the same to the respondent, formed a substantial portion of the whole rent.

This first case, therefore, depends on the appellant's contention that the rent included such payment in respect of " attendance " as took the flat outside the Rent Restrictions Acts. No question of " furniture " is involved. If this contention failed it was not in dispute that the respondent would also succeed on her counterclaim. Both LORD GODDARD, C.J., who tried the case, and the Court of Appeal (MORTON, SOMERVELL and ASQUITH, L.JJ.) decided that the appellant's contention failed.

PROPERTY HOLDING CO., LTD. *v.* MISCHEFF.

In this appeal, the appellants, Property Holding Co., Ltd., are the owners of a block of flats known as Albion Gate, Hyde Park, in the county of London. By a lease in writing dated Jan. 27, 1937, the appellants demised to one Trevor at a yearly rental of £275, with the addition of £1 6s. 3d. per quarter in respect of the basic charge for electricity for the said block of flats, from Mar. 1 to 25, 1937, and thence for a term of 14 years a flat numbered 19 (hereinafter called " the said flat ") situate in the said block of flats. It is alleged by the appellants that the rent included payments in respect of attendance and use of furniture forming a substantial portion of the whole. Flat No. 19 is on the ground floor, and contains two sitting rooms, three bedrooms, a kitchen and two bathrooms. By a licence dated May 5, 1942, the appellants granted to the said Trevor licence to underlet the said flat to the respondent for a term of 2½ years from Mar. 25, 1942, with the option on the part of the sub-lessee to determine the tenancy at the end of the first year. By an agreement under seal dated June 26, 1942, the said flat was sub-let to the respondent by Trevor for a term of 1 year from Mar. 25, 1942, with an option to the respondent (which was exercised) to continue for a further period of 1 year and 6 months from the expiry thereof at a yearly rental of £275 with the addition of the said quarterly basic electricity charge. The period for which the sub-lease was granted did not in form correspond with the period authorized by the licence, but it was not suggested that the granting of the sub-lease was not duly authorized by the licence. Pursuant to a provision of his said lease from the appellants, Trevor gave a notice determining his said term on Mar. 25, 1944. By a deed dated Oct. 18, 1943, Trevor's tenancy was extended to Sept. 29, 1944, at a yearly rental of £375 with the addition of a payment of £6 4s. 4d. per annum in respect of the basic electricity charge of the said block of flats. The respondent contended that as a result of (*a*) the exercise by him of his option to continue the tenancy which he held from Trevor—which had the result that his term would not expire till Sept. 25, 1944—coupled with (*b*) Trevor's subsequent exercise of his option to determine his lease—which had the result that Trevor's lease determined on Mar. 24, 1944—the sub-lease to the respondent operated as an assignment to the respondent of the lease to Trevor. If the respondent was right in this, the year as at which the furniture should be valued would be 1937 and not 1942. But there is no substance in this contention. At the date of the transaction with the respondent, there was vested in Trevor a term which extended to March 1951, and, therefore, left him a reversion expectant on the respondent's sub-tenancy, whether or not the respondent exercised his option to continue his tenancy. The respondent, therefore, duly became sub-tenant of Trevor.

The sub-demise by Trevor to the respondent included exactly the same property as was included in the head-lease, the articles referred to in the sub-lease as " landlord's fixtures " being the same as those to which that term was applied in the head-lease. Subject to some verbal adaptations, to the alteration in the period, and to one immaterial exception, the sub-lease reproduced *verbatim* the language of the head-lease. The following terms of the sub-lease are material :—(1) By cl. 1 Trevor leased to the respondent the said flat together with the use of the landlord's fixtures therein and together also with the right of ingress and egress to and from the said flat by the lessee and all persons authorised by him in common with all other persons entitled to the like right at all times along and through the passages stairs doors of the said building and together with the use by the same persons in common aforesaid of the lifts of the said building and together also with all privileges and appurtenances to the said flat belonging or appertaining. (2) By cl. 3 of the lessee's covenants the respondent agreed that he would "at the end or sooner determination of the said term peaceably yield up the said flat and the landlord's fixtures including those set forth in sched. I hereto and the appurtenances thereto to the lessor." (3) By cl. 2 of the lessor's covenants, the lessor covenanted to "pay or cause to be paid all outgoings taxes and assessments charged upon or in respect of the premises hereby demised (excepting any charge for gas or electricity current used in the said flat which the lessee shall pay to the proper authorities)." (4) By cl. 3, the lessor covenanted to:

> . . . cause to be lighted the staircase and landing of the said building and will at all times cause the same to be kept properly cleaned and swept but shall not be liable to remove any litter or dirt caused by the lessee and the lessor also undertakes that there shall be provided a resident porter and that he will use his best endeavours to procure that maintenance at all reasonable hours of an available supply of hot water for domestic purposes and also during the period from Sept. 30 to May 1 in every year for the central heating apparatus.

(5) By sched. II, cl. 3, it was provided that:

> . . . the lessor shall not be held responsible for any act committed by the porter or any person acting under him and the porter shall be under no obligation to furnish attendance or other use of his services to occupiers for their private convenience.

(6) By sched. II, cl. 8, it was provided that:

> . . . all services (other than as aforesaid) rendered to the lessee by the porter shall be considered as rendered by him as the servant of the lessee and the lessor will not be responsible for the same or any consequence thereof.

The appellants commenced proceedings by a specially indorsed writ of summons issued on Oct. 9, 1944, and by their statement of claim thereon claimed possession of the said flat on the ground that their lease to Trevor had expired on Sept. 29, 1944, and mesne profits at the rate of £375 per annum from Sept. 29, 1944. By his defence, delivered on Nov. 7, 1944, the respondent pleaded (*inter alia*) that the flat was controlled in accordance with the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and that the respondent continued in possession of the said flat as a statutory tenant. The action was tried before Henn Collins, J., when the appellants proved certain facts and advanced certain contentions as follows:—(1) That the said flat while let to the respondent contained the following articles which were provided by the appellants, such articles being in 1942 of the respective values hereinafter set out:—a kitchen cabinet, £45; a refrigerator, £80; linoleum in the kitchen, the bedrooms, the lobby and the maid's bathroom, £42; rubber floor covering in the principal bathroom and a mirror in the cloakroom, £8; a fitted medicine chest in the principal bathroom, £20. (2) That the halls, landings and staircases in the said block of flats over which the respondent had, together with persons authorised by him the right to ingress and egress, were furnished with the following articles provided by the appellants, which were of the respective values in 1942 as hereinafter set out:—carpets, £1,320; thick underfelt, £120; window hangings and pelmets, £288; a settee in the entrance hall, £30. (3) That the occupants of 24 flats had the use of the articles last referred to. It was contended that, if the value of these articles was to be spread over the 24 flats, the fair proportion of the value of such articles attributable to flat No. 19 sub-let to the respondent was £73. (4) That, having regard to depreciation, a proper annual charge, in respect of the said articles in the said flat and in the aforesaid common parts was 15 per cent. (5) That in the premises, a proper notional rent for flat No. 19 in respect of the said articles in the flat and of the suggested fair proportion of the articles in the common parts was about £45 per annum. (6) That every room in the said flat was equipped with ample points for electric power. (7) That the reception room in the said flat was fitted with coal fires. (8) That coal for the said fires could be stored in the basement of the said block of flats and would be delivered to individual flats by the head porter provided and paid by the appellants. (9) That for the 24 flats aforesaid the appellants provided a head porter living on the premises and two other porters on duty all day from about 8.30 a.m. until about 8.30 p.m. (10) That the said porters called taxis, helped with tenants' luggage, received and delivered parcels, adjusted radiators when necessary, took messages and were available for the convenience of the tenants. (11) That the appellants provided fuel for the water central heating systems at a cost of £980 per annum in respect of the said block of flats. It was contended that the proper proportion attributable to the said flat was £20 per annum. (12) That the appellants provided stokers for the maintenance of the water central heating system at a cost of £490 per annum in respect of the said block of flats. It was contended that the proper proportion attributable to the said flat was £10 per annum. (13) That the appellants provided cleaners for cleaning the staircase, the back stairs and the yard and for removing the tenants' bins to the yard from whence the local authority collected them. (14) It was contended that the proper proportion of the wages of porters and cleaners atributable to the respondent's said flat was £10 per annum. (15) That the appellants provided a passenger lift in addition to one automatic passenger and one hydraulic lift at the back of the said block. (16) That the appellants provided an internal telephone to each flat with a switchboard in the hall for the tenants to communicate with the porters if they should require their services. (17) That there was in addition a main telephone in the hall. (18) It was contended that the proper proportion of the cost of cleaning materials, lift maintenance and telephone attributable to the respondent's said flat was £10 per annum. (19) That the appellants provided and maintained a refrigerating plant from which the refrigerator in the respondent's said flat was run. (20) That the appellants maintained at the back of the said block a garden and that the proper proportion of the cost of upkeep of the garden and of sundries attributable to the respondent's said flat was £2 per annum. (21) It was contended that the proper proportion of the cost of providing the matters referred to in paragraphs (8) to (20) inclusive attributable to the respondent's said flat was £52 per annum. (22) That the appellants paid the rates of the said flat, amounting to £73 per annum. I have already referred to the circumstance that the sub-lease to the respondent embraced exactly the same subject-matter as the lease to Trevor and that the lease and the sub-lease were in substantially identical terms. These circumstances were not relied on by the respondent as a ground for distinguishing *Prout* v. *Hunter* (1) and it was not contended that in the light of ss. 12 (6) and 15 (3) of the Act of 1920 it was the tenancy to Trevor and not the sub-lease to the respondent which was the material tenancy to be considered. I express no opinion on the question whether that contention might have succeeded. The point was not raised, and in the circumstances the case must be dealt with on the footing that the sub-lease was the material tenancy.

In this second case, therefore, the matters to be determined arise from the appellants' contention that the rent included such payments in respect of (*a*) attendance or (*b*) use of furniture as formed a substantial portion of the whole rent and thus took the flat outside the Rent Restrictions Acts. The language of s. 10 of the Act of 1923 raises some doubt in cases where a payment for attendance and a payment for the use of furniture are both included in the rent. Should the two payments be added together in order to determine whether the total forms a substantial portion of the whole rent, or should each payment be so tested in turn ? For example, if the figure fairly attributable to attendance was £20 and the figure fairly attributable to the use of furniture was £25, would the matter be disposed of by saying that neither of these figures formed a substantial portion of the whole rent, or would the proper question be whether, when the two figures were added together, £45 formed a substantial portion of the whole ? The latter appears to be the better construction, for the section calls for the determination of one amount even though both elements are present.

Taking these two cases as examples of the difficulties which arise in construing and applying the sections set out at the beginning of this opinion, it appears that there are six questions with which it is useful to deal.

(1) *What is the meaning of the phrase* " *bona fide let at a rent which includes payments in respect of board, attendance or use of furniture* " ? In my opinion " *bona fide* " in this phrase governs the whole of the words which follow. The words amount to a stipulation that the rent to be paid genuinely includes payments in respect of board, attendance or use of furniture. The Act is not to be evaded (as SHEARMAN, J., pointed out ([1922] 2 K.B. 59) in *Nye* v. *Davis* (2)) by a merely colourable use of words which do not correspond to what is really provided. Of course, so far as regards attendance or use of furniture, the further test imposed by s. 10 (1) of the Act of 1923 is also imposed.

(2) *What is attendance* ? It means service personal to the tenant performed by an attendant provided by the landlord in accordance with his covenant for the benefit or convenience of the individual tenant in his use or enjoyment of the demised premises. " Service " is a wider word than attendance. Attendance, being personal in its nature, may be dispensed with by an individual tenant at his pleasure, though it is not on that account excluded from what the tenant pays for when the landlord has covenanted to supply it, but services common to others (*e.g.*, the heating of a communal water supply, or the cleaning of passages, halls, etc., outside the demised premises) will not constitute attendance. It follows from the above that a landlord's covenant to supply someone to carry up coals to a flat or to carry down refuse from the flat is a covenant to provide attendance. Similarly, the provision of a house-maid or valet to discharge duties in connection with the flat would be the provision of attendance, but a covenant by the landlord to provide a resident porter or house-keeper for a block of flats would not. In this last connection it might be well to point out that in the English language " porter " is not one word, but two distinct words—two words of the same sound and spelling, but of different meaning and derivation, which may be confused. Sometimes " porter " means a door-keeper or janitor, and is derived through mediaeval French from the Latin noun *porta*. The porter in *Macbeth*, or Cerberus as the porter of Hades, was a porter in this sense. The second word means someone who carries things (*e.g.*, a railway porter) and is derived from the Latin verb *portare*. There can be no doubt that the " porter " often to be found at the entrance of a block of flats is a porter with the first meaning, in the absence of a special covenant by the landlord that the porter shall carry things. It may be that on occasion he does some carrying for tenants, but, unless this is provided in the lease, he does this, not because the landlord has covenanted to provide a person to carry, but as a private service for which he may reasonably expect from time to time some private remuneration. In *Mischeff's* case, the position of the porter when rendering services to the lessee is put beyond doubt by sched. II to the lease quoted above, for this provides that the porter shall be under no obligation to furnish attendance or other use of his service to occupiers for their private convenience, and that service rendered to the lessee by the porter shall be considered as rendered by him as the servant of the lessee. The porter of a block of flats, therefore, does not provide " attendance " in respect of which payment is included in the rent unless the landlord covenants that he shall render personal service to the tenant involving attendance at the individual flat. The above view of the meaning of the word " attendance " in the statute is in accord with what was said ([1945] 1 All E.R. 233) by Lord Greene, M.R., in *Engvall* v. *Ideal Flats Limited* (3), approving *Nye* v. *Davis* (2), *King* v. *Millen* (4) and *Wood* v. *Carwardine* (5).

(3) *What is the meaning of "furniture"* ? This is not an easy question to answer with precision, and it is well to clear the ground by some preliminary observations. Inasmuch as the question involves the interpretation of the relevant enactments, the first comment to be made is that the terms of the contract of tenancy are not conclusive as to the proper application of the term—that is to say, " furniture " has a statutory meaning, and that meaning cannot be extended merely because the landlord stipulates in the lease that certain things are to be regarded as " furniture " when, in fact, they do not fall within the proper interpretation of the word. Secondly, " furniture " must, of course, consist of articles in which the landlord has a proprietary right as against the tenant. Thirdly, the expression " use of furniture " in s. 10 (1) of the Act of 1923 refers to articles provided for the use or enjoyment of the dwelling in question. Articles provided for the use or enjoyment of places outside the demise, such as halls and passages used in common with other tenants in a block of flats, are excluded. Proceeding from this basis, it is further to be observed that s. 10 (1), so far as it refers to rent for the use of " furniture," plainly contemplates that the whole rent paid is divided, actually or notionally, into a portion which is rent for the dwelling-house itself and another portion, which must be substantial, which is rent fairly attributable to the use of " furniture." " Furniture," therefore, in the section, cannot include anything which is already paid for by the portion of the rent attributable to the dwelling-house itself ; otherwise there would be, *pro tanto*, a payment twice over for the same things. It follows that in arriving at what is " furniture " for this purpose it is necessary to exclude

articles which, at the beginning of the demise, constituted part of the dwelling-house itself. A further necessary test is that, of articles provided for the use or enjoyment of the dwelling-house, only those which are commonly and currently regarded as " furniture " can rank as such. The modern bath fitted into a bathroom, or the heavy cellar lid which keeps its position by its own weight, are examples of what is not " furniture." They are supplied for the use or enjoyment of the premises, but today no one would think of describing either as a piece of furniture. It was otherwise with the old-fashioned bath tub. Tables and chairs, of course, are " furniture," but a corner seat fixed solidly into a corner and forming in fact part of the building would not be. In most cases, articles of " furniture " are loose and can be moved about: *cf.* the derivation of *meubles* from *mobilia.* But this is not always so, and the main difficulty in arriving at a precise interpretation of the statutory expression arises when the article is in some degree attached to the premises. The problem in this latter case was much discussed in the Court of Appeal in *Gray* v. *Fidler* (6) where MacKinnon and du Parcq, L.JJ., differed from the minority judgment of Lord Greene, M.R. Lord Greene would have resolved this difficulty by excluding from " furniture " all fixtures that would pass with the demise, and on this basis he would have regarded as part and parcel of the dwelling-house not only such features of the design of the premises as fitted wardrobes and fitted bed-cupboards, but also such articles as electric-light fittings with their shades and lamps. MacKinnon and du Parcq, L.JJ., on the other hand, refused to accept the proposition that fixtures (in the sense of things affixed to the freehold) could not be furniture for the purposes of the section or to regard movability as in itself a test. They considered that " furniture," in the statutes under discussion, must be given its ordinary popular meaning and, in the result, they held that fitted wardrobes and bed-cupboards as well as other objects, apparently more readily detachable, were " furniture." In my opinion the correct view of the requirements of s. 10 (1) does not precisely correspond with either the majority or the minority view in *Gray* v. *Fidler* (6). As Lord Greene, M.R., points out ([1943] 2 All E.R. 295) " in the development of constructional technique many articles which formerly used to be provided as furniture by the tenant have become part of the fixed equipment provided by the landlord." In seeking where to draw the line between the fabric of the building and its furniture for the purposes of the section it is difficult to suppose that the legislature intended to marshal as furniture objects—such as built-in wardrobes and cupboards—which, though performing the functions of conventional furniture, could only be detached at the cost of altering the design or arrangement of the building or of appreciable damage to it or themselves. Nor is it easy to think that " furniture " can include a fixture which on detachment becomes so altered as to lose the utility it previously possessed, as, for example, a table affixed to the wall and depending for support on a wall bracket. On the other hand, however, it is no less difficult, having regard to the obvious intendment of the section, to suppose that the legislature in speaking of the " use of furniture " meant to recognise the law of real property to the extent of excluding from " furniture " each and every fixture whatever the nature and degree of its attachment. In my opinion, the true view is that articles belonging to the landlord otherwise entitled to rank as " furniture " for the purposes of s. 10 should, if affixed to the fabric, be regarded as part thereof if they cannot be detached without appreciable damage to or alteration of the fabric or themselves. Otherwise they should be regarded as furniture. To sum up, the first question is whether the articles in question are commonly regarded as " furniture "; if so, loose articles are necessarily included in the expression, while articles which are not loose will or will not be furniture according to the nature and degree of attachment as above indicated.

(4) Now comes the question how to arrive at " *the amount of rent which is fairly attributable to attendance or the use of furniture, regard being had to the value of the same to the tenant.*" It is convenient, first, to observe that the " amount of rent " is equivalent to " the portion of the whole rent." " Of the same " refers to the attendance or to the use of furniture or to both together when both are provided. A question of some difficulty arises as to the meaning of "the tenant." Does the expression refer to the particular individual whose lease is in question, or does it refer to the average or normal tenant of that

class of property ? I think the phrase refers to the actual tenant whose lease is under examination. It is the analysis of the particular transaction to which he is a party that is the subject-matter of the inquiry. It is the value to him (and included in that value is the fact that he may assign or sub-let) which must be taken into account, but, in taking this view, it is of the utmost importance to observe that the section directs that " regard shall be had " to the value to the tenant and not that the value to such tenant is to govern the calculation absolutely. In the recent case of *Newport Borough Council* v. *Monmouthshire County* A *Council* (7) where this same phrase, " regard shall be had to," fell to be interpreted, I pointed out ([1947] 1 All E.R. 904) that such a direction called for the exercise of a broad judgment and that any arithmetical conclusion was qualified by what is deemed to be fair and reasonable. In the present case the direction that regard is to be had to the value to the tenant, *i.e.*, that such value must not be overlooked but must be suitably allowed for, is made clear by the main direction that the amount of rent is to be such as " is fairly attributable B to " the item in question. Other factors have to be duly weighed and allowed for. In some cases the parties to the lease may themselves have placed a value on various elements which enter into the total rent. Even so, the statement of these respective values in the lease is not a conclusive distribution, though it may be strong evidence of what the proper distribution would be. Nevertheless, the amount to be arrived at is the amount which is " fairly attributable " to the item, not the amount which is actually attributed to it in the lease. The C phrase " having regard to " etc. appears to be introduced in order to exclude or discount articles included in the let which are left on the premises by the landlord either for his own convenience (for example, as a convenient way of storing them without paying a storage charge) or in quantities which, having regard to the size of the flat and the tenant's need for furniture, are greater than the tenant wants. If a landlord insists on letting a three-roomed flat with D the use of a number of chairs and tables in excess of what the tenant of such a flat can reasonably need, then the phrase under discussion will limit the let to the use of articles to this need. In the same way, the judge of fact may have to consider what is the value to the tenant of pictures which the landlord insists on leaving on the walls of the dwelling-house, and what is the amount of rent which is fairly attributable to the tenant's use and enjoyment of them. A number of factors may be relevant in arriving at the proper figure and the E governing consideration is the word " fairly." The questions involved are to be answered by common-sense considerations rather than by any formula which can be laid down by this House. In assessing " the amount of rent which is fairly attributable " to the use of furniture, a number of considerations are relevant, of which the chief is that if and so far as the landlord does not provide furniture which the tenant would normally require to use, the tenant would have to provide it himself. It is the value to the tenant of the landlord's F covenant to provide furniture which mainly controls the figure to be arrived at, and not the cost of such furniture to the landlord, though the latter in many cases may also be a relevant factor. If the tenant provided the furniture himself, he would have to suffer the loss due to wear and tear, whereas, if the landlord provides the furniture, the burden of wear and tear (in the absence of an express covenant) falls on him. On the other hand, it must not be overlooked G that when the landlord lets the use of furniture he does not, apart from special agreement, undertake to repair it or to renew it from time to time when it becomes worn out. If the furniture is not new, what the tenant gets is not more than the use of it during the term for what remains of its life. A table that is " on its last legs " is not usable when it collapses, and the landlord does not undertake to provide it with new legs or to furnish a new table. For this reason, it is incorrect to start a calculation of the value to the tenant of furniture which has H already been considerably used by taking a figure representing the price of brand-new furniture at the date of letting. What the judge of fact has to do is to take the furniture as it is and to fix a fair rental for it, having regard to its value to the tenant, remembering that old furniture wears out sooner than new and that the landlord (apart from special covenant) does not undertake to repair or renew it. These balancing considerations are not capable of being precisely quantified and the judge of fact has in the end to arrive at a figure which he considers in the result fairly allows for the relevant matters to be taken into account. As already observed, an agreement which lists certain articles as "furniture" does not prove that they are furniture within the meaning of the section. Their nature must be judged according to the facts and not simply by admissions in the documents. Where the word "furniture" is never used in an agreement, but the reference in the agreement is to "landlord's fixtures," some of which are in an agreed list (as in *Mischeff's* case), this does not establish that the articles are not furniture. The words of the section have to be applied according to their proper meaning and an agreement between the parties as to their application in a particular case is not conclusive, though it may be some evidence of the fact.

(5) *What does "substantial portion" mean*? It is plain that the phrase requires a comparison with the *whole rent,* and the whole rent means the entire contractual rent payable by the tenant in return for the occupation of the premises together with all the other covenants of the landlord. "Substantial" in this connection is not the same as "not unsubstantial," *i.e.*, just enough to avoid the *de minimis* principle. One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence. Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case, the onus being on the landlord. If the judgment of the Court of Appeal in *Palser*'s case were to be understood as fixing percentages as a legal measure, that would be going beyond the powers of the judiciary. To say that everything over 20 per cent. of the whole rent should be regarded as a substantial portion of that rent would be to play the part of a legislator. If Parliament thinks fit to amend the statute by fixing percentages, Parliament will do so. Aristotle long ago pointed out that the degree of precision that is attainable depends on the subject-matter. There is no reason for the House to differ from the conclusion reached in these two cases that the portion was not substantial, but this conclusion is justified by the view taken on the facts, not by laying down percentages of general application.

(6) *What is the "whole rent"*? As already indicated, it is the entire contractual rent payable by the tenant to his landlord. In cases where the landlord covenants to pay rates, it would be an error to deduct the rates from the contractual rent in order to arrive at the whole rent. Whether the landlord pays the rates or not is immaterial in arriving at the whole rent. In *Palser* v. *Grinling*, LORD GODDARD, C.J., deducted the rates (which the landlord had to pay) from the contractual rent of £175, but the Court of Appeal rightly corrected this. MORTON, L.J., said: "It is wrong for the judge to deduct the rates from the rent—in cases where the rates are paid by the landlord—and then to compare the amount of rent fairly attributable to the attendance with the figure so arrived at. The section refers to the whole rent, and I think there is clear authority for the proposition that in ascertaining the whole rent it is not legitimate to make any deduction on account of rates. See *Somershield* v. *Robin* (8)." Inasmuch as a sum may be a substantial portion of a given figure, though it would not be regarded as a substantial portion of a larger figure, this distinction may be important in some cases, though it does not seem to make any practical difference in the two cases now before the House.

It now only remains to apply the above propositions and interpretations to the two cases actually before us.

PALSER *v.* GRINLING

In *Palser* v. *Grinling* no dispute as to furniture arises, and the only question is whether, out of a total rent of £175, there was a substantial portion paid in respect of attendance. Neither the appellant's covenant to keep the entrance hall, staircases and passages clean, nor to keep the lift in working order, nor to provide a supply of hot water constitutes attendance. Neither does the provision of a resident porter, to be in charge of the main entrance-door of the flats at Chantrey House, constitute attendance on the respondent. The only element that can be regarded as attendance is the service of the porter, as stipulated in the lease, in carrying up coals to the respondent's flat and in removing refuse therefrom. What is the portion of the total rent of £175 which is fairly attributable to this attendance, and is this portion substantial? The total remuneration received by the porter from the appellant (including the rental value of the flat with which he was provided) was about £340. The main duties of the porter are downstairs, where he has many things to do throughout the day as the servant of the landlord. The carrying of coal up to the tenants and the removing of refuse can only be an incident in his main work. Nevertheless, the evidence offered to LORD GODDARD, C.J., by the appellant sought to divide the total remuneration received by the porter among the 24 flats and to treat the respondent as paying for one twenty-fourth of the whole. This cannot be right, for it would be regarding the engagement of the porter by the appellant as solely for the benefit of the tenants, and as though he had nothing to do except to carry up coals and remove refuse. Counsel for the respondent argued that no more than £100 out of the £340 could be attributed to the duties in question. Assuming this, and dividing the £100 among the tenants in the same proportion as the rateable value of the block of flats bears to the rateable value of the flat in question, he arrived at something like £2 as the share fairly included in the respondent's rent. Even if the £100 were equally spread among all the flats, the respondent's share would be little more than £4. On either of these calculations the figure cannot be regarded as a substantial portion of the total rent. Even if £14 was the correct proportion, I should still support the view of LORD GODDARD, C.J., that this was not enough to be a " substantial portion." The LORD CHIEF JUSTICE recognised that the services of the porter were not solely for the tenants' advantage, but he put this on the limited ground that the removal of refuse is also to the advantage of the landlord. A broader view is fully justified, *viz.*, that the greater part of the services of the porter were services rendered to the landlord which did not involve any attendance on the tenants at all. On the other hand, the LORD CHIEF JUSTICE, following *Engvall* v. *Ideal Flats Ltd.* (3), held that, inasmuch as the respondent did not require the services of the porter for carrying up coals because she was not using coal fires, the portion of the whole rent which was fairly attributable to the porter's attendance for this purpose would be reduced. This does not seem to be the case, for the tenant who has contracted to pay rent for attendance which the landlord covenants to supply cannot reduce the proportion of the rent fairly attributable to such attendance by saying that though he is entitled to have it he does not want it. The result in *Palser's* case is that the attendance provided by the appellant and paid for in the total rent was not such as to make the figure which may be fairly attributable to it a substantial portion of the whole rent. The appeal therefore fails, and the respondent's counterclaim succeeds.

PROPERTY HOLDING CO., LTD. *v.* MISCHEFF

In *Property Holding Co. Ltd.* v. *Mischeff* the various items claimed to be attendance are not " attendance " as above defined at all. They are either services rendered voluntarily by the porter, or else services under the lessor's covenant which do not involve personal attendance. There remains the question of furniture, as to which some detail is necessary. Applying the principles which which have been set out above to the situation disclosed in the evidence, it appears that the kitchen cabinet was built into the fabric and constituted part of the flat itself. The refrigerator got its necessary electric current through a plug in the wall which could be withdrawn without injury. It could thus be moved out of the flat, when the electric plug was withdrawn, as a loose article, and the trial judge was justified in regarding it as furniture. The judge has taken the same view about the linoleum and rubber floor covering, and though the evidence is not entirely clear whether in the present case these were detachable (as they often are), there seems no reason to reject the judge's view. He also treated the fitted medicine chest as coming within the category of furniture ; there is not much evidence about it and the decision depends, of course, on the facts. In the circumstances there is no reason to over-rule this view. This leaves in the category of furniture articles to which the judge attributed the value of £155 in June, 1942. Even if the method followed by the trial judge be accepted, 15 per cent. of this is approximately £23, and there is no reason to disturb the judge's conclusion that this does not amount to a substantial proportion of the total yearly rent of £280 5s. 0d. The result is that the appeal in *Property Holding Co. Ltd.* v. *Mischeff* should also be dismissed.

My Lords, my noble and learned friend, **LORD UTHWATT,** who is unable to be here today, authorises me to say that he concurs in this opinion.

LORD THANKERTON : My Lords, I desire to express my concurrence in the reasoning and the conclusions of the opinion just delivered by my noble and learned friend on the Woolsack.

LORD PORTER : My Lords, I also concur.

LORD MACDERMOTT : My Lords, I also agree.

Appeals dismissed.

Solicitors : *Griffinhoofe & Brewster* (for the appellant Palser) ; *Lipton & Jefferies* (for the respondent Grinling) ; *Markby, Stewart & Wadesons* (for the appellants Property Holding Co., Ltd.) ; *J. M. Menasse & Co.* (for the respondent Mischeff).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

ROLLO AND ANOTHER *v.* MINISTER OF TOWN AND COUNTRY PLANNING.

[Court of Appeal (Lord Greene, M.R., Bucknill and Asquith, L.JJ.), December 11, 12, 1947.]

Town and Country Planning—New town—Duties of Minister—Consultation—New Towns Act, 1946 (*c.* 68), *s.* 1 (1).

By the New Towns Act, 1946, s. 1 (1) : " If the Minister [of Town and Country Planning] is satisfied, after consultation with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town by a corporation established under this Act, he may make an order designating that area as the site of the proposed new town."

On July 10, 1946, three weeks before the Act received the royal assent, a meeting took place between the Minister and his assistants and the local authorities who appeared to him to be concerned at which the Minister proposed to " outline the main factors which . . . led him to consider the Crawley-Three Bridges area especially suitable to be the site of a new town . . ." The local authorities were informed at that meeting of the general nature of the proposal, the area, the size of the proposed town, and what the Minister wished and intended to bring about. Discussion was invited and a number of questions was put by the representatives of the authorities and answered by the Minister and his assistants, a minute was prepared, and a Press notice was issued stating what had happened. On Oct. 7, 1946, a second meeting was held between representatives of the Minister and the local authorities, at the latter's request, " to explain the considerations which the Minister had in mind in arriving at the boundaries of the area." Objections were raised to the proposed order and on Nov. 4, 5 and 6, 1946, a public inquiry was held :—

Held : regarding as a whole the events which occurred between July 10 and the holding of the public inquiry in November, the local authorities throughout were aware of the effect of the provisions of the Act and had full opportunity to put forward any criticism or suggestion which they wished, and, therefore, the requirements of s. 1 (1) of the Act had been complied with.

Per Lord Greene, M.R. : there was no need for the Minister to complete his " consultation " with local authorities before he published the draft order.

Per Bucknill, L.J. : Consultation in the sub-section means that, on the one hand, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice.

Decision of Morris, J., ([1947] 2 All E.R. 488), *affirmed.*

[For the New Towns Act, 1946, s. 1 (1), see HALSBURY'S STATUTES, Vol. 39, p. 664.]

APPEAL by the applicants, two residents of Crawley, from an order of MORRIS, J., dated July 30, 1947, and reported [1947] 2 All E.R. 488, refusing to quash the Crawley New Town (Designation) Order, 1947, made by the Minister of Town and Country Planning under the New Towns Act, 1946, s. 1 (1). The original notice of motion set out several grounds, but the only one relevant in the present appeal was whether the requirements of s. 1 (1) as to consultation had been complied with. The Court of Appeal, affirming MORRIS, J., held that they had.

Rees-Davies for the applicants.

The Attorney-General (*Sir Hartley Shawcross, K.C.*) and *H. L. Parker* for the Minister.

LORD GREENE, M.R.: This appeal relates to a proposal to set up a new town in the district of Crawley and Three Bridges under the New Towns Act, 1946. The applicants, who are private individuals, seek to bring themselves within the limited range of matters in respect of which complaints may be made against Orders made under the Act. These matters are to be found in s. 16 (1) (*b*) of the Town and Country Planning Act, 1944, which for this purpose is incorporated in the Act of 1946. Counsel for the applicants asserts that a requirement of the Act has not been complied with, and he, therefore, seeks from the court an order to quash the New Town Order against which he is fighting. That he may have a *locus standi* under that limb of the section, he has to show that he has been substantially prejudiced. That is a matter which would require going into in a much more elaborate way than that in which it has been canvassed in argument, but I am prepared to assume in favour of counsel that, if a matter that he calls attention to is properly called a requirement and that requirement has not been complied with, he has been substantially prejudiced. It may be, as the ATTORNEY-GENERAL pointed out, that this is not a requirement, but something not within the powers of the Act, in which case substantial prejudice would not require to be shown. I do not think, myself, it is necessary to go into these matters, but I will assume in counsel's favour all the necessary matters except the one point of substance which he has argued before us. There were a number of points taken in his original notice of motion, but only one of them is relevant to this appeal. It turns on s. 1 (1) of the New Towns Act, 1946, which is in the following terms:

> If the Minister is satisfied, after consultation with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town by a corporation established under this Act, he may make an order designating that area as the site of the proposed new town.

The whole point in this appeal turns on the meaning, in relation to the facts of the case, to be placed on the word "consultation." It is said that the Order which the Minister made can be attacked, and ought to be quashed, because it was not made after consultation, there having been no such consultation as the Act requires. It is to be noticed that local authorities, under the machinery of this Act, are to be consulted at two quite distinct stages. One is the stage referred to in the sub-section which I have just read, *i.e.*, the stage before the Order designating the area has been actually made. The other stage at which consultation is required by the Act is a much later one and arises when the Order has been made and the development corporation which is to be charged with the development of the new town has been established and is setting about its work, placing proposals before the Minister who has, at that stage, to approve of those proposals, or not approve of them, after consultation with the local authorities. It is important to keep those two stages apart, because they are not only different in point of time, but they are quite different in point of subject-matter. At the later stage, the subject-matter on which the authorities are to be consulted are proposals for development of the land; under sub-s. (1) the Minister is required, before he can make an Order, to satisfy himself that it is expedient in the national interest that an area of land should be developed as a new town by a corporation established under the Act. In other words, he has to satisfy himself as to the expediency in the national interest, he has to satisfy himself as to a particular area in respect of which the expediency arises, and he has to satisfy himself that it is an area that should be developed as a new town by a corporation. In respect of all those matters, before he can finally make up his mind to make the Order, consultation with the local authorities is prescribed by the sub-section as a step or element in the process, but it is to be observed that the object of the consultation, which must affect and define its nature, is to be found in the object which, at that stage, the Minister has in mind, and that is not detailed matters of development, but the question whether or not a particular area should be developed in the national interest as a new town. It is to be observed also that under the sub-section the ultimate judge of what is or is not in the national interest is the Minister. It is not the local authorities. It is not the court. It is the Minister who is responsible to Parliament if he administers the Act badly and comes to conclusions which are open to criticism as not being in the national interest.

The next point I would call attention to is that the Minister, in performing that task of directing his mind to the question of the national interest, must survey the problem from a totally different angle from that from which a local authority would normally approach such a question. Local authorities, no doubt, have very useful knowledge and information about local conditions, but it is no part of their function to regard their areas from the point of view of the national interest and the development of new towns. That is essentially a matter which is not merely within the competence of the Minister, but is one in respect of which the Minister must have sources of information and assistance which are not open in any sense to any particular local authority or any group of local authorities. For instance, in deciding on the national interest in relation to a particular area, he has the advantage of consultation with a number of government departments. The Minister of Transport can advise him on the question of roads and railways, and the Minister of Health can advise him on the question of housing, the possibilities of housing, water, drainage, and matters of that kind. He has sources of information not merely within his own department, but in the other government departments, all of which must be of vital importance in enabling him to make up his mind on the question of national interest in regard to any particular area which he has in mind. Bearing that in mind, when he comes to consult with the local authorities in the district, he would, I venture to think, be, or might be, wasting a great deal of time if he were expressly to ask their opinion on matters of which they could know very little. It would not be much use his asking them whether they thought that something which he had obtained from the Minister of Health or the Ministry of Transport on a subject about which they could not know anything was in accordance with their ideas. In other words, in consulting the local authorities, he must have present to his mind the realities of the situation and the necessity and desirability of making a practical, working scheme.

In the present case, there were six local authorities which the Minister considered to be concerned, and no question arises that he failed to communicate with them. The sole question is : Did he or did he not consult them ? I do not propose to go through the facts of the case, which are very carefully and fully dealt with by MORRIS, J. Broadly speaking, the contact—I will use a neutral phrase at the moment—was made with the local authorities at a conference on July 10. At that conference, which was summoned on the invitation of the Minister, all the six local authorities were represented. It is true that that took place on July 10 when the Bill was on its way through the House of Lords. There was no substantial alteration made in the terms of the Bill on these points after that date. The point immediately arises whether that interview alone could be a consultation within the meaning of the sub-section, having regard to the fact that the Bill had not, at that stage, become an Act ? I do not think that that question requires an answer in this case, nor do I see any necessity for going into the question whether, assuming nothing else had happened, that could be described as a consultation contemplated by the sub-section. I can see various considerations which would have to be taken into account before we could lay down a proposition that that would satisfy the sub-section by itself, and I prefer myself to leave that matter undecided. On July 10, however, the local authorities clearly were informed of the general nature of the proposal, the area suggested, its size, and what the Minister wished and intended to bring about. Discussion was invited, and a large number of questions were put by those attending, representatives of the local authorities, which were answered by the Minister and his assistants. A minute was prepared, and there was a Press notice stating what had happened. It seems to me that, leaving on one side the question whether that was technically a consultation, the effect of what took place on July 10 was this. The Minister, in anticipation of an action which he would take when the Bill became an Act, was sounding the local authorities, informing them at the earliest stage of what was being considered and finding out what their views were on the proposal. It is true that, according to the minute, the discussion took the form principally of question and answer, but the local authorities were obviously raising points which they were anxious the Minister should consider and which appeared to them to be relevant to the principal matters on which he had to make up his mind.

There the matter remained until a later date, after the Bill had received the royal assent. Morris, J., took the view that the giving of advice or the making of suggestions remained open throughout to these local authorities. I should have thought myself that under the Act the Minister, in fulfilling his duty of consultation, would naturally, and, indeed, ought to, put to the local authorities any point on which in his honest opinion he considered they could assist him in the task which he had in hand, *viz.*, of deciding whether or not it was in the national interest to do what he was proposing to do, *viz.*, to designate that particular area. If he thought of something on which he felt a local authority could help him, I cannot think that he would keep it up his sleeve. I venture to think that, if he did so, he would be acting wrongly. So far as the side of the local authority is concerned, he must allow any authority who has a point which it considers will help him to put it forward. He is not entitled to say: "I will not listen to any suggestion that you make." In the present case, it seems to me that Morris, J., was perfectly right in the inference which he drew—that from beginning to end the local authorities had every opportunity of putting forward any point they thought relevant, that they knew that they do it, and, subject to what I am going to say in a moment, that they did not.

Confronted with that situation, the answer of counsel for the applicants is simple. He says: "Of course, there must be an invitation to the the local authorities to put forward any points that they deem useful and relevant, but it is not sufficient that that should be an open invitation. There should be an express invitation. They should, in terms and in so many words, be invited by the Minister to put forward any points that they think ought to be put forward to him." That seems to me to shut one's eyes to practical considerations. These local authorities were aware on July 10 that this area in their district was going to be brought under the new Act, and I have not the slightest doubt that they knew perfectly well what was happening in Parliament and what the terms of the Bill were. It was a matter of vital importance to these local authorities, and I refuse to accept the view that all the time the Bill was going through Parliament, they had not taken the trouble to inform themselves what was happening. It was clear on the minutes of July 10 that they knew all about the matter, and they certainly must have known all about it when the Bill became an Act. To imagine the contrary is, it seems to me, to shut one's eyes to common sense and to attribute to these local authorities an obscurantism and a disregard of the matters affecting them and their ratepayers which I should hesitate to ascribe to any local authority.

In these circumstances, regarding what happened from July 10 down to the date of the local inquiry on Nov. 4, 5, and 6, the local authorities well knew that they were entitled to, were allowed to, and were expected to, put forward anything that crossed their minds as being relevant to the matter with which at that stage the Minister was concerned. The broad inference which I draw from the evidence, without going into it, is that the local authorities, subject to one or two points, were only interested in the details which would come to be settled at the later stage after the Order had been made, the new corporation set up, its proposals for development submitted to the Minister, and when the Minister was in consultation with the local authorities thereon. These were the things which they were really interested in. If they had an interest in something antecedent to that, I entirely refuse to believe that they would have been so lacking in a sense of duty as to avoid or decline or refrain from bringing it forward. Counsel suggested that they were afraid that the Minister, unless they were ostensibly fully co-operative, might at some later stage treat them in a cavalier fashion and not give weight to their opinions and objections. I am afraid I cannot accept such a suggestion. The reason why the local authorities did not, at this consultative stage, put forward matters of advice was, in my view, that they realised that there was nothing on the broad questions which then fell to be decided on which they could help. At the later meeting on Oct. 7, they put this very important question: Why was it decided that the site of the new town should be at Crawley rather than elsewhere? That question suggests that the Minister was wrong in the public interest in picking on Crawley. That second interview, at which representatives of the Ministry attended, was summoned in response to a request by the authorities to deal with a matter principally, if not entirely, of boundaries, but questions were asked, and it is clear that those present did not think, from the question I have just quoted, that they were limited to boundary questions. Manifestly, they knew quite well they could raise any questions they pleased.

The substance of the matter, in my view, is that, so far as putting questions to the local authorities is concerned and asking their advice on specific matters, the Minister may well properly have taken the view, and I infer that he did take it, that he had brought to his mind and had present in his mind when he was deciding what to do, the views of the local authorities obtained on July 10 and later on Oct. 7, and he must have had in his mind the fact that the local authorities could and would, if they so thought fit, invite his attention to any matter which they thought of importance. They had not done so. Taking all those facts together, including the knowledge of the local authorities of what was proposed and their knowledge of what their powers and functions were under the Act, I come to the conclusion that MORRIS, J., was perfectly right, and that the requirements of s. 1 (1) as to consultation at the stage to which that sub-section is directed were complied with.

It was suggested, although not pressed, that the Minister ought to carry the consultation stage through before he publishes the draft order. On examination of the sub-section, it is found that that argument cannot be maintained, because the consultation stage can persist down to the very last minute when the Order is made, and, therefore, even after the public inquiry has been held. If it had not been for the obvious importance of the case to the applicants and the skill and tenacity with which their counsel presented his case, I should have been content to accept the conclusions of MORRIS, J., in a judgment with which, on all points which fall for consideration here, I entirely agree. The appeal must be dismissed.

BUCKNILL, L.J.: I agree that the appeal should be dismissed, and for the reasons given by the MASTER OF THE ROLLS. I would only add a very few words of my own. Counsel for the applicants conceded that the learned judge had applied the right principle to this case, but he said the facts did not fit the principle. I would like to read a few lines at the end of the judgment of MORRIS, J., which appear to me to sum the whole thing up so well. He says this ([1947] 2 All E.R. 496):

> The holding of consultation with such local authorities as appear to the Minister to be concerned is, in my judgment, an important statutory obligation. The Minister, with receptive mind, must by such consultation seek and welcome the aid and advice which those with local knowledge may be in a position to proffer in regard to a plan which the Minister has tentatively evolved. For the reasons which I have given, I consider that on the facts of this particular case, consultation did take place so as to be a compliance with the statute.

It is said by counsel for the applicants that the evidence does not support that last finding of fact as to the consultation. In my view, the evidence does support it. A certain amount has been said as to what consultation means. In my view, as junior counsel for the Minister said, it means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice. The rather difficult question arises whether the discussion on July 10 was a consultation within the meaning of s. 1. Even assuming for the moment it was not because it took place three weeks before the Bill actually became law, it seems to me unreal to say that when the Bill did become law the Minister must shut out of his mind all the information that he had received from the local authorities at that consultation on July 10. He had then learned what the general attitude of the authorities was to this proposal. No doubt, some of their constituents welcomed it and others did not welcome it. They had to look at the matter from all points of view, and they had been asked their views, and expressed their doubts, and asked questions at that meeting. Although the minute may not contain all the questions that were asked, I see no reason why the representatives of the county council and district councils could not deal fully and courageously with any doubts they might have had. That being so, I think that the further meeting which the representative of the Minister had with the local authorities on Oct. 7, coupled with the information which the Minister had already received, did amount to a sufficient consultation to comply with the provisions of the Act. For these reasons, as well as for the reasons which my Lord has given, I think the appeal should be dismissed.

ASQUITH, L.J.: I agree entirely with the judgment delivered by my Lord.

Appeal dismissed, with costs.

Solicitors: *Syrett & Sons* (for the applicants); *Treasury Solicitor* (for the Minister).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re GINGER.

[Court of Appeal (Tucker and Bucknill, L.JJ., and Jenkins, J.), December 10, 1947.]

Emergency Legislation—Liabilities adjustment—Mortgage deed—Variation—Power of court to reopen past payments—Liabilities (War-Time Adjustment) Act, 1941 (c. 24), *s.* 7 (3) (*a*), *as amended by Liabilities (War-Time Adjustment) Act,* 1944 (c. 40), *s.* 7 (1).

The Liabilities (War-Time Adjustment) Act, 1941, s. 7 (3), as amended by the Liabilities (War-Time Adjustment) Act, 1944, s. 7 (1) provides: "If and so long as any mortgagee is not permitted to realise his security and does not surrender his security, the debtor shall, subject to . . . the following provisions of this sub-section, remain personally liable to pay interest and to repay the amount secured by the mortgage in accordance with the instrument creating the mortgage: Provided that the court may direct in the liabilities adjustment order that (*a*) interest in respect of any period whether before or after the making of the order shall either not be payable or be reduced to such rate or amount as may be specified in the order . . . and the instrument creating the mortgage shall have effect subject to the provisions of the order."

Under the terms of a mortgage deed the debtor was to pay to the creditors monthly instalments which included principal and interest. At the date of the liabilities adjustment order, she had paid all instalments then due. The county court judge, in making the order on Oct. 31, 1946, directed that the mortgage deed should be varied by eliminating therefrom the provision for the payment of interest from Sept. 30, 1940 (when the debtor's house which was subject to the mortgage was destroyed) and by applying the total sum which the debtor had paid to the creditors since that date to the reduction of the principal due under the deed:—

Held: the court had no power under s. 7 (3) (*a*) (as amended) to vary a mortgage deed so as to affect payments already properly made under the deed.

[For the Liabilities (War-Time Adjustment) Act, 1941, s. 7 (3) (*a*), as amended by s. 7 (1) of the Act of 1944, see HALSBURY'S STATUTES, Vol. 34, pp. 32, 33, and Vol. 37, p. 19].

Appeal by the creditors, the Abbey National Building Society, from an order made by His Honour Judge Neal, at Brentford County Court on Oct. 31, 1946, under the Liabilities (War-Time Adjustment) Acts, 1941 and 1944.

The debtor owned a freehold dwelling-house subject to a mortgage to the creditors under the terms of which monthly instalments of principal and interest were payable. On Sept. 30, 1940, the house was completely destroyed, but the debtor continued to pay the monthly instalments. On Aug. 26, 1946, she obtained a protection order, and on Oct. 31, 1946, the county court judge made an order varying the terms of the mortgage deed by eliminating therefrom the provision for the payment of interest as from Sept. 30, 1940, until such time as the property was re-erected, and providing that the total sum paid after Sept. 30, 1940, should be applied in reduction of the principal due under the mortgage on that date. The Court of Appeal held that s. 7 (3) (*a*) of the Act of 1941 (as amended by s. 7 (1) of the Act of 1944) did not give the court power to vary a mortgage deed in such a way as to affect payments already properly made under the deed.

McGougan for the creditors.
Aronson for the liabilities adjustment officer.
The debtor did not appear.

TUCKER, L.J.: This is an appeal by the Abbey National Building Society from an order made by His Honour JUDGE NEAL at Brentford County Court under the Liabilities (War-Time Adjustment) Acts. The debtor whose affairs were being dealt with was a Mrs. Daisy Mabel Ginger. Two reports have been made in the matter. The protection order was on Aug. 26, 1946, and in his report of Aug. 21 the adjustment officer reported that the total liabilities of the debtor were £264 2*s.* 6*d.* with assets estimated to produce £350. He stated that the debtor was aged 53 and the widow of Mr. L. C. Ginger, who had died on June 16, 1946, leaving no estate. In a subsequent report he said that the debtor's sole means now consisted of a widow's pension of 10*s.* a week, but she was in receipt of a sum of £3 10*s.* a week given her by her sons, who were in employment, but were liable for military service. In October, 1929, the debtor had purchased for £600 the freehold house No. 64 Mornington Road, Greenford, towards the purchase price of which she had obtained an advance of £565, on mortgage of the property, from the Abbey National Building Society, repayable as to principal and interest by monthly instalments of £4. These instalments were paid regularly until Sept. 30, 1940, on which date the property and part of the contents of the house were entirely destroyed. At that date the balance due under the mortgage was approximately £340. The adjustment officer said that there was some irregularity in the payments after that date, but there is no dispute that at the time the matter came before the county court judge all past payments of instalments under the mortgage had been paid—payments which were to go partly in repayment of capital and partly in payment of interest. There were other liabilities, being £9 for the hospital treatment of the deceased husband and £10 2*s.* 6*d.* for arrears of rent of a flat or house which the debtor was occupying as the result of her own residence having been destroyed by enemy action. The adjustment officer goes on to report that the debtor is at present residing at 102, Costins Lane, a requisitioned house for which she is paying 7*s.* a week inclusive, but the rent of that property was raised by the local council on Apr. 1, 1946, from 7*s.* a week to 19*s.* a week, and, as a result of the increase, she found herself indebted to the local authority for the sum of £10 2*s.* 6*d.* to which I have referred. The liabilities adjustment officer goes on to say that, in his opinion, the debtor's financial difficulties are owing to war circumstances and that she had been advised to apply to the court, which she did, to obtain a protection order. Subsequently, the adjustment officer made some further observations in a report dated Sept. 7, in which he states that the debtor has submitted a proposal for the adjustment of her liabilities in the following terms: (i) that the terms of the deed of mortgage granted her by the building society should be varied by the elimination of the interest payable by her to the said mortgagees from Sept. 30, 1940, until the date when the property is re-erected and ready for occupation; (ii) that the total sum which she had paid to the said mortgagees since Sept. 30, 1940, should be applied in the reduction of the principal due under the mortgage deed on Sept. 30, 1940. The adjustment officer in a still further report recommended that the court should act accordingly. He says that he considers the proposal reasonable and equitable.

The matter came before the county court judge and he gave a judgment as the result of which he made the order in the terms asked for. He first dealt with the question which had evidently been raised before him, whether the case came within s. 3 (1) (*a*) or 3 (1) (*b*) of the Liabilities (War-Time Adjustment) Act, 1941. Section 3 (1) is in these terms :

> An application may be made to the court for the adjustment and settlement under this Part of this Act of the affairs of any person, on the ground that, owing to war circumstances, (*a*) he is unable to pay his accrued debts or will be unable, after payment of his accrued debts (if any), to meet, as they fall due, any future liabilities in respect of obligations already incurred ; or (*b*) [as amended by s. 4 of the Act of 1944] is in such a position that, if he were required to pay his accrued debts and to meet, as they fall due, any such future liabilities as aforesaid, he would not have sufficient resources to enable him to preserve or recover his business or former means of livelihood or otherwise to make reasonable provision for the future maintenance of himself and his family . . .

The county court judge says :

> It cannot, I think, be disputed, and I find as a fact, that the applicant comes within the terms of the Liabilities (War-Time Adjustment) Act, 1941, s. 3 (1) (*b*), as amended. Further I find as a fact that this is owing to war circumstances. It is true that the death of her husband is a contributory factor, though it is by no means unlikely that if he had survived she would still have been entitled to an order.

I think that there was ample material on which the county court judge could come to the conclusion at which he arrived, and, therefore, counsel for the building society has failed to establish his first point, namely, that there was no evidence on which the county court judge could find that the case came within s. 3 (1) (*b*) of the Act of 1941 (as amended).

His second point is that the order made by the county court judge on Oct. 31, 1946, could not properly be made under the Act in that it ordered that the total sum which had been paid to the mortgagees since Sept. 30, 1940, should be applied in the reduction of the principal due under the mortgage deed and further ordered that the mortgage deed should be varied by the elimination of the provision as to the payment of interest as from Sept. 30, 1940. Counsel for the building society says that everything had already been paid that was due under the deed down to the date of this order of Oct. 31, 1946, and that the county court judge had no power to reopen past payments made under the provisions of the mortgage deed. These payments had been dealt with as payments partly in repayment of capital advanced and partly in payment of interest, and the effect of the variation would be to convert payments of interest into payments for the repayment of capital against the wishes of the mortgagees. Counsel for the building society submits that there is nothing in the Act which gives the court power to deal with payments made in respect of debts which were owing in the past. He says that, if it were otherwise, there would be nothing to prevent a county court judge under these Acts from ordering the creditor, or the person who was the creditor in the past, to repay money which had been properly paid to him in past years by the debtor, and that it would require very clear language in these Acts to enable the court to make such an order.

This question turns on the proper construction to be put on s. 7 of the Act of 1941 [as amended by s. 7 of the Act of 1944]. The material parts of that section are as follows :

> (3) If and so long as any mortgagee is not permitted to realise his security and does not surrender his security, the debtor shall, subject to the last foregoing sub-section and the following provisions of this sub-section, remain personally liable to pay interest and to repay the amount secured by the mortgage in accordance with the instrument creating the mortgage : Provided that the court may direct in the liabilities adjustment order that (*a*) interest in respect of any period whether before or after the making of the order shall either not be payable or be reduced to such rate or amount as may be specified in the order . . . and the instrument creating the mortgage shall have effect subject to the provisions of the order . . . (6) Where the instrument creating any mortgage is varied by or under this section, the court may make such consequential amendments and adjustments of that instrument as it considers necessary.

It is to be observed, in the first instance, that the words in s. 7 (3) (*a*), namely, " interest in respect of any period whether before or after the making of the order shall either not be payable or be reduced to such rate or amount as may be specified in the order," appear by way of a proviso to sub-s. (3), which provides for the continuance of the liability of the debtor to pay interest and to repay the amount secured by the mortgage under the instrument creating the mortgage. In my view, that proviso does not give to the court power to vary the mortgage deed in such a way as to affect payments which have previously been properly made under it. I think that this proviso refers to A payments of interest which have not been made before the date of the order. Provision is made under this section to deal with periods subsequent to the order and with periods before the making of the order, but, in so far as the section is dealing with periods before the making of the order, in my view, it contemplates sums due for interest and not paid before the date of the order and not payments properly made before that date. I think the whole scheme of the Act supports that view. The object of the Act is to make B provision in favour of a debtor with regard to debts which have accrued and debts which will accrue in the future, and I can find nothing to justify the view that it gives power to order a creditor to repay debts which have been properly paid in the past or to vary a mortgage deed in such a way as to bring about that result. I think that view is supported also by the use of the word "payable" in the proviso. In my view, this appeal succeeds to the extent that the order of Oct. 31 ought to be varied so as to read :

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> . . . shall be varied by the elimination of interest payable by her to the said mortgagees from Oct. 31, 1946, to the date when the property is re-erected and ready for occupation.

BUCKNILL, L.J. : I agree. I would merely add that para. 2 of the order deals with a period of no less than six years from September, 1940, to October, 1946, and it is a very strong thing to say that payments which have D extended over a period of six years are to be repaid to the debtor. For that to be so the words of the section must be very clear. I would point out that para. (*a*) of s. 7 (3) is an amendment by the Act of 1944 to the original Act of 1941, and the corresponding para. (*a*) which was repealed by that amendment was as follows :

> . . . interest in respect of the period for which the order is in force or any less period shall be payable at such reduced rate as may be specified in the order.

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I do not think it could possibly be contended that those repealed words would apply to payments made before the order, and, if one was to uphold this judgment, it seems to me it would in effect be ordering the repayment of money during a period when the original Act was in force and no such payments could possibly be ordered. For these reasons I agree with the judgment delivered by my Lord.

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JENKINS, J. : I agree.

Order of the county court judge varied accordingly.

Solicitors : *Lambert, Hale & Procter* (for the creditors) ; *Treasury Solicitor* (for the liabilities adjustment officer).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

G

GRUNDT *v.* GREAT BOULDER PROPRIETARY GOLD MINES, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), December 4, 5, 1947.]

Companies—Articles of association—Directors—Retirement by rotation—Retiring H *director to continue in office until vacancy filled, unless resolution to reduce number of directors in office passed after due notice—Retiring director eligible for re-appointment—Proposed resolution for re-appointment lost—Vacancy not filled—No resolution to reduce number of directors—Right of retiring director to continue in office.*

A company's articles of association provided (*a*) that 7 days' notice should be given of general meetings, specifying the general nature of any special business (or 21 days' notice, where it was proposed to pass a special resolution) ; (*b*) that the business of a general meeting should be (*inter alia*) to elect directors in place of those retiring in rotation; (*c*) that, until otherwise determined by the company in general meeting, the number of directors should be not less than three and not more than five; (*d*) that, at the ordinary general meeting in each year, one third of the directors should retire from office and be eligible for re-election; and (*e*) that, at any general meeting at which any directors retired, the company might fill up the vacated offices. Article 102 provided: " If at any general meeting at which an election of directors ought to take place the place of any director retiring by rotation is not filled up, he shall, if willing, continue in office until the ordinary meeting in the next year, and so on from year to year until his place is filled up, unless it shall be determined at any such meeting on due notice to reduce the number of directors in office." At the annual general meeting held on July 9, 1947, G. retired by rotation from the board of directors and offered himself for re-election, but the resolution for his re-election was lost on a show of hands. There was no suggestion in the notice convening the meeting of any resolution to reduce the number of directors in office. After G.'s retirement there remained four directors of the company. G. contended that, under art. 102, he continued in office until the ordinary meeting in 1948, and so on from year to year until his place was filled up, unless it should be determined at any meeting, on due notice, to reduce the number of directors in office:—

Held: on the true construction of the company's articles, the number of of directors in office was not to be reduced unless there was a specific resolution of the company to that effect after a mention of the general nature of such a resolution had been included in the notice convening the meeting in question; the fact that G. was not re-elected and no one else was elected to fill the vacancy did not amount to a determination by the company to reduce the number of directors; and G. was, therefore, entitled, under the company's articles, to continue in office until his place on the board was filled up or until it was determined by any meeting, on due notice, to reduce the number of directors in office.

Holt v. *Catterall* (1931), (47 T.L.R. 332) *applied.*

Robert Batcheller & Sons, Ltd. v. *Batcheller*, ([1945] 1 All E.R. 522) *disapproved.*

Decision of WYNN-PARRY, J. ([1947] 2 All E.R. 439), *reversed.*

[AS TO RETIREMENT OF DIRECTORS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 340, 341, para. 560; and FOR CASES, see DIGEST, Vol. 9, pp. 524, 525, Nos. *3448-3455*, and Supplement.]

Cases referred to:

(1) *Spencer* v. *Kennedy*, [1926] Ch. 125; 95 L.J.Ch. 240; 134 L.T. 591; Digest Supp.
(2) *Holt* v. *Catterall*, (1931), 47 T.L.R. 332; Digest Supp.
(3) *Batcheller (Robert) & Sons, Ltd.* v. *Batcheller*, [1945] 1 All E.R. 522; [1945] Ch. 169; 114 L.J.Ch. 156; 172 L.T. 298; Digest Supp.
(4) *Gramophone & Typewriter, Ltd.* v. *Stanley*, [1908] 2 K.B. 89; 77 L.J.K.B. 834; 99 L.T. 39; 9 Digest 35, *14*.
(5) *Bennett Brothers (Birmingham), Ltd.* v. *Lewis*, (1903), 20 T.L.R. 1; 9 Digest 436, *2836*.

APPEAL by the plaintiff from an order of WYNN-PARRY, J., dated July 29, 1947, and reported [1947] 2 All E.R. 439. On a motion by the plaintiff for a declaration that, having retired by rotation from the board of directors of the defendant company, he was entitled, under its articles of association, to continue in office until his place was filled up or until it was determined to reduce the number of directors in office, it being agreed to treat the motion as the trial of the action, WYNN-PARRY, J., held that the plaintiff was not entitled to continue in office. The plaintiff appealed and the Court of Appeal allowed the appeal and held that he was entitled to the declaration for which he asked. The facts and the relevant articles appear in the judgment of COHEN, L.J.

J. F. Bowyer for the plaintiff.
Charles Russell for the company.

LORD GREENE, M.R.: I will ask COHEN, L.J., to deliver the first judgment.

COHEN, L.J. : In this case the plaintiff sought a declaration that he, having retired by rotation from the board of directors of the defendant company at the annual general meeting held on July 9, 1947, not having been re-elected, his place on the board not having been filled up, the number of directors in office not having been reduced, and he being willing so to do, continues in office pursuant to art. 102 of the defendant company's articles of association until the ordinary general meeting in the next year and so on from year to year until his place is filled up, unless it shall be determined at any such meeting on due notice to reduce the number of directors. The case was brought before the court on motion, the motion by consent being treated as the trial of the action. WYNN-PARRY, J., dismissed the action, and from that judgment the plaintiff now appeals.

The company was incorporated in 1894. At all material times its capital was £250,000 divided into 2,500,000 stock units of 2*s*. each fully paid. In 1934 new articles of association were adopted and these were in force at the material time. Articles 63 and 64 deal with the definition of "ordinary" and "extraordinary general meeting," and are in these terms :

> 63. The statutory general meeting of the company shall, as required by the Companies Act, 1929, s. 113, be held at such time, not being less than one month nor more than 3 months from the date at which the company shall be entitled to commence business, and at such place as the directors may determine. Other general meetings shall be held once at least in every calendar year at such time not being more than 15 months after the holding of the last preceding general meeting, and at such place as may be determined by the directors. 64. General meetings other than the statutory general meeting shall be called ordinary meetings, and all other general meetings shall be called extraordinary meetings.

It is common ground that art. 64 does not make sense, but the purpose for which counsel for the company asks us to look at that article is that he says that art. 63 also does not make sense unless you strike out the words "at least." That has no direct bearing on the question we have to decide, but counsel for the company, as he desired to get some words struck out later on, thought that he might thereby create a precedent. I pass now to arts. 67 and 68 which have a more direct bearing on the matter we have to decide. Article 67 prescribes the length of notice required for general meetings and, so far as material, is in these terms :

> Seven days' notice, or in any case where it is proposed to pass a special resolution, 21 days' notice of general meetings, specifying the place, day and hour of meeting, and in case of special business the general nature of such business, shall be given to the members in the manner hereinafter provided, or in such other manner (if any) as may be prescribed by the company in general meeting.

Article 68 deals with the proceedings at general meetings and provides :

> The business of an ordinary meeting shall be to receive and consider the profit and loss account, the balance sheet and the reports of the directors and of the auditors, to elect directors in place of those retiring in rotation, and auditors, and vote their remuneration, to declare dividends and to transact any other business which under these presents ought to be transacted at any ordinary meeting. All other business transacted at an ordinary meeting and all business transacted at an extraordinary meeting shall be deemed special.

The question is under which head the resolution referred to in art. 102 falls. Is it ordinary business requiring no notice or is it special business requiring a specification of the general nature of the business ? The next article to which reference was made was art. 88, and this is in the section dealing with directors :

> Until otherwise determined by the company in general meeting, the number of the directors shall be not less than three nor more than five.

Article 91 is in these terms :

> The directors shall have power at any time, and from time to time, to appoint any other qualified person as a director, either to fill a casual vacancy or as an addition to the board, but so that the total number of directors shall not at any time exceed the maximum number fixed. But any director so appointed shall hold office only until the next following ordinary general meeting of the company, and then shall be eligible for re-election.

Article 99, dealing with rotation of directors, provides :

> At the ordinary meeting in 1935, and in every subsequent year, one third of the

directors or, if their number is not a multiple of three, then the number nearest to but not exceeding one third, shall retire from office, and be eligible for re-election. The company at any general meeting at which any directors retire may fill up the vacated offices by electing a like number of persons to be directors.

Article 101 deals with the requirements where the shareholders desire to propose somebody other than the retiring director for election to fill the vacancy and provides :

> No person not being a retiring director shall, unless recommended by the board for election, be eligible for election to the office of director at any general meeting, unless a nomination signed by five members, together with a notice in writing signed by the person nominated, and expressing his willingness to act as director, shall be left at the registered office of the company not less than 7 clear days nor more than 28 days before the day for election of directors.

Article 102, which was the critical article, provides as follows :

> If at any general meeting at which an election of directors ought to take place the place of any director retiring by rotation is not filled up, he shall, if willing, continue in office until the ordinary meeting in the next year, and so on from year to year until his place is filled up, unless it shall be determined at any such meeting on due notice to reduce the number of directors in office.

I pause there to mention that counsel for the company said—and I think rightly said—that there were no means by which a shareholder wishing to propose that the number of directors be reduced could compel the directors to include any such resolution in the notice convening the meeting. He could ask them to do so, but the inclusion of special business in the notice of an ordinary general meeting was left by the articles to the uncontrolled discretion of the directors so far as an ordinary meeting was concerned.

The 51st general meeting of the company was held on July 9, 1947. It was convened pursuant to a notice dated June 27, 1947, which was in the following terms :

> Notice is hereby given that the 51st ordinary general meeting of the company will be held on Wednesday, July 9, 1947, at 12 o'clock noon, at Winchester House, Old Broad Street, London, E.C.2, for the following purposes : (i) To receive the directors' report and accounts. (ii) To declare a dividend. (iii) To re-appoint auditors. (iv) To elect directors.

There was no suggestion in that notice of any resolution to reduce the number of directors in office. In the booklet in which that notice was enclosed was also the directors' annual report, the last paragraph of which is in these terms :

> The director retiring by rotation under the articles of association is Mr. W. Grundt [*i.e.*, the plaintiff] who, being eligible, offers himself for re-election. Mr. B. Faye, who was appointed to fill the vacancy caused by the resignation of Col. N. Shand-Kydd, retires and offers himself for re-election.

What happened at the meeting is set out in the affidavit of Mr. Herbert Ernest Matthews, who was the managing clerk in the employ of the plaintiff's solicitors and held one share in the company. He says that after the chairman's address, and the directors' report and accounts had been taken as read, four separate resolutions were passed : (i) proposing and passing the directors' report and accounts ; (ii) declaring the dividend recommended by the directors ; (iii) re-appointing the auditors ; and (iv) re-electing, as a director, Mr. Faye, who had been appointed to the board in or about May, 1947, to fill the casual vacancy referred to in the report. These, he says, were proposed, seconded, and on a show of hands declared by the chairman to have been carried. A poll was not demanded on any of them. The plaintiff retired from office by rotation and a resolution for his re-election was proposed by the chairman, seconded by the managing director, and on a show of hands was declared by the chairman to be lost. No poll was demanded on this resolution, and, according to the deponent, no forms of proxy were issued by the company to any of the stockholders to enable them to vote by proxy in the event of a poll.

That being the position, counsel for the plaintiff submitted that the plaintiff continues in office under art. 102. He summarised his argument by saying that all the necessary conditions specified in art. 102 to produce the result of the retiring director being automatically re-elected had been satisfied. First, the general meeting in question was a meeting at which the election of directors ought to take place ; secondly, the plaintiff was a director retiring by rotation at that meeting and his place had not been filled; thirdly, the plaintiff was willing to continue in office; fourthly, no resolution had been passed determining to reduce the number of directors in office. To this may possibly be added a fifth point, that, even if what was done could be said to be a resolution determining to reduce the number of directors in office, no notice of the intention to pass such a resolution had been given. Counsel for the company sought to meet this argument, which I think accords with the natural meaning of the words used in the article, in three ways. First, he said that, as a matter of construction, an article in the form of art. 102 cannot in common sense operate when a company intimates by express adverse vote that it does not desire the retiring director to continue as a director; secondly, he said—and this is the ground on which the judge decided the case—that the introductory words of the article, and, in particular, the words, "ought to take place" connote an element of compulsion which can only be applied by reference to art. 88, which fixes the minimum number of directors. He says that, if you adopt that construction, it gives a reasonable meaning to "due notice." It is obvious that a resolution which is to operate under art. 88 must be a resolution of which notice has been given, and he says that, as it was possible in the present case to reduce the number of directors without going below the minimum number of three, art. 102 had no application and the mere decision to refuse to re-elect the plaintiff was fully effective. Thirdly, he says—and this he admits must be an alternative to his other arguments—that in effect it was determined to reduce the number of directors in office, since (i) the meeting refused to elect the plaintiff; (ii) they took no other steps to fill the vacancy, and (iii) they in no other way indicated their desire to maintain the number of directors at the number at which it was at the commencement of the meeting. In formulating that third argument, he ignores the words "on due notice," but he sought, as I shall explain later, to satisfy us that on the true and reasonable construction of these articles, they ought to be struck out.

When the case came before WYNN-PARRY, J., he found himself in the difficulty that there were two apparently conflicting decisions on similar articles, and he, therefore, seized on the second argument which was advanced by counsel for the company and had not been advanced in any previous case as a means of avoiding deciding between the earlier decisions. He accepted it and decided in the defendant company's favour on the basis of that argument. I must refer to the relevant passages in the judgment. He said ([1947] 2 All E.R. 441, 442):

> The crux of this matter appears to me to be contained in the opening words of art. 102, which are: "If at any general meeting at which an election of directors ought to take place . . ." because it is only if that condition applies at a general meeting that the remainder of the article has any application. Therefore, it is necessary, first, to determine whether or not an election of directors ought to have taken place at the general meeting in question. As I have pointed out, under art. 88 it is provided: "Until otherwise determined by the company in general meeting, the number of the directors shall be not less than three nor more than five." There must, therefore, until there is a determination by the company, be at least three directors, but there need not be as many as five . . . On a consideration, therefore, of the provisions of the articles, I am of the opinion that at the general meeting in question there were not present circumstances which created a position in which an election of directors ought to have taken place. It appears to me that the only occasion on which an election of directors ought to take place, within the meaning of that phrase in art. 102, is when the number of directors, through a director retiring by rotation or any other circumstance, is reduced to less than the minimum for the time being provided, namely, three, in the absence of a determination by the company. That is borne out by the closing words of art. 102: ". . . unless it shall be determined at any such meeting on due notice to reduce the number of directors in office."

In my opinion, the closing words of art. 102, far from leading to the construction placed on the opening words by the judge, are inconsistent with it. I think there is a distinction between the number of directors in office and the number of authorised directors. Article 88 fixes a minimum and a maximum number of directors, and does not deal with the number actually in office. True it is that it impliedly requires the minimum number to be in office, but there is no need for the maximum number to hold office, and, in my opinion, the concluding words are dealing with the actual number in office, not with the minimum allowed to conduct the business. I think the introductory words are merely an expanded way of saying: " If at any ordinary general meeting. . ." It is to be observed that the word " ought " is not necessarily of imperative significance and is certainly not synonymous with the word " must." A reference to the SHORTER OXFORD ENGLISH DICTIONARY shows, under the third head of definition, the following:

> As auxiliary of predication. The general verb to express duty or obligation of any kind, strictly used of moral obligation, but also expressing what is befitting, proper, correct, or naturally expected.

Applying that definition to art. 102, I think the reference is to " any ordinary general meeting at which directors retire by rotation " since at such a meeting the election of directors is proper, correct, or naturally expected. For these reasons I am unable to agree with the reasons given by the judge for his conclusion. I would add that in the cases to which I shall have to refer in dealing with the first argument of counsel for the company, the argument accepted by WYNN-PARRY, J., would have been relevant and would have benefited one or other of the parties, but in none of the cases was the argument advanced. I confess to doubting whether, if the argument really had substance, it would have been overlooked by the eminent counsel and judges who were concerned in those cases.

I return now to the first ground taken by counsel for the company, and this involves a consideration of the authorities to which our attention was directed. The first was *Spencer* v. *Kennedy* (1) which is not strictly in point since in that case, on the judge's finding, the vacancy created by the non-election of the plaintiff, Spencer, was filled, and it is only in point because of a *semble* in the headnote which is in these terms:

> Article 82 [*i.e.*, the article which corresponds to art. 102 in this case] only applies to a case where the retirement of a director by rotation and the necessity for his re-election or replacement is entirely lost sight of at the annual meeting.

In the next case to which I shall refer MAUGHAM, J., said that that *semble* was not justified by the judge's judgment. I respectfully agree with MAUGHAM, J., in that comment. The passage in the judgment of ASTBURY, J., on which it is based is in these terms ([1926] Ch. 135):

> If the meeting of Nov. 11 had not been adjourned, or if the question of Spencer's re-election or replacement had been entirely lost sight of, art. 82 would have applied, and it would have been the directors' duty to adjourn the meeting to Nov. 18, and if he was not re-elected or replaced on that day he would have been deemed re-elected. But in the present case I think his re-election was validly dealt with and rejected at the adjourned meeting on Nov. 17 . . .

I do not think, having regard to the facts of the case, that the judge was endeavouring to lay down a complete catalogue of the events in which art. 82 was to apply. I think that, having regard to the facts of that case, his observations were clearly right, but I do not think we can leave out of account the fact that, as the judge went on to find, a vacancy created by Mr. Spencer's retirement was, in fact, filled by the appointment of another director.

I pass now to *Holt* v. *Catterall* (2). The headnote first sets out art. 97 of the company's articles then in question, which provided for one third of the directors retiring at the second ordinary annual general meeting. It then sets out art. 100, which corresponds to art. 102 in this case, and is in these terms:

> If at any meeting at which an election of directors ought to take place the places of the retiring directors or some of them are not filled up, then, subject to any resolution reducing the number of directors, the retiring directors, or such of them as have not had their places filled up and may be willing to act, shall be deemed to have been re-elected.

It was held that, if a retiring director was not re-elected and his place was not filled up at the same meeting, he retained office until his retirement by rotation, since by art. 100 he was to be deemed to have been re-elected, and, therefore, there was no vacancy to which a successor could subsequently be elected. The facts appear to have been as follows. The annual general meeting was held on Dec. 29, 1930. One of the items of business was the election of a director, Mr. Holt retiring by rotation and being eligible for re-election. It was common ground that he was not re-elected, and also that nobody was elected in his place, so that the question arose whether he did not continue to be a director. Then various articles were set out and I do not think it necessary for me to refer to them any further. The learned judge, as appears from the headnote, held that, notwithstanding the fact that when Mr. Holt was proposed for re-election he was not re-elected, he, in fact, continued to hold office.

Counsel for the company in this case very frankly, and I think rightly, admitted that there was no material difference between the provisions of the article in that case and the present case, and, if that case was correctly decided, it would necessarily follow that he must fail. He asked us, however, to overrule it, and he pointed out that it had not been followed in *Robert Batcheller & Sons, Ltd.* v. *Batcheller* (3). The headnote in that case states ([1945] Ch. 169) :

> At the annual general meeting of a company two retiring directors were, on a show of hands, not re-elected. A poll having been demanded, it was decided that the poll should be held at a later date and that an item providing for the election of two directors to fill the vacancies should also be dealt with at the later meeting. The retiring directors failed to secure re-election at the later meeting, but the chairman (ignoring the consideration of the item which provided for the filling of the vacancies) declared that they were re-elected under art. 93 of the company's articles which provided that, if their places were not filled up, retiring directors should be deemed to be re-elected. The shareholders, however, then purported to elect the two proposed new directors to fill the vacancies. In an action brought by the company for a declaration that the two new directors and not the retiring directors had been duly elected : HELD, that, as the notice to the shareholders of the later meeting was not in the proper form, the purported election of the two proposed new directors was invalid ; but that, as art. 93 only operated when the known circumstances of a particular case were such as sensibly and legitimately to admit of its application, the claim of the retiring directors to have been re-elected was repugnant to common sense . . .

Having regard to the facts found by the judge, it is difficult to see how he could reconcile that decision with that of MAUGHAM, J., in *Holt* v. *Catterall* (2). The learned judge sought to reconcile the two cases in the following way. After expressing his agreement with the view stated by MAUGHAM, J., in *Holt* v. *Catterall* (2) that the headnote to *Spencer* v. *Kennedy* (1) was not justified by the judgment of ASTBURY, J., reading the headnote in *Holt* v. *Catterall* (2), and summarising the judgment in that case, ROMER, J., said ([1945] Ch. 176) :

> MAUGHAM, J., certainly did say, according to the report, that the article there under consideration " could not be cut down and made to apply only to the case of complete inadvertence of all the members of the company present at the meeting," but I do not think that, except for that proposition, *Holt* v. *Catterall* (2) is of any real assistance to me in deciding the present case. It does not appear that any other person had been nominated for election in the place of the plaintiff (the retiring director), and there was no adjournment of the meeting at which he failed to secure re-election ; it also seems to have been admitted by the defendants' counsel in argument that the plaintiff must be treated as having been re-elected by virtue of the article then under discussion, the only question being how long he subsequently remained a director.

The last words that I have read seem to be the basis on which he sought to distinguish *Holt* v. *Catterall* (2), but, with all respect to ROMER, J., I think that they are based on a misapprehension of what happened in *Holt* v. *Catterall* (2). It seems to me plain that MAUGHAM, J., was considering, not merely how long the director in question remained a director, but whether, in fact, he was to be treated at all as having been re-elected. If that were not the case, *Spencer* v. *Kennedy* (1) would have been irrelevant. Moreover, Mr. SPENS [for the defendants] in his argument, to which I think ROMER, J., must be referring, is reported in these words :

> Therefore if the plaintiff was to be deemed to have been re-elected at all, he remained so only until a successor was elected.

It seems to me that those words quite plainly indicate that Mr. SPENS was arguing, first, that the plaintiff was not re-elected at all, and saying, secondly only, that, if he was deemed to have been re-elected, he remained so only until a successor was appointed.

For these reasons, I think, the distinction which ROMER, J., sought to draw between the case before him and the case before MAUGHAM, J., is not well founded. ROMER, J., went on to give his own reasons for concluding as he did that the directors had not been re-elected. He said ([1945] Ch. 176) :

But whatever the true scope of the article may be, I am of the opinion that it only operates when the known circumstances of a particular case are such as sensibly and legitimately to admit of its application. It is, of course, quite permissible to "deem" a thing to have happened when it is not known whether it happened or not. It is an unusual but not an impossible conception to "deem" that a thing happened when it is known positively that it did not happen. To deem, however, that a thing happened when not only is it known that it did not happen, but it is positively known that precisely the opposite of it happened, is a conception which to my mind, if applied to a subject-matter such as that of art. 93, amounts to a complete absurdity.

With all respect to the learned judge, it seems to me that that sentence which I have read creates a somewhat dangerous precedent, for what may appear to one judge as sensible and legitimate may appear to some other judge, or to the persons responsible for forming the company, as neither sensible nor legitimate. I do not think that on grounds of that kind we are justified in disregarding what seems to me the plain meaning of the English language even though in a particular case it does appear to produce an equitable result. I should mention that in the present case the article we have to consider is not precisely in the same language as in the case before ROMER, J., as the article provides, not that the director shall be deemed to be in office, but that he shall continue in office. However, I do not desire to rest my judgment on that distinction because I prefer to look at the substance of the matter, and the substance of the matter is the same whichever form of language be used. I respectfully agree with MAUGHAM, J.'s construction of the language and it seems to me that counsel for the plaintiff was right in saying that in the present case his client had satisfied to the full the conditions required by art. 102 as to his remaining in office. I would add that, even had I agreed with ROMER, J., I should have felt considerable doubt whether his judgment covered the present case, because in *Robert Batcheller & Sons, Ltd.*, v. *Batcheller* (3) the article did not contain any provision about notice being given of the intention to reduce the number of directors. Counsel for the company, recognising the difficulty that was created for him by those words, put forward an ingenious argument to try and persuade us to strike them out. He said that art. 68 provided, on his construction, that not only the specified items relating to the election of directors in place of those retiring by rotation, the election of auditors and the voting of their remuneration, and the declaration of dividends, were ordinary business, but also any other business which under the articles ought to be transacted at an ordinary meeting. All such business, he said, was ordinary business and, since art. 102 referred to a determination which necessarily involved a resolution to reduce the number of directors in office, it necessarily followed that that was other business which ought to be transacted at an ordinary meeting, and he said, accordingly, that no notice was necessary. In my view, that argument cannot be sustained. As the MASTER OF THE ROLLS said in the course of argument, and I respectfully agree, the courts do not lightly strike words out in documents. They endeavour, if it is possible, to reconcile the two conflicting provisions in the documents they are considering. I think that the MASTER OF THE ROLLS suggested a perfectly natural construction of art. 68 which avoids the conflict between the two articles on which counsel for the company relies. He said that, in the last sentence of art. 68, the sentence which reads: "All other business transacted at an ordinary meeting and all business transacted at an extraordinary meeting shall be deemed special," the words "all other business" relate back to the words "any other business" in the preceding sentence, and that, on the true construction of that article, it is saying that items specifically mentioned therein are ordinary business, but that any other business, whether arising under an express provision of the articles or not, was special business, the general nature of which should be specified in the notice convening the meeting. However, let me assume that this construction is not permissible and that the two articles are irreconcilable. Even so, I think counsel for the company would be out of court on the principle that, where two contradictory provisions are found, one in general terms but in terms wide enough to cover the specific matter, and the other dealing specifically with it, the specific provision must prevail. It seems to me that art. 102 is peremptory that due notice has to be given, and, therefore, if there is a conflict between the two articles, art. 102 prevails and the number of directors in office cannot be reduced unless a mention of the general nature of that resolution has been included in the notice convening the meeting. For these reasons, in my opinion, the second argument advanced by counsel for the company fails. It seems to me that the last point I have mentioned is also fatal to counsel's third argument, since it cannot possibly be suggested that there was included in the notice convening this meeting any intimation of an intention to reduce the number of directors in office. Indeed, if that had been the intention, I cannot imagine a notice less likely to convey it to the minds of the shareholders. I would add that I do not think it can necessarily be assumed that, because the directors resolved not to re-elect the plaintiff, they desired to reduce the number of directors in office. It may well be that their minds were not directed to that point at all.

There are two other points I think I should mention before I conclude this judgment. The first is this. WYNN-PARRY, J., expressed his pleasure at reaching the result he was able to reach, because, as he viewed the matter, the construction which, in my view, is the right construction involves an absurdity, namely, that shareholders, having rejected the resolution that the plaintiff be re-elected, now find that he has continued in office. However, I am not satisfied that this is necessarily an absurdity. It may well be that the persons responsible for the adoption of the articles in their present form deliberately took the view that, having regard to the small number of directors to whom this business was being entrusted, there should be no reduction of the number left in charge without the attention of the shareholders being specifically drawn to what was proposed in the notice convening the meeting. Therefore, I am not prepared to agree that the provision, although it produces a strange result, is absurd. It seems to me it may have been founded on sound business common sense. The other matter I want to mention is this. Counsel for the company pointed out—and I have already expressed my agreement with him—that on the articles as they are framed the shareholders cannot get a resolution to reduce the number of directors in office inserted in the agenda against the will of the board and that they can only get rid of the plaintiff by electing someone else in his place, but it is to be observed, first, that, if a shareholder gives notice of his desire to move a resolution reducing the number of directors, the directors would probably include it in the agenda, and, secondly, that there is nothing unusual in the shareholders not being allowed to interfere in matters which have been deliberately placed under the control of the directors. In that connection I have in mind some observations of BUCKLEY, L.J. ([1908] 2 K.B. 105, 106) in *Gramophone & Typewriter, Ltd.* v. *Stanley* (4) which are cited in BUCKLEY ON THE COMPANIES ACTS, 11th ed., p. 723, where the citation is in these terms :

> Even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals ; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals.

Therefore, I am not so shocked as was counsel for the company at the fact that the shareholders cannot necessarily get this resolution included in the agenda. Counsel for the company may, perhaps, have this consolation that, when the Act of 1947 is brought into force, it will be competent for a percentage of shareholders to secure the inclusion in the notice convening the meeting of any resolution which can properly be passed at an annual general meeting. For these reasons I think that the decision of the judge was wrong and that the plaintiff is entitled to the declaration for which he asks.

ASQUITH, L.J. : I agree.

LORD GREENE, M.R. : The matter has been so fully dealt with by COHEN, L.J., that I do not feel there is any necessity to go into the matter in any detail, but there are just two points on which I might usefully say a word. One was the point on which the judge very largely based his judgment, namely, that, in his view, any other construction of the article would lead to an absurdity. "Absurdity," I cannot help thinking, like public policy, is a very unruly horse, because there may very well be considerations which would be well understood by the persons concerned to work the documents in question, but do not readily present themselves to the mind of a judge. I am bound to say here that I agree with what Cohen, L.J., has said on the question of this particular article. The article contemplates that the number of directors in office in the previous year is temporarily going to be reduced by retirement by rotation. If that vacancy is not filled, the company will be minus a director. The number of directors to run the company's affairs which have been found necessary or desirable in the previous year, will, in the next year, be reduced by one. It seems to me quite a reasonable view to take that in those circumstances the company may do one of two things. It may either restore the number of directors by filling the vacancy—which it can do either by re-electing the retiring director or by electing somebody in his place—or it can decide that the previous number of directors was unnecessarily large and resolve to reduce the number of directors in office. Unless the company signifies its intention to do one or other of those two things, I can well understand it being thought that a director who, after all, has been tried in office for two or three years, or whatever it may be, should continue in office rather than that the number of directors which had previously been found necessary to run the company should be reduced. It seems to me that that is a perfectly sensible business attitude for people to take in the running of a company, and, therefore, I am bound to confess that, in construing art. 102, I am much tempted to approach it in what might be called a diametrically opposite line to that adopted by the learned judge and to read the rather stringent provisions as not unreasonably, being intended to be stringent and to place on the company the necessity, if it wishes not to fill a vacancy, of saying so in clear terms.

In the present case counsel for the company argued that the company had, in effect, determined to reduce the number of directors in office (*a*) by refusing to re-elect the retiring plaintiff, and (*b*) by not electing anybody to fill that vacancy. I do not accept that argument. It appears to me that the concluding words of art. 102 require a specific resolution, not merely to re-elect A, but a specific resolution that nobody shall be elected to fill the vacancy. An example of the sort of resolution which would be required can, in my opinion, be found in *Bennett Brothers* (*Birmingham*), *Ltd.* v. *Lewis* (5). There, with an article practically the same as this except that it contained no reference to due notice, the company, having declined to re-elect two directors who were retiring, passed a resolution that the said two directors "be not re-elected, and that the vacancies thereby created be not filled up, and that the number of directors be reduced accordingly." That is the sort of resolution, it seems to me, which the concluding words of art. 102 contemplate, and the very event contemplated by art. 102 appears to me to have happened.

There is one rule, I think, which is clear—and it brings me back to the doctrine of absurdity—that, although the absurdity or the non-absurdity of one conclusion as compared with another may be, and very often is, of assistance to the court in choosing between two possible meanings of ambiguous words, it is a doctrine which has to be applied with great care, remembering that judges may be fallible in this question of an absurdity, and in any event it must not be applied so as to result in twisting language into a meaning which it cannot bear. It is a doctrine which must not be used to re-write the language in a way different from that in which it was originally framed. Here, I not only do not find any absurdity, but, even if I did, I should not be justified in re-writing art. 102 in such a way as to make it comply more nearly with what I or another judge might consider to be more reasonable. I agree that the appeal must be allowed, that the plaintiff succeeds in the action, and that he is entitled to the declaration for which he asks.

Appeal allowed with costs.

Solicitors: *Nordon & Co.* (for the plaintiff); *Linklaters & Paines* (for the company).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re BURDEN (*deceased*), MITCHELL *v.* TRUSTEES OF ST LUKE'S HOSTEL.

[CHANCERY DIVISION (Romer, J.), December 9, 10, 1947.]

Wills—Construction—Gift of house for life—Condition requiring residence—Sum settled for outgoings during life of tenant—Gift over—Prohibition against exercise of power of sale—Settled Land Act, 1925 (*c.* 18), *s.* 106 (1).

A testatrix by her will gave two houses, one to her sister, E.F.E., and the other to another person, for life with remainder after their deaths to the Hostel of St. Luke. Clause 6 of her will provided " . . . I hereby direct that in any case if the life tenant shall cease to reside in the house . . . devised to him or her for life such fact shall operate as a determination of such life interest and accelerate the operation of the gift to the said Hostel of St. Luke." By cl. 7 (*a*) she directed her trustees " to set apart the sum of £1,000 and to hold the same during the lifetime of my . . . sister E. . . . upon trust to pay thereout the local rates and property tax and the cost of such repairs as they may deem necessary or desirable to the said house Glynhaven and after her death as regards so much as shall remain unexpended . . . for the said Hostel of St. Luke." There was a similar direction with regard to the second house. A declaration was sought by the tenants for life regarding the effect of these clauses in the event of their exercising their powers of sale under the Settled Land Act, 1925.

HELD : (i) the deprivation of an amenity such as that conferred by cl. 7 (*a*) was not within the Settled Land Act, 1925, s. 106 (1) (which makes void any provision tending to induce a life tenant to abstain from exercising any power under the Act), it being merely an extra benefit conferred on the life tenants.

Re Simpson, Clarke v. *Simpson* ([1913] 1 Ch. 277) and *Re Patten, Westminster Bank* v. *Carlyon* ([1929] 2 Ch. 276) *followed.*

Re Ames, Ames v. *Ames* ([1893] 2 Ch. 479) *not followed.*

Re Eastman's Settled Estates, (1898), (68 L.J.Ch. 122*n*) *distinguished.*

(ii) even if such a deprivation were within s. 106 (1), the gift over to take effect on the life tenants' exercising the power was within that section, and there was nothing in the sub-section to convert the trust from a direction to pay outgoings into a direction to pay money out to the life tenants.

(iii) taking cl. 6 of the will in conjunction with cl. 7 (*a*), the words " after her death " in cl. 7 (*a*) should be read as meaning " subject to her interest," and, therefore, in the event of a sale by the life tenants of the houses under the powers conferred by the Act, so much of the sums of £1,000 as remained unexpended would devolve at once on the Hostel of St. Luke.

Re Shuckburgh's Settlement, Robertson v. *Shuckburgh,* ([1901] 2 Ch. 794) and *Re Donald, Royal Exchange Assurance* v. *Donald,* ([1947] 1 All E.R. 764) *applied.*

[AS TO PROHIBITION AGAINST EXERCISE OF STATUTORY POWERS OF TENANT FOR LIFE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 697, 698, para. 976 ; and FOR CASES, see DIGEST, Vol. 40, pp. 743, 744, Nos. *2736-2752.*]

Cases referred to :

(1) *Re Simpson, Clarke* v. *Simpson,* [1913] 1 Ch. 277 ; 82 L.J.Ch. 169 ; 108 L.T. 317 ; 40 Digest 752, *2819.*

(2) *Askew* v. *Woodhead,* (1880), 14 Ch.D. 27 ; 49 L.J.Ch. 320 ; 42 L.T. 567 ; 44 J.P. 570 ; 11 Digest 247, *1477.*

(3) *Re Trenchard, Ward* v. *Trenchard,* (1900), 16 T.L.R. 525 ; 40 Digest 735, *2648* ; *Re Trenchard, Trenchard* v. *Trenchard,* [1902] 1 Ch. 378 ; 71 L.J.Ch. 178 ; 86 L.T. 196 ; 50 W.R. 266 ; 46 Sol. Jo. 231 ; 40 Digest 743, *2732.*

(4) *Re Patten, Westminster Bank* v. *Carlyon,* [1929] 2 Ch. 276 ; 98 L.J.Ch. 419 ; 141 L.T. 295 ; Digest Supp.

(5) *Re Ames, Ames* v. *Ames,* [1893] 2 Ch. 479 ; 62 L.J.Ch. 685 ; 68 L.T. 787 ; 40 Digest 744, *2746.*

(6) *Re Eastman's Settled Estates,* (1898), 68 L.J.Ch. 122*n* ; 40 Digest 744, *2744.*

(7) *Re Shuckburgh's Settlement, Robertson* v. *Shuckburgh,* [1901] 2 Ch. 794 ; 71 L.J.Ch. 32 ; 85 L.T. 406 ; 37 Digest 447, *510.*

(8) *Re Donald* (*decd.*), *Royal Exchange Assurance* v. *Donald,* [1947] 1 All E.R. 764.

ADJOURNED SUMMONS for a declaration as to the effect of certain clauses in the will of the testatrix in the event of the exercise by life tenants of their powers of sale conferred by the Settled Land Act, 1925. ROMER, J., held that the life tenants would not be entitled to any benefit from the amount unexpended of funds provided by the testatrix for the upkeep of houses which they sold under such powers, and that the interest of the remainderman in those funds would be accelerated. The facts appear in the judgment.

Cozens-Hardy Horne for trustees of will or settlement.
R. L. Edwards for residuary legatees.
Blanshard Stamp for tenants for life.
B. S. Tatham for remainderman (trustees of the Hostel of St. Luke).

ROMER, J. : The questions I have to determine arise from the provisions in the testatrix's will for the upkeep of two of the houses which she gave to certain persons for life with remainder after their respective deaths to the Hostel of St. Luke. Clause 6 provides :

> In the case of each of the six foregoing life interests it is my desire and I hereby direct that in any case if the life tenant shall cease to reside in the house as aforesaid devised to him or her for life such fact shall operate as a determination of such life interest and accelerate the operation of the gift to the said Hostel of St. Luke.

By cl. 7 (*a*) :

> I direct my trustees to set apart the sum of £1,000 and to hold the same during the lifetime of my said sister Emily Frances Ellis upon trust to pay thereout the local rates and property tax and the cost of such repairs as they may deem necessary or desirable to the said house Glynhaven and after her death as regards so much as shall remain unexpended of the said sum and the interest thereof for the said Hostel of St. Luke.

There is a further direction to the same effect with regard to the house which the testatrix had given during the life of the survivor of her cousin, Robert Arthur Lloyd, and his wife. The tenants for life of these two properties want to know what their position will be with regard to these sums of £1,000 each in the event of their desiring to exercise their powers of selling under the Settled Land Act. It is argued on their behalf that, if they sell, they should be entitled to have an equivalent benefit which, it is said, could be quantified in terms of money in substitution for the benefits conferred on them by cl. 7, and it is contended that that is the result of the provisions of the Settled Land Act, 1925, s. 106.

It is clear that the testatrix did not intend any part of these sums of £1,000 to pass into the pockets of the life tenants. The sums were dedicated solely to achieve one particular object which was to permit the life tenants to occupy the houses without having themselves to pay the rates and taxes and for repairs. Therefore, it would be altering the terms of these dispositions if the arguments for the life tenants were to be acceded to and part of these sums of £1,000 were to be diverted from the object to which they were intended to be applied and were to pass into the pockets of the tenants for life.

The argument advanced on behalf of the tenants for life is founded on the view that, if a person has a life interest in a house and is exonerated from the payment of the outgoings relating to the house, that is a benefit, and, if the tenant for life should lose that benefit and not acquire an equivalent benefit on selling the house, that is an element which might act as a deterrent to him in deciding to exercise his powers under the Settled Land Act. Whether, as a result of adopting the view that it is a deterrent, the trusts would be altered in a way that the testatrix herself never contemplated is another matter. It seems to me that this matter is covered by authority which is binding on me. In *Re Simpson* (1) which came before SWINFEN EADY, J., the headnote states ([1913] 1 Ch. 277) :

> A testator bequeathed a leasehold house to his executors and trustees in trust to permit his wife to occupy the same during her widowhood, with a provision for payment of ground rent, rates, taxes and outgoings, execution of repairs, and performance of covenants out of the testator's general estate, it being his intention that his wife should be personally relieved therefrom. The widow resided in the house for fourteen years from the testator's death, the outgoings, amounting to £160 a year, being paid by the trustees. She then sold the house as life tenant under the Settled Land Act, 1882, and the trustees received the purchase-money :—HELD, that under s. 34 the proceeds of sale must be applied in paying the widow during widowhood such an annuity as

would exhaust those proceeds, capital and income, in the remaining eleven years of the lease. *Askew* v. *Woodhead* (2) applied. Held, also, that the widow was not entitled to be paid £160 a year out of the general estate in lieu of the provision for payment of rent and outgoings, as that provision, being merely an extra benefit conferred on her to enable her to reside in the house, was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of s. 51, and consequently came to an end on the sale.

After deciding the first point in favour of the widow, Swinfen Eady, J., said (*ibid.*, 282):

The widow, however, also asks for a further payment. She says that as she had a right to occupy the house free of ground rent, rates, taxes, outgoings, and cost of repairs amounting in all to £160 a year, which were payable out of the general estate, she ought now to receive an annuity of that amount out of the general estate, which no longer has to pay the actual rent and outgoings. She contends that having regard to s. 51 [of the Settled Land Act, 1882] this extra benefit conferred on her by the will cannot be put an end to by a sale under her statutory power. In my judgment the provision for payment of rent and outgoings does not fall within s. 51 at all. It is merely an extra benefit conferred on the widow to enable her to reside in the house without the expense of these outgoings. It is true that while she was in occupation she was free from these outgoings, but I am of opinion that the provision conferring this extra benefit on her was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of s. 51.

He then referred to *Re Trenchard* (3) which came first before Byrne, J. (16 T.L.R. 525) and subsequently before Buckley, J. ([1902] 1 Ch.D. 378), and said he thought that the view which he had expressed was supported by the view which Buckley, J., had taken in *Re Trenchard* (3).

The headnote in *Re Patten* (4) states ([1929] 2 Ch. 276):

A testator by his will, dated Nov. 22, 1927, directed his trustees to retain £3,000 and to apply the interest yearly in payment of the taxes, rates and repairs of his freehold house, and he desired that his aunt should "have the use of it and my furniture free of cost for her occupation during her life or so long as she may require them, but without the power to sub-let the same or any part thereof [and] on the termination of her occupation the house is to be sold," and from the proceeds, added to the above £3,000, certain specific legacies were given . . . Held, (1) that the provision forbidding the tenant for life to sub-let was void under sub-s. (1) of s. 106 of the Settled Land Act, 1925, and that the provision requiring the house to be sold and the gift over of the proceeds of sale upon the termination of her occupation was also avoided by that sub-section, so far as that provision would operate in the event of her exercising any of her powers as tenant for life; (2) that the gift over of the £3,000 was a provision which tended to induce her to abstain from exercising her powers of leasing as a tenant for life, and was void, therefore, in so far as it had that tendency; and that it should be read to take effect only upon her ceasing to reside for any reason other than the exercise of her powers of leasing as a tenant for life; (3) that in the event of her selling the house she would not be entitled to be paid any part of the income of the £3,000 . . .

Romer, J., after reading the will and referring to the admitted fact that the tenant for life, Mrs. Patten, had the powers of a tenant for life, said (*ibid.*, 279):

She desires, however, to know what her position will be as to the house, the pictures, and the interest on the £3,000 in the event of her ceasing to reside there. Should she cease to occupy the house for any reason other than the exercise by her of her powers as a tenant for life, there can be no question but that the directions contained in the will to take effect on the termination of her occupation will at once come into operation. She may, however, cease to occupy the house by reason of an exercise by her of her powers of a tenant for life, and in that case it becomes necessary to consider the provisions of s. 106 of the Settled Land Act. But before doing so, it will be convenient to ascertain what, according to the terms of the will, are the trusts upon which the £3,000 are to be held. It was contended on behalf of Mrs. Patten that during her residence at the house the trusts of the interest accruing on this sum were solely for her benefit, that the payment of the rates taxes and repairs was merely one method indicated by the testator of utilizing the interest for her benefit, and that she was entitled to be paid such interest so far as it was not exhausted by the particular payments in question. I am unable to take this view. Mrs. Patten would of course be benefited by having the rates and taxes and repairs paid for during her residence, but so far as repairs are concerned the persons entitled to the proceeds of sale of the house when sold are also interested in having it kept in a proper state of repair until the sale. In my opinion the only trust declared by the will in respect of the interest of the £3,000 is to apply it in payment of the rates, taxes and repairs, and I cannot find any indication of the testator's intention that any surplus after discharging that trust should go to Mrs. Patten. Should there be any surplus it would appear to be undisposed of and would fall into residue.

Those observations of the learned judge are precisely in point in the present case. There is no indication here of the testatrix's intention that any surplus after discharging the particular trusts should go to the life tenant. ROMER, J., continued (*ibid.*, 280):

> I must now consider the effect of s. 106 upon the provisions of the will to which I have referred. There is nothing in these provisions purporting or attempting to forbid Mrs. Patten to exercise any power under the Act except the direction that she shall not have power to sub-let. That provision obviously falls within para. (*a*) of the first sub-section and is to be deemed void. The provision requiring the house to be sold and the gift over of the proceeds of such sale upon the termination of Mrs. Patten's occupation is also avoided by the first sub-section so far as the provision would operate in the event of her exercising any of her powers as a tenant for life, either because it comes within para. (*b*) of the sub-section, or because her estate or interest may be regarded as limited to continue so long only as she abstains from exercising any of such powers, and must therefore by virtue of sub-s. (2) be and take effect as an estate or interest to continue during her life or until she shall cease to occupy for any reason other than the exercise by her of any of such powers. If therefore Mrs. Patten in exercise of such powers should let or sell the house she will be entitled to receive during her life the rent or the interest of the proceeds of sale, as the case may be. The question of what effect s. 106 has upon the £3,000 and the furniture is, however, one of greater difficulty. And first as to this £3,000. In connection with this my attention was called to the decision of BYRNE, J., in *Re Trenchard* (3), a case decided upon s. 51 of the Settled Land Act, 1882, a section which for the present purpose differed in no material respect from s. 106, sub-ss. (1) and (2), of the present Act. In that case a testator gave to his widow the use of a certain house so long as she should desire to make it her permanent place of residence, his estate to pay all rates, taxes and outgoings in respect thereof and to keep the house and grounds in tenantable repair. The widow claimed to be entitled as tenant for life to sell the house and receive the income of the proceeds. It was held that this claim was well founded. But she also claimed in the event of such a sale to receive out of the testator's estate such a further sum in each year during her life as should be equivalent to the rates, taxes and outgoings of the house. As to this, according to the report, the learned judge said that the point was "whether the direction contained in the will as to the payment of the rates, taxes and outgoings, so long as she should desire to make it her permanent place of residence, was such as would deprive the lady of all interest in the portion of the testator's estate properly applicable to such payment in the event of her selling the residence and therefore a prohibition or limitation, void within the meaning of s. 51 of the Act, as preventing the tenant for life from exercising, or as inducing her to abstain from exercising, or as putting her into a position inconsistent with her exercising her powers under the Act, or as tending to bar that operation. He was of opinion that, so far as the direction in the will made it a condition that the benefit of the payments in question was to be dependent upon residence, it was void within s. 51, and that the widow's interest in such sums continued during her widowhood independently of her residing in the house." With all respect to the learned judge, I feel great difficulty in understanding this decision. What provision in the will would have prevented her from exercising or would have induced her to abstain from exercising, or put her into a position inconsistent with her exercising the power of sale? If the answer to this question be that it was the direction to pay the rates, taxes, outgoings and repairs out of the testator's general estate during her residence, then that provision was void in so far as it had that effect. The result of this would be either that the whole provision was void, which is absurd, or that the confining of this provision to the duration of her residence was void. The provision was not, however, in terms so confined, and even if it had been, I see much difficulty in treating the section as enlarging the directions contained in the will unless recourse be had to sub-s. (2) and the direction for payment be regarded as creating an estate or interest limited to continue so long as the widow abstained from exercising her power of sale. But supposing that the direction could be treated, by reason of one or other of the provisions contained in the section, as a direction to make the payments during the widow's life, I am unable to find anything in the section that could justify the court in further disregarding the provisions in the testator's will, and treating the direction as one to pay the rates, taxes, outgoings and repairs while the house remained unsold, and an equivalent sum to the widow during the remainder of her life after a sale had taken place, and the house had consequently ceased to form part of the testator's estate. But, notwithstanding these doubts of mine, I might have felt it my duty to follow BYRNE, J.'s decision in the present case were it not for the fact that in *Re Simpson* (1) SWINFEN EADY, J., took a different view as to the application of the section to a somewhat similar state of facts. [Having referred to *Re Simpson* (1) and cited a

part of Swinfen Eady, J.'s judgment in that case, he continued (*ibid.*, 284) :] The learned judge [Swinfen Eady, J.] then referred to *Re Trenchard, Ward* v. *Trenchard* (3) and came to the conclusion that Buckley, J., had taken (16 T.L.R. 525) a different view from that of Byrne, J., on a subsequent application ([1902] 1 Ch. 378) to confirm a compromise in the same matter come to between the widow and the parties interested in remainder. I have carefully read the judgment given by Buckley, J., on that occasion, and for myself have been unable to discover anything to suggest that Buckley, J., expressed or even indicated by implication that he disagreed with Byrne, J. The point was not in any way considered by him. But, however that may be, I have the clear expression of Swinfen Eady, J.'s own view that in a case such as the present the tenant for life is not entitled after a sale to be paid during her life the money that would but for this sale have been expended in outgoings. In the present case the trust is to pay out of the interest from the £3,000 the taxes, rates and repairs. There is no provision as to how long that trust is to continue except what is to be implied from the gift over of the £3,000 on the termination of Mrs. Patten's occupation, the effect of which I will consider in a moment. But whatever may be the duration of that trust, I can find nothing in s. 106 of the Settled Land Act, 1925, that can have the effect of turning it into a trust to pay any part of the interest to Mrs. Patten. It is, however, a trust to apply the income in payment of the outgoings and but for the gift over is a trust that would endure so long as the house remained subject to the trusts of the will. That being so, it appears to me that the gift over of the £3,000 upon the termination of Mrs. Patten's occupancy is a provision that tends to induce her to abstain from exercising her powers of leasing as a tenant for life, and is therefore void in so far as it has that tendency. The gift over should therefore be read as one to take effect only upon her ceasing to reside for any reason other than the exercise of her powers of leasing as a tenant for life. If she should let the house the trust will accordingly continue and she will benefit by obtaining a larger rent. But there can be no necessity for preventing the gift over taking effect upon her selling, for it is not the gift over that tends to induce her not to exercise that power ; it is the fact that, upon selling, the trust for payment of the outgoings comes to an end by reason of the nature of that trust, and for the reasons I have given I cannot treat its nature as being altered by any of the provisions of the section.

Both Swinfen Eady, J., in *Re Simpson* (1) and Romer, J., in *Re Patten* (4) expressed the view that it was not the gift over that tended to induce the tenant for life not to exercise the power for sale, and they both decided that, if there was a sale under the Settled Land Act, the tenant for life would not be entitled to any monetary benefit in substitution for any advantage of having the taxes and rates and repairs paid before the time of selling. Those cases seem clearly to negative the claims made by the tenants for life in the present case, but counsel for the tenants for life pointed out in argument that two earlier cases were not brought to the attention of Swinfen Eady, J., in *Re Simpson* (1) or of Romer, J., in *Re Patten* (4). The first is *Re Ames* (5), which was a decision of North, J. It was rather a complicated case where there was a settlement of land and a direction that a sum of £4,000 was to be set aside and the income applied in maintaining in good and efficient repair a wall forming part of the property and in preserving in proper order and condition the walks and drives on the estate, and that the surplus of any such dividends arising from the sum of £4,000 should in effect be paid to the tenant for life of the property from time to time by virtue of the limitations declared on the real estate. There was a provision that, if the tenant for life should, by alienation or other act of his, cease to be entitled to such possession, the trust declared of the £4,000 annuities should cease and determine and thenceforth the same should fall into and be deemed part of the residuary personal estate. North, J., said ([1893] 2 Ch. 485) :

> There may be some difficulty in saying who will take under the ultimate gift after the expiration of the trust ; but under the words of the trust the plaintiff as tenant for life is also entitled to have the income of the fund applied in keeping up the sea-wall, and what I may call the amenities of the property, so that to that extent if the property were retained he would be entitled to have expended upon it that which would produce to him an increase in the value of a property the enjoyment of which he has. If he parts with the property he cannot have the same benefit. After declaring the trusts of the £4,000, the codicil provides that if at any time during the continuance of the trusts of the £4,000, the person entitled to possession or receipt of the rents and profits of the settled property shall by alienation or other act of his cease to be entitled to such possession or receipts, or in case of a tenant in tail disentailing and not resettling the settled property : " In either of such cases the trusts declared concerning the £4,000 and the dividends thereof shall cease and determine, and thenceforth the

> same shall fall into his residue." That is to say, if the present tenant for life had refrained from selling, he would have been in enjoyment of the estate with a yearly expenditure upon it, in relief of the expenditure he would otherwise have been put to himself. That is, so long as he was in the possession, he would have had the benefit of the income of the £4,000 Consols. The capital of that sum would not, of course, go into his own pocket. But there is an estate which, while the tenant for life remains in possession, will have a sum of money spent on it yearly; but when he parts with it the expenditure ceases. That certainly seems to me to come within s. 51 of the Settled Land Act, which provides for the case of a disposition of personal property being made, the effect of which is to tend to have the operation of making the tenant for life abstain from exercising the power of sale given him by the Act; a disposition which the section intends shall not have any legal effect. I think that, notwithstanding the sale, the plaintiff is entitled still to have the income of the fund.

Counsel for the residuary legatees pointed out in that case the trusts of the £4,000 fund were not only to preserve the amenities of the property, but to pass any balance of dividend not wanted for that purpose to the tenant for life. It was really the ordinary case of attempting to take away from the tenant for life something in the nature of an annuity which had been given to him if he exercised his Settled Land Act powers. It is true that that element was present in that case, but I do not think it was the element on which North, J., proceeded. I think that the ground on which he decided the case was that the person entitled to possession or to receive the rents and profits of the settled property was also entitled to a benefit, which he described in his judgment, of having the amenities of the property maintained otherwise than at his own cost, and that an attempt to deprive him of that benefit, if he had sold, under his powers under the Settled Land Act was avoided by the Act.

Counsel for the tenant for life referred me also to *Re Eastman's Settled Estates* (6) which was decided in 1898. The headnote is (68 L.J.Ch. 122*n*):

> By his will dated May 18, 1895, a testator gave his residuary real and personal estate to trustees, upon trust as to his leasehold house, No. 5, Acre Lane, Brixton, . . . wherein he was then residing, to permit the applicant, his wife, to occupy the same for her life or till the expiration of his term therein (provided she should so long live and continue his widow), the applicant paying the ground rents and all rates and taxes payable in respect thereof, and also the annual premium for insuring the said premises to the full value thereof. And upon further trust, out of the income of his residuary estate to do all repairs that might be necessary from time to time to No. 5, Acre Lane, and to pay to the applicant for her own use during her life or widowhood (if she should continue to reside in his present residence so long or until the lease thereof should expire) the annual sum of £850 . . . Provided, that if the applicant should remove from No. 5, Acre Lane, before the expiration of the lease, the said annuity of £850 to her should be reduced, as from the date of her ceasing to reside there, to £600 . . . The annuity of £850 was increased by codicil to £1,000, payable to the applicant during her life or widowhood if she should continue to reside in the testator's then residence till the expiration of his term therein.

An application was made to the court by the tenant for life, the widow, who was the applicant, and the applicant's infant son, and certain questions were raised on that application. The judgment is very shortly reported and is to this effect. Romer, J., says (*ibid.*, 123):

> The words of s. 51 of the Settled Land Act, 1882, are strong, and I am glad to be able to hold that the provision for reducing the applicant's annuity comes within the section, as tending to induce her to abstain from exercising her powers. It is not necessary that the settlor should have intended the provision to have this result. The questions must be answered in the affirmative.

It is to be observed that the only point raised and decided in that case was as to the reduction of the tenant for life's annuity. No question was raised regarding the deprivation of the widow of the benefits conferred on her in having the ground rent and rates and taxes on the house in which she was given a life interest paid out of the estate. I cannot regard that decision, therefore, as being an authority on either question with which I have to deal.

Notwithstanding the views which were, apparently, taken by North, J., in *Re Ames* (5), I have the clearest possible guidance both of Swinfen Eady, J., and of the late Lord Romer in the two cases to which I earlier referred with regard to the proper bearing of s. 106 on such a problem as the one before me. They both express the view that the deprivation of such an amenity as is conferred on a tenant for life by this will is not within s. 106 of the Settled Land Act, it merely being an extra benefit conferred on the tenant for life and not one such as to tend to induce the tenant for life to abstain from exercising her Settled Land Act powers of sale. LORD ROMER further points out that, even assuming that it was avoided by s. 106, the gift over to take effect on her exercising the powers was within s. 106, and there is nothing whatever in the section to convert the trust from a direction to pay outgoings into a direction A to pay money out to the tenant for life. I propose to follow *Re Simpson* (1) and *Re Patten* (4), and I respectfully adopt and concur in the reasoning which LORD ROMER expresses in his considered judgment. If the view contended for by counsel for the tenants for life is to prevail over the view expressed by SWINFEN EADY, J., and ROMER, J., it must prevail in a higher court. I, therefore, hold that the tenants for life will not be entitled to any interest in the sums of £1,000 if they sell the properties by virtue of their Settled B Land Act powers.

The question then arises what should happen to those sums if these powers are exercised. Counsel for the remainderman to the real estate, the Hostel of St. Luke, says that there is acceleration in their favour of any unexpended portions of the sums in question. Counsel for the residuary legatees says that until the death of the tenants for life there will be no operative trust effective C in relation to this money, the income will pass into residue, and on the death of the tenants for life the capital will go to the remainderman, the Hostel of St. Luke. I think that this question should be decided in favour of the Hostel of St. Luke. True, that on the language of cl. 7 of the will the sums in question are not to go to the Hostel of St. Luke until after the death of the tenants for life, but I read that in conjunction with cl. 6 in which the testatrix says:

> D In the case of each of the six foregoing life interests it is my desire and I hereby direct that in any case if the life tenant shall cease to reside in the house as aforesaid devised to him or her for life such fact shall operate as a determination of such life interest and accelerate the operation of the gift to the said Hostel of St. Luke.

It appears to me that, taking that clause in conjunction with cl. 7, it is by no means difficult to adopt the kind of principle which has so frequently been E adopted in such cases as *Re Shuckburgh's Settlement* (7) and *Re Donald* (8), and, in effect, to read the words "after her death" in cl. 7 (*a*) as meaning "subject to her interest." It is urged by counsel for the residuary legatees that in cl. 6 there is an express provision for acceleration in the case of each of the six foregoing life interests, it being the testatrix's desire that, if the life tenants should cease to reside, that fact should operate as acceleration of the operation of the gift to the Hostel of St. Luke, and that there is no such F provision under cl. 7 where the gift over is expressed to be after the deaths of the tenants for life. I do not think that any great weight is to be attached to that argument. It seems reasonably clear that the testatrix intended the Hostel of St. Luke to have not only the properties but the £1,000 which, in effect, was to go with the properties as long as they formed part of the testatrix's estate, subject only to the interest which she had carved out in G relation to that property of a sum in favour of the tenants for life. Accordingly, I take the view that, if the tenants for life sell these houses under their Settled Land Act powers, so much of these sums of £1,000 as at that time remains unexpended will go at once to the remainderman, the Hostel of St. Luke. I will make the appropriate declaration.

Declaration accordingly.

Solicitors: *Guscotte, Wadham & Co.*, agents for *O'Donogue & Forbes*, H Bristol (for the trustees, residuary legatees and tenants for life); *Trotter, Leaf & Pitcairn* (for St. Luke's Hostel).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

ROGERS AND ANOTHER *v.* WOOD AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), December 17, 1947.]

Practice—Counterclaim—Default in delivering reply—Motion for judgment—Action still pending—Subject-matter of action and counterclaim indivisible - R.S.C., Ord. 27, *r.* 11.

Where the plaintiff in an action has failed to deliver a reply to a counterclaim, the court has jurisdiction under R.S.C., Ord. 27, r. 11, to entertain a motion for judgment on the application of the defendant, but, where the subject-matter of the action and the counterclaim is indivisible, it would be unjust to make an order for judgment on the counterclaim while the action is still pending, and the motion should, therefore, be refused.

Roberts v. *Booth* ([1893] 1 Ch. 52) *distinguished.*

Observations of LOPES, L. J., *in Jones* v. *Macaulay* ([1891] 1 Q.B. 221) *applied.*

[AS TO FAILURE TO REPLY TO COUNTERCLAIM, see HALSBURY, Hailsham Edn., Vol. 19, p. 222, para. 520 ; and FOR CASES, see DIGEST, Vol. 40, p. 428, Nos. *495-504.*]

Cases referred to :

(1) *Roberts* v. *Booth,* [1893] 1 Ch. 52 ; 67 L.T. 646 ; 40 Digest 428, *502.*

(2) *Jones* v. *Macaulay,* [1891] 1 Q.B. 221 ; 60 L.J.Q.B. 258 ; 64 L.T. 621 ; 40 Digest 428, *501.*

MOTION for judgment.

The plaintiffs having failed to reply to the defendants' counterclaim, the defendants moved for judgment while the action was still pending. ROXBURGH, J., held that, although the court had jurisdiction to entertain the motion, it would be unjust to make an order for judgment on the counterclaim while the action was still pending.

W. Fraser for the defendants.

ROXBURGH, J. : Some curious points arise on this summons. The plaintiffs on the record are William Rogers, and Pauline Mary Rogers, his wife. The defendants are Jennie Wakefield Wood and Joseph Wood. The statement of claim alleges a written contract for the sale of a certain dwelling-house, 98, Baskerville Road, Hanley, in the city of Stoke-on-Trent, at the price of £900, and the payment by the plaintiffs, who are the alleged purchasers, to the defendants, who are the alleged vendors, of an unusually large deposit, namely, £300. The dispute between the parties appears to be whether or not, in the events which happened and having regard to the documents and other matters, the contract was a contract to sell with vacant possession. The defendants either would not or could not give vacant possession. The plaintiffs refused to complete and they claim a declaration that the defendants have wrongfully refused to carry out their part of the contract, damages for breach of contract (including repayment with interest of the said deposit of £300), and further or other relief. The substance of the defence is that the contract was not a contract to sell with vacant possession, and that, accordingly, the plaintiffs, in refusing to complete because they could not obtain vacant possession, were themselves in breach of contract. The defendants then counterclaim and state that the plaintiffs were in default under the said contract on Dec. 9, 1946, the date on which the defendants gave notice under cl. 32 of the General Conditions of Sale. They set out cl. 32 which says :

> (1) If a purchaser shall fail to perform his part of the contract, the vendor may give to the purchaser or to his solicitor at least 14 days' notice in writing specifying the default . . . (2) If the purchaser does not comply with the terms of the said notice (*a*) the deposit money, if any, shall be forfeited to the vendor . . . (*b*) the vendor may resell . . . (*c*) the contract shall [subject to various matters] become void . . .

The defendants counterclaim a declaration that the contract became void, except as stated in the General Conditions of Sale, cl. 32, on Dec. 23, 1946—14 days from the date of the letter of Dec. 9, 1946, forfeiture of the deposit of £300 paid by the plaintiffs, and further or other relief. The plaintiffs have made default in delivering a reply to that counterclaim. The reason why is not material.

In those circumstances, the defendants have moved for judgment. I am not certain from the form of the proposed minutes of order whether the motion was intended to be a motion for judgment in the action and on the counterclaim, or whether it was intended to be a motion for judgment on the counterclaim only, but I need not pursue that point further because I think it is clear that the motion could not lie for judgment on the counterclaim. Two things seem to me to be manifest. One is that I have jurisdiction to entertain the motion under R.S.C., Ord. 27, r. 11: see *Roberts* v. *Booth* (1). The second is that, if I were to give judgment now on the counterclaim, it would make it impossible for the plaintiffs further to pursue the action, because the subject-matter of the action and the counterclaim is indivisible. In those circumstances, I have looked at the authorities which seem to me to make the position clear. In *Roberts* v. *Booth* (1) the facts were somewhat similar, but there were two important differences. First, in that case an order was made on Nov. 9, 1892, dismissing the action for want of prosecution unless the plaintiff should deliver a reply within seven days. This was not done, and so, when NORTH, J., heard the motion for judgment, there was no pending action. Secondly, while there might have been a good ground for treating the subject-matter of the action and counterclaim in that case as closely inter-related, they could not, I think, have been described as indivisible. On the other hand, while it is true to say that the point was not directly in issue in *Jones* v. *Macaulay* (2), LOPES, L.J., made some observations which seem to me to throw much light on the question which I have to decide. The headnote in *Jones* v. *Macaulay* (2) is:

> Where the plaintiff fails to deliver a defence to a counterclaim, the defendant cannot sign judgment on the counterclaim for default of pleading, but must move for judgment under Ord. 27, r. 11.

In pronouncing judgment in that case to that effect, LOPES, L.J., said ([1891] 1 Q.B. 223):

> There is a good reason why the practice should be so. Suppose a plaintiff claimed £500, and there was a counterclaim for £100 to which the plaintiff did not plead. If the defendant were entitled to sign judgment on the counterclaim, he could issue execution for the £100 while the action against him for £500 was still pending. I think that it was intended by the rules to prevent this and to reserve to the court control over the matter; and with this object it was provided, not that the defendant should be able to sign judgment in a case of this sort, but that he must come to the court, which should make such order as might be just under the circumstances.

I think those observations should guide my conduct here. In my judgment, it would be altogether unjust, where the subject-matter of the action and the counterclaim is indivisible, to make an order for judgment on the counterclaim while the action is still pending, and I, accordingly, refuse this motion.

I do not think that the defendants were in any difficulty. Had they applied under a different rule for an order that the action, as distinct from the counterclaim, be dismissed for want of prosecution, apart from special circumstances, an order would probably have been made dismissing the action for want of prosecution unless the plaintiffs delivered a reply within a certain period. If the plaintiffs failed to reply within that time or within such extended period as the court might in certain circumstances allow, the result would inevitably be that the action would be dismissed for want of prosecution under the appropriate rule. Then the field would have been clear. There would have been no pending action and, accordingly, no difficulty—because there is no absolute bar—in obtaining judgment on the counterclaim on motion for judgment.

Motion refused.

Solicitors: *Simmonds, Church Rackham & Co.*, agents for *Challinors & Dickson*, Hanley (for the defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

JASLOWITZ *v.* BURSTEIN.

[King's Bench Division (Croom-Johnson, J.), November 26, 27, 1947.]

Landlord and Tenant—Recovery of possession—Costs—Action in High Court—House within Rent Restrictions Acts—Acts not pleaded in defence—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 17 (2).

A landlord brought an action for possession of a dwelling-house subject to the Rent Restrictions Acts, on the ground of breach, by the tenant, of a covenant not to sub-let. The tenant was unable to claim the protection of the Acts, which were not pleaded :—

Held : the action was a common law action and not a proceeding "arising out of" the Act of 1920, or "any of the provisions thereof," within the meaning of s. 17 (2), and, therefore, the landlord was not precluded by that sub-section from being awarded costs.

[As to Costs in Proceedings Arising Out of the Rent Restrictions Acts, see HALSBURY, Hailsham Edn., Vol. 20, p. 335, para. 402 ; and for Cases, see DIGEST, Vol. 31, p. 585, Nos. *7344-7348*.]

Cases referred to :

(1) *Gill* v. *Luck,* (1923), 93 L.J.K.B. 60 ; 130 L.T. 331 ; [1923] W.N. 284 ; 31 Digest 584, *7334*.

(2) *Gunter* v. *Davis,* [1925] 1 K.B. 124 ; 94 L.J.K.B. 352 ; 132 L.T. 538 ; 31 Digest 585, *7347*.

(3) *Wolff* v. *Smith,* (1923), 2 Ch. 393 ; 92 L.J.Ch. 635 ; 130 L.T. 154 ; 31 Digest 584, *7332*.

(4) *Russoff* v. *Lipovitch,* [1925] 1 K.B. 628 ; 94 L.J.K.B. 355 ; 132 L.T. 789 ; 31 Digest 585, *7343*.

(5) *A. J. Smith, Ltd.* v. *Kirby,* [1947] 1 All E.R. 459.

Action for recovery of possession of a dwelling-house.

The landlord claimed possession of a dwelling-house on the ground that the tenant had committed a breach of a covenant in the lease by subletting the whole of the premises without his consent and so had incurred a forfeiture. The house was subject to the Rent Restrictions Acts, but the tenant, having given up possession to a third party, was unable to claim the protection of the Acts, and he did not plead the Acts in his defence. Judgment was given for possession, and counsel for the tenant submitted that there should be no order as to costs on the ground that the proceedings arose out of the Rent Restrictions Acts, and that under s. 17 (2) of the Act of 1920 the landlord was not entitled to costs where proceedings "arising out of the Act or of any of the provisions thereof" were taken in the High Court when they could have been taken in the county court. The landlord was awarded costs.

Ashe Lincoln, K.C., and *Max Rowe* for the landlord.
Stranders for the tenant.

CROOM-JOHNSON, J., after finding for the landlord on the facts continued : The only question which remains is whether this is an action which has to do with a claim or other proceedings arising out of any one of the Rent Restrictions Acts or any of the provisions thereof. Counsel for the tenant has submitted to me, on authority, that once it is shown that the premises are within the limits of the statute, the result of s. 17 (2) of the Act of 1920 is that the landlord could have brought the action in the county court and, accordingly, cannot recover any costs in the High Court. The tenant relies on *Gill* v. *Luck* (1). In the course of that case Bankes, L.J., and Atkin, L.J., made observations on the question of costs which, as I read the case, were *obiter* because the point did not really call for decision, but which must command great respect as being the utterances of those Lords Justices. They are to the effect that, once it is shown that a dwelling-house is within the limits of the statute, proceedings to recover possession of it must arise out of the Act. Russell, J., in vacation had confirmed an order of a master in chambers giving the landlord leave to sign judgment for possession of a dwelling-house, and the order was criticised in the Court of Appeal. Bankes, L.J., says ([1923] W.N. 284) : "But, granting his right to sue in the High Court, can he have judgment under Ord. 14 ?" The learned Lord Justice then points out that the master cannot make an order unless, on the evidence before him, he considers it reasonable to do so, and continues : "Here the only fact before the court was that the rent had been tendered after action and before the order for leave to sign judgment. For these reasons the procedure under Ord. 14 was inapplicable in this case." That being so, there was no judgment, and the question whether the plaintiff could bring a High Court action and recover the costs did not arise for determination. The report of the case winds up with this statement: "It appeared that the plaintiff could recover no costs of the proceedings, that the rent had been paid, and that the premises had been given up. In these circumstances the action was by consent dismissed without costs."

A That case was considered by McCARDIE, J., in *Gunter* v. *Davis* (2), where the plaintiff obtained judgment against the defendant, who was a trespasser, for possession of the premises which were within the Act by reason of their rental. McCARDIE, J., came to the conclusion that the plaintiff, having recovered that judgment, was entitled to his costs. After referring to the judgment of EVE, J., in *Wolff* v. *Smith* (3), the learned judge said ([1925] 1 B K.B. 127): ". . . if a plaintiff can only maintain an action for recovery of possession by invoking the Act of 1920, the action must be deemed to fall under the provisions of s. 17, sub-s. (2), thereof, as one 'arising out of this Act.'" Going on to examine the effect of the *dicta* in *Gill* v. *Luck* (1), he said that the substance of the decision was whether Ord. 14 applied, and he continued (*ibid.*, 128):

> . . . the present point arose, on the question of costs, and having arisen accidentally C and not being argued at length—s. 17 only being referred to and no cases cited—certain *obiter dicta* were pronounced. That of BANKES, L.J., is ambiguous, and may or may not cover this case. But with the greatest respect I cannot follow the *dictum* of ATKIN, L.J., where he says: "When it is shown that the house is within the Act proceedings to recover it must arise out of the Act, because they cannot be enforced unless the conditions imposed by the Act are fulfilled." In my view the action of ejectment in the present case was not brought by virtue of the provisions of the Act D of 1920.

McCARDIE, J., came to the conclusion that, the plaintiff having brought his action against a trespasser, the action was an ordinary action for damages and the plaintiff was entitled to his costs.

In the same year the matter came before the Court of Appeal in *Russoff* v. *Lipovitch* (4), and the question involved was whether the county court had E jurisdiction to entertain the action. It was an action by a landlord to recover from the tenant possession of a house to which the Rent Acts applied. McCARDIE, J., had ruled that there was no jurisdiction in the county court to entertain an action for recovery of possession. The Court of Appeal reversed that judgment, and held that there was jurisdiction in the county court to try the action. That was the real point which arose, and again, therefore, it will be seen that the question whether the plaintiff could recover F costs in respect of High Court proceedings when he could have obtained judgment in the county court did not come up for express decision. The court, however, all expressed the view that an action for the recovery of premises to which the Act applies is a claim or proceeding arising out of that Act or the provisions thereof. The tenant in that case was setting up that he was entitled to the protection of the statute, as a "statutory tenant," in the same way as the defendant in *Gill* v. *Luck* (1). *Gill* v. *Luck* (1) was cited G in the judgment, but not on the question of costs, and, there being no application or decision as to costs, it does not seem to me it takes the matter any further. With regard to *Gunter* v. *Davis* (2) ATKIN, L.J., merely said ([1925] 1 K.B. 640):

> I desire to add that I propose to reserve consideration of the question that arose in *Gunter* v. *Davis* (2) whether proceedings against a mere trespasser, who has never filled the position of tenant or sub-tenant, for the recovery of possession of a house H to which the Act applies are proceedings arising out of the Act. On that question there is much to be said on both sides, but it does not arise here, and our judgment need not deal with it.

The last case to which my attention was directed was a decision of HILBERY, J., which is directly in point—*A. J. Smith & Co., Ltd.* v. *Kirby* (5). That was an action commenced by a landlord against his tenant claiming arrears of rent under a lease and mesne profits and recovery of possession of a house and shop which were within the Act, the amount of rent being £370. Judgment was given for the landlord, and the question arose whether, as the action was brought in the High Court, the landlord was entitled to recover costs by virtue of s. 17 (2). The learned judge came to the conclusion that, so far as the claim for possession was concerned, it was a claim which the county court could, and should alone, have entertained. He does not say why, and I confess I do not follow him. No one suggests that the landlord is not entitled to bring an action in the High Court, although, if he does, he may lose his costs. The tenant in that case was entitled to the protection of the Rent Restrictions Act. The learned judge said that, so far as the claim for arrears was concerned, it arose, not out of the Act, but out of the lease, but the claim for possession did arise out of the Act. That, apparently, was because the tenant was a statutory tenant and had to obey the provision of the statute that a statutory tenant is only protected so long as he goes on paying the rent reserved by the arrangement under which he originally went in. I am not sure I completely follow the reasoning in that case.

In my view, all these cases are different from the present case. The tenant here has wholly quitted and delivered up to somebody else possession of the premises in respect of the term still existing in him under the combined action of the written agreement and the Validation of War-time Leases Act, 1944. The Rent Restrictions Acts were intended primarily, at all events, to protect sitting tenants. Nobody in this case relies or has relied on any provision in these statutes. In all the cases to which I have referred, except *Gunter* v. *Davis* (2), somebody was relying on the statute, or seeking to take advantage of the statute, or claiming rent which had been increased pursuant to the statute. The present is a perfectly simple case of a common law action to recover possession of premises and mesne profits at the rent reserved by the original tenancy agreement. Nobody wants any advantage which is to be derived from the statute. The statute is not pleaded. Nobody has suggested that there is any right in the tenant to be protected by the statute. The original letting having conferred a right of re-entry on the landlord on a breach having been committed, directly the landlord expresses a determination to forfeit the lease or the term he is entitled to do so.

In those circumstances I have come to the conclusion that this is not a proceeding arising out of the Act. The tenant, accordingly, is not entitled to escape the payment of those costs which his own conduct has caused the landlord to incur, and there will be judgment for the landlord with costs.

Judgment for the landlord with costs.

Solicitors: *Kramer & Co.* (for the landlord); *Miller, Clayton & Co.* (for the tenant).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

Reversed. C.A. [1948] 1 All E.R. 917.

Re SKINNER (an infant). SKINNER *v.* CARTER.

[Chancery Division (Vaisey, J.), December 17, 1947.]

Infants and Children—Maintenance—Adoption order—Validity—Order made on application of two "spouses" jointly—"Spouses" bigamously married—Liability of "husband" for maintenance of child—Guardianship of Infants Act, 1925 (*c.* 45), *s.* 3 (2)—*Adoption of Children Act*, 1926 (*c.* 29), *s.* 1 (3).

By the Adoption of Children Act, 1926, s. 1 (3): "Where an application for an adoption order is made by two spouses jointly, the court may make the order authorising the two spouses jointly to adopt, but save as aforesaid no adoption order shall be made authorising more than one person to adopt an infant."

On July 19, 1937, S. gave birth to a child. On Nov. 12, 1941, she went through a ceremony of marriage with C. In June, 1942, an adoption order with regard to the child was made in favour of S. and C. on their joint application, they representing themselves to be husband and wife. On Sept. 9, 1947, C. was convicted of bigamously marrying S. On Nov. 13, 1947, C. was adjudged by justices to be the guardian of the child, and was ordered to pay 10*s.* a week for her maintenance. On appeal:—

Held: C.'s only concern with the child was under the adoption order which, S. and C. not being "spouses" when it was made on their application, was invalid under s. 1 (3) of the Act of 1926, and, therefore, the justices' order must be discharged.

[As to Adoption Orders, see HALSBURY, Hailsham Edn., Vol. 17, pp. 685, 686, paras. 1416, 1417; and for Cases, see DIGEST Supp.]

Appeal by the defendant from an order of the Edmonton justices sitting at Tottenham on Nov. 13, 1947, ordering him, as guardian, to contribute to the maintenance of an infant. The justices' order was based on an adoption order made on the application of the defendant and the mother of the child, which order was now held invalid by Vaisey, J., in whose judgment the facts appear.

Neil Nairn McKinnon for the appellant.

Ashkenazi for the respondent.

VAISEY, J.: This case arises on an application made under the Guardianship of Infants Acts, 1886 and 1925. By the order of the Edmonton justices sitting at Tottenham on Nov. 13, 1947, the defendant, William James Carter, was adjudged to be the guardian of a child named Joyce Skinner, who was born on July, 19, 1937, to the plaintiff, Margaret Rose Skinner, and was ordered to pay to Margaret Rose Skinner 10*s.* per week in respect of the child. From that order the defendant appeals.

Giving evidence before the justices, the mother stated that she was bigamously married on Nov. 12, 1941, to the defendant and that they lived together as man and wife from that date to Sept. 9, 1947, when the defendant was sentenced to a term of imprisonment for bigamy. After he came out of prison, the mother said, he left her. She then stated that the child, Joyce Skinner, was born on July 19, 1937, *i.e.*, some four years before the alleged bigamous marriage, and that, in June, 1942, she and the defendant obtained from the Edmonton County Court an order for the adoption of the child by them jointly. If that order had been valid and effectual, I should have been in a position to regard these two persons as the parents of the child, but the Adoption of Children Act, 1926, s. 1 (3), prohibits the making of an adoption order in favour of more than one person except in the case of husband and wife. I have some copy documents which appear to show that the mother and the defendant represented themselves to the Edmonton County Court as man and wife, that they swore separate affidavits in support of their application, and that the county court judge was satisfied that the statements in the petition and affidavit were true. For anything I know, they may have been true, but when she was before the magistrate, the mother put in the forefront of her evidence the fact that her marriage to the defendant was bigamous, and I have the greatest difficulty in seeing how, when she had said that the marriage was bigamous, she could ever be heard to say that the adoption order was valid. It may be that she is wholly ignorant of the difference between a marriage and a bigamous marriage. It may be that she is wholly ignorant of what an adoption is, but I should have thought, since, when she was before the justices, she denied that she was married and then proceeded to assert a right under an adoption order which was prohibited by law if the two applicants for it were not married, the proper course would have been for the justices to have stopped the case and to have told the parties they must establish their position before some other tribunal and under some other jurisdiction.

It may be, as I have said, that the mother was wrong in saying she was bigamously married. It may be that the defendant was unjustly imprisoned. It may be that further investigations would show that his first marriage was invalid so that the second ceremony was good. I do not know, but it seems to me that the justices ought not to have made an order in favour of the mother in the face of her own assertion that she had no *locus standi*. The defendant is not the father of the child. His only concern with the child is under the adoption order which, apparently, ought never to have been made, and, in my judgment, this is not a case in which the adoption order stands until it is revoked. I think it was invalid, but, whether it was or not, I think that in all the circumstances I must hold that the magistrates ought not to have made this order and that I must discharge it. I shall make n order as to costs.

Order discharged.

Solicitors: *Nash & Co.* (for the appellant); *H. W. Pegden* (for the respondent).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

Applied and dictum of TUCKER, L.J., at p. 47, *explained.* MORLEYS (Birmingham), LTD. *v.* SLATER. [1950] 1 All E.R. 331.

Applied. EAST END DWELLINGS CO., LTD. *v.* FINSBURY B.C. [1950] 2 All E.R. 81.

Approved. EAST END DWELLINGS CO., LTD. *v.* FINSBURY B.C. [1951] 2 All E.R. 587.

ELLIS & SONS, AMALGAMATED PROPERTIES, LTD. *v.* SISMAN.

[COURT OF APPEAL (Tucker and Cohen, L.JJ., and Jenkins, J.), December 11, 12, 1947.]

Landlord and Tenant—Rent restriction—Possession—Short tenancy—House rendered uninhabitable by bombing—Notice to tenant to quit before rebuilding completed—Right of tenant to occupy rebuilt house—Rent and Mortgage Interest Restrictions Act, 1939 (*c.* 71), *s.* 3 (3)—*Landlord and Tenant* (*War Damage*) (*Amendment*) *Act,* 1941 (*c.* 41), *s.* 1 (6).

On June 24, 1940, the landlords let to the tenant a dwelling-house at a weekly rental. On Mar. 8, 1941, the house was damaged by enemy action and rendered unsafe for habitation and the tenant vacated the premises, but no notices under the Landlord and Tenant (War Damage) Acts were served. Later, the house, except for the foundations, was demolished by the local authority, and in due course there began on the site the construction of a house similar in all respects to the old house, although new materials were employed. On June 10, 1947, the landlords served a valid notice on the tenant to quit on June 21, 1947. The tenant claimed that, on the expiration of the notice, he became a statutory tenant under the Rent Restrictions Acts, and sought a declaration that when the house, which was in the course of construction on the site, was completed, he would be entitled to occupy it.

HELD: (i) the house in the course of erection was not the same house as that which had been damaged by enemy action.

(ii) there could not be read into the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1 (6), a provision that, where property has suffered war damage, the landlord could not determine a short tenancy without satisfying the court that the circumstances are such as to justify him in determining the tenancy.

(iii) the protection of the Rent Restrictions Acts was not applied by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3), to the site of a dwelling-house which had ceased to exist.

(iv) on the day before the notice to quit expired the tenant was not tenant of a dwelling-house let as a separate dwelling which was at that date being used and occupied as a dwelling-house, and, therefore, on the expiration of the notice, the tenant had no claim to occupy the premises then or at any future time.

Quaere: whether the tenant could have claimed to be the statutory tenant of the new house if the landlord had built and completed the house on the site before determining the tenancy.

[AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, AND STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-335; and FOR CASES, see DIGEST, Vol. 31, pp. 575-584.]

Cases referred to:

(1) *Skinner* v. *Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; Digest Supp.

(2) *Eyre* v. *Haynes*, [1946] 1 All E.R. 225; 90 Sol. Jo. 55; Digest Supp.

APPEAL by the landlords from an order of His Honour JUDGE A. RALPH THOMAS at the Mayor's and City of London Court on Sept. 16, 1947, under which a tenant was granted (i) a declaration that he was entitled to re-occupy premises rebuilt after suffering war damage and subsequent demolition, and (ii) an injunction restraining the landlords from letting the premises to anyone other than the tenant. The Court of Appeal now allowed the appeal. The facts appear in the judgment of TUCKER, L.J.

Heathcote-Williams for the landlords.
Crispin for the tenant.

TUCKER, L.J.: This is an appeal from the decision of His Honour JUDGE THOMAS sitting in the Mayor's and City of London Court. The landlords, Ellis & Sons, Amalgamated Properties, Ltd., claimed a declaration that the defendant tenant had no existing interest in or right to occupy the land situate at No. 7, Cypress Road, Wealdstone, or any building constructed or to be constructed thereon, and the tenant counter-claimed for a declaration that he had a right to re-occupy those premises so soon as the same should have been rebuilt, restored, or repaired. The action came before the judge under the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1 (7), which enables the landlord or tenant of any land let on a short tenancy to apply at any time "to the court to determine whether the land is or was at any time unfit by reason of war damage or any other question arising under this section in relation to the tenancy." The premises in dispute consist of a small plot of land on which is a partially erected house. Before 1941 the tenant had become the contractual weekly tenant at a rent of 22*s.* 6*d.* of the house which at that time was existing on this site, and that house was a dwelling-house within the Rent Restrictions Acts. On Mar. 8, 1941, the premises were damaged by enemy action to such an extent as to be unsafe, and the house was subsequently pulled down and the material cleared away by the local authority. At that time the tenant was away on service and his wife and family were evacuated. They are now in occupation of a similar house owned by the local authority. No notices of disclaimer or retention were served under the Landlord and Tenant (War Damage) Acts, and no rent has been paid since the war damage occurred. This being a short tenancy within the meaning of the definition in the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1 (10), the payment of rent was suspended until such time as the house was certified as fit for habitation. On June 10, 1947, the landlords served a notice to quit terminating the contractual tenancy, which notice expired on June 21, 1947. It is not disputed that that was a proper and valid notice to quit and that the contractual tenancy in fact expired on June 21, 1947. The tenant contended that on the expiration of that notice to quit he became a statutory tenant under the Rent Restrictions Acts, and was, accordingly, entitled to the enjoyment of such rights as are given him by those Acts. He, therefore, claimed a declaration that he had "the right to re-occupy the premises so soon as the same shall have been rebuilt, restored, or repaired." The landlords, on the other hand, contended that at the material date—the expiration of the notice to quit, namely, June 21, 1947—there was nothing of which the tenant could properly be regarded as a statutory tenant, for there was in existence at that date no dwelling-house let as a separate dwelling of which he could be the statutory tenant. The judge found that the original house, the subject of the original contractual tenancy, never ceased to exist, but that the partially erected dwelling-house now on the site, is, in fact, the original house in the process of being repaired, and that the tenant has never lost the protection to which he was entitled at all times under the Acts on the determination of the contractual tenancy. He said that there had been a conflict of evidence whether the foundations had been taken out or not, and, after dealing with the evidence, he said:

> I find that the foundations were not removed. If, however, the whole of the foundations had been removed, it would not, in my judgment, affect the decision in this case . . . In the present case the tenant was temporarily absent owing to enemy action and had an intention to return at a time when his contractual tenancy was still continuing, and thereafter. The remaining question is whether he is entitled to return to the house which is now on the premises. If the house had merely been damaged and had been repaired there would be no doubt that the tenant would be entitled to re-occupy it, even if the house had been to a large extent demolished. Does it make any difference if the house is so badly damaged that the landlord rebuilds it? In my judgment, it does not; what the landlord has done is, in effect, to repair the house . . . I hold that in this case the house had been so badly damaged that the only practical way of repairing it was to remove what remained and re-build, and that is what was done. It is said by the landlords that, as the house at one time ceased to exist, the tenant lost his right to re-occupy. This contention is based on *dicta* in cases dealing with facts which are quite different from those in this case . . . Whether in this case it is a question of fact or a question of law, I find that so far as the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, is concerned, the house was damaged and repaired by rebuilding; it has not been "altered into something substantially different"; it is identically the same as before it was damaged. The extent of the repairs does not affect the matter, nor would it make any difference if for a time there was no part of the house or the foundations on the site.

It is contended that that is a finding of fact which concludes the matter. I do not agree that it is a finding of fact. It must be a question of law whether on the facts, which were undisputed, this house could be said to have ceased to exist or not, and, in my view, it is impossible to say that the house in the course of erection was the same house as that which had been damaged by enemy action. It clearly was not. The original house had been pulled down and had ceased to exist and an entirely new, though, no doubt, similar, house was in the course of erection. I think the judge was misled in this matter by applying to that question the test as to a landlord's or tenant's liability under covenant to repair or rebuild, and he has said, in effect, after referring to some of the authorities, that because the landlord or tenant may under his covenant to repair be liable to rebuild in the case of premises being totally destroyed, therefore, rebuilding in the present case can be regarded merely as repairing. I think that that is an erroneous view.

That, however, does not dispose of the case, because the tenant remained throughout until the expiration of the notice to quit the contractual tenant of the plot of land on which the house had previously existed, and he also remained tenant of any building or partly constructed building which the landlord chose to erect on the land of which he was the tenant until the expiration of the notice to quit. Two contentions have been put forward by counsel for the tenant. He says that the landlord never had power to determine this tenancy by notice to quit, it being contrary to the provisions of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1 (6), for such a notice to have been given. That sub-section provides:

> Where the court is satisfied, on the application of the landlord of any land let on a short tenancy which has been rendered unfit by war damage, that—(*a*) the land is fit; (*b*) a period of not less than three months has elapsed since the land was rendered fit, and during the whole of that period the tenant has not been in occupation of the land either in whole or in part and has not paid any rent in respect of that period or any part thereof; and (*c*) the landlord has made all reasonable efforts to communicate with the tenant and has failed to do so; the court may, if it thinks fit, determine the tenancy and give immediate possession of the tenant's interest in the land . . .

Sub-section (7) gives the right to the landlord or tenant at any time to refer to the court. Counsel says that the whole tenor of s. 1 and the scheme of this Act is such that the court ought to read into it a provision that a landlord cannot determine a short tenancy of this kind where the property has suffered war damage without applying to the court and satisfying the court that the circumstances are such as to justify him in determining the tenancy, and that one of the things he would have to prove before he could do that was that "the land is fit," to use the language of sub-s. (6). It may be that it would have been an advantage or desirable that some such provision should have been made to protect tenants of war damaged property in such circumstances, but the legislature did not provide for such a contingency, and, in my view, it is impossible for this court to read into these Acts such a provision. The landlord is left with his legal right to determine such a tenancy in such circumstances without applying to the court, so that the case must be dealt with on the basis that a proper notice to quit has been given.

Counsel for the tenant further argued that whatever happened to this plot of land and the buildings on it, it always remained within the scope of the Rent Restrictions Acts, so that the tenant would be entitled to the benefit of those Acts on the expiration of a notice to quit, and he says that that is so by reason of the fact that the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 provides:

> (3) . . . for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house; but, save as aforesaid, the principal Acts shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house.

Counsel says that, as there was here land let with the original dwelling-house, it became for the purposes of these Acts part of the dwelling-house, that the land has always remained, even if the dwelling-house has ceased to exist, and so

the plot of land has remained at all times part of the dwelling-house. I find that argument impossible to accept. It is difficult to see how something which has to be treated as part of something else can still be regarded as part thereof when that something else has ceased to exist, but, apart from that, even if the land was part of the dwelling-house, to remain within the protection of the Act it would have to be part of the dwelling-house let as a separate dwelling, and how a plot of land with nothing on it can be regarded as a dwelling-house
A let as a separate dwelling passes my understanding. Therefore, I think that that argument fails.

That brings one to the question whether or not this contractual tenant, on the day before the notice to quit expired, was the tenant of a dwelling-house let as a separate dwelling. He was the tenant of that partially erected building on that piece of land, and, if it was a dwelling-house let as a separate dwelling, I think on the expiration of the notice to quit he would have been entitled
B to claim the protection of the Rent Acts and be allowed to continue in occupation to enjoy those benefits. One of the matters that the county court judge would have to decide would be whether or not this was a dwelling-house of that nature. In his judgment the county court judge has described this partially erected dwelling-house as follows :

> There is now being constructed on the land in question a house which is in all respects
> C similar to and in the same position as the house which was damaged, new material having been used for such construction. The house is nearly, but not quite, completed so as to be fit for habitation. It was admitted that this re-construction is being paid for out of payments by the War Damage Commission on a cost of works basis. The premises have not as yet been re-assessed for rates.

The evidence given before him, as to which there was no dispute, was that
D some six weeks before the trial, which would be about June 21, the tenant had said : " Another house is practically up as far as I can see on the former foundations," and the managing director of the landlords had said that in June the windows of the new house were not in, and so it was not quite ready for habitation. Our attention has been drawn to several authorities which have decided that to be within the protection afforded by these Acts the house must be one which is not only let as a separate dwelling, but which at the material
E date is being used and occupied as a dwelling-house. It is true that in several cases it has been pointed out that a tenant does not lose the benefit of the Acts merely because in the course of his business or occupation he may be absent from the premises for long periods, but the house must be one which is being used by the tenant as a dwelling-house. In the present case it seems to me impossible to say, on the uncontradicted evidence and on the judge's finding, that on June 21, 1947, this was a house which was let as a separate dwelling.
F It was not completed or fit for habitation, the windows were not in, and it was, in my view, not only not being used as a dwelling-house, but it was not fit for or capable of user as a dwelling-house at the material date. Therefore, the original house having ceased to exist and the tenant not being entitled to claim that the protection of the Acts throughout attached to the plot of land, he has also failed in his contention that the building in the course of erection
G on these premises was at the material date a dwelling-house let as a separate dwelling. That being so, he has no claim to occupy these premises now or at any future time. If this is a matter which calls for remedy in view of the unfortunate position of tenants whose houses have been destroyed, that remedy must be provided by the legislature, and it is not for these courts, in an attempt to do what may appear to be justice to the tenants, to put a strained and unnatural interpretation on the language of these Acts of Parliament. For these
H reasons I think that this appeal must be allowed.

COHEN, L.J. : I agree so entirely with the reasons given by my Lord for allowing this appeal, that I can state my own reasons quite shortly.

So far as the first point is concerned, I think it is impossible to imply in the Landlord and Tenant (War Damage) Act, 1941, a provision, such as counsel for the tenant asks us to imply, suspending the right of the landlord to give notice to determine the tenancy. I think this court has to be chary of implying in an Act of Parliament a provision which Parliament has not thought fit to include, and I see no such implication in this case. So far as that particular point is concerned, we are confirming the view taken by the county court judge. So far as the main point is concerned, I think there was no evidence on which the judge could properly find that the house now existing on the plot of land in question is identically the same as the original house before it was damaged. I think the only possible inference from the evidence is that the house comprised in the original tenancy, which was created, I think, in 1940, ceased to exist as a house as the result of the bomb incident which took place on Mar. 8, 1941. If that be the true view, while, no doubt, the tenant remained a tenant, though relieved from payment of the rent by the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1 (2), he ceased to be tenant of a dwelling-house to which the Rent Restrictions Acts applied. Counsel for the tenant endeavoured to escape from that difficulty by relying on s. 3 (3) of the Act of 1939. I agree with my Lord that that sub-section cannot help him. I do not think that land can be treated as part of a dwelling-house when the dwelling-house of which it is to form part has ceased to exist. A tenancy, no doubt, remained in being, and, if the landlord had been foolish enough to build and complete a house on the site before determining the tenancy, an interesting question might have arisen whether the tenant could claim to be the statutory tenant of the new house. I entirely agree with my Lord that in the present case the evidence clearly establishes that at the material date, when the notice to determine the tenancy expired, there was no house fit for occupation on the premises. That being so, I do not think it was possible for the tenant to establish a claim to remain on as statutory tenant.

There is only one other matter I want to mention. Counsel for the tenant relied throughout on the findings of the judge that in the present case the tenant was only temporarily absent owing to enemy action and intended to return at a time when his contractual tenancy was still continuing and thereafter. He said that, in view of that finding and in accordance with the principle laid down in *Skinner* v. *Geary* (1), this tenant must be treated as always being willing to return to the dwelling-house. In the present case, however, there never was at the material time anything capable of occupation, and in these circumstances I do not think that the principles laid down in *Skinner* v. *Geary* (1) and other like cases have any application. For these reasons, I agree that the appeal must be allowed.

JENKINS, J.: I agree.

Appeal allowed.

Solicitors: *Simon, Haynes, Barlas & Cassels* (for the landlords); *Culross & Trelawny* (for the tenant).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Overruled. MOODIE *v.* HOSEGOOD.
[1951] 2 All E.R. 582.

THYNNE *v.* SALMON.

[COURT OF APPEAL (Tucker and Bucknill, L.JJ. and Roxburgh, J.), December 5, 19, 1947.]

Applied. SMITH *v.* MATHER. [1948] 1 All E.R. 704.

Landlord and Tenant—Rent restriction—Possession—Death of tenant—Contractual tenancy—Administratrix not residing in house at time of tenant's death—Sister so residing and continuing to reside—Contractual tenancy determined by notice to quit—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 12 (1) (*g*).

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, (as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1): "(1) For the purposes of this Act, except where the context otherwise requires . . . (*g*) . . . the expression 'tenant' includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid . . ."

In 1931, a landlord let on a monthly tenancy a dwelling-house at a rent which brought it within the Rent Restrictions Acts. In 1946, while the contractual tenancy was still subsisting, the tenant died intestate, and letters of administration were granted to his sister L., who had never resided with him. Another sister, S., was residing with the tenant at the time of his death and had so resided since the beginning of the tenancy. L. did nothing to create a tenancy between herself and S. The landlord served notice to quit on L., and, on its expiry, applied for possession against S.

HELD (BUCKNILL, L.J., *dissentiente*): the tenancy created by s. 12 (1) (*g*) took effect from the date of the death of the tenant; para. (*g*) did not apply where the tenancy which was vested in a contractual tenant at his death had passed by his will or on his intestacy to some person other than his widow or a member of his family residing with him at the time of his death; and, therefore, S. was not entitled to the protection afforded by para. (*g*).

[AS TO DEVOLUTION OF INTEREST ON DEATH OF LESSEE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 374-377, paras. 452-454; and FOR CASES, see DIGEST, Vol. 31, p. 390, Nos. *5350-5352*.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (1), see HALSBURY'S STATUTES, Vol. 10, pp. 343-345.]

Cases referred to:

(1) *Mellows* v. *Low*, [1923] 1 K.B. 522; 92 L.J.K.B. 363; 128 L.T. 667; 31 Digest. 562, *7097*.

(2) *Lovibond (John) & Sons, Ltd.* v. *Vincent*, [1929] 1 K.B. 687; 98 L.J.K.B. 402; 141 L.T. 116; 93 J.P. 161; Digest Supp.

(3) *Price* v. *Gould*, [1930] W.N. 134; 143 L.T. 333; 94 J.P. 210; Digest Supp.

(4) *Keeves* v. *Dean, Nunn* v. *Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 31 Digest 576, *7254*.

(5) *Lawrance* v. *Hartwell*, [1946] 2 All E.R. 257; [1946] K.B. 553; 175 L.T. 150; Digest Supp.

APPEAL by the defendant from an order of His Honour JUDGE KIRKHOUSE JENKINS, made at Warminster County Court and dated Apr. 18, 1947, giving possession of a dwelling-house to the landlord. The defendant claimed that on the death of her brother, who at the time of his death was contractual tenant of the house and with whom she had resided for some years up to his death, she became "tenant" of the premises by virtue of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*g*). The county court judge held that the contractual tenancy had vested in the administratrix of the estate of the brother to the exclusion of para. (*g*). By a majority, the Court of Appeal now affirmed that decision. The facts appear in the judgment of TUCKER, L.J.

Krikorian for the defendant.

K. Bain for the landlord. *Cur. adv. vult.*

Dec. 19. The following judgments were read.

TUCKER, L.J.: This appeal raises an important question under the Rent Restrictions Acts which has hitherto remained undecided. By an agreement in writing dated Sept. 14, 1931, the plaintiff let a cottage

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known as 41, Temple, in the parish of Corsley, Wilts., to one E. A. Salmon on a monthly tenancy from Sept. 29, 1931, at a rent which brought the premises within the scope of the Rent and Mortgage Interest Restrictions Acts. On June 2, 1946, E. A. Salmon died intestate. Letters of administration were taken out by his sister, Mrs. Lush, on July 30, 1946. On Oct. 4, 1946, notice to quit expiring on Nov. 5 was served on Mrs. Lush who at no time had been in occupation of the premises and was not residing with her brother at the date of his death. The defendant, Beatrice Fanny Salmon, another sister of the deceased, was residing with him at the date of his death and had been so residing from the commencement of the tenancy. She continued in occupation of the premises after his death and was in occupation when the present proceedings for possession were taken. No other member of the deceased's family was residing with him at the date of his death. It was common ground that Mrs. Lush had done nothing to create any tenancy as between herself and the defendant after the grant of letters of administration.

The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, provides: "(1) No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless . . ." and then follow certain requirements which must be satisfied before such an order can be made. Some of those requirements are to be found in sched. I to the Act of 1933. The first of them is that "(*a*) any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy . . . so far as the obligation is consistent with the provisions of the principal Acts, has been broken or not performed." Paragraph (*b*) of sched. I deals with the case where a tenant or any person residing or lodging with him or being his sub-tenant has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers. Paragraph (*c*) deals with the case where the tenant has given notice to quit, and, in consequence of that notice, the landlord has contracted to sell. Paragraph (*d*) deals with the case where the tenant without the consent of the landlord has assigned or sub-let. Those provisions all deal with matters which arise under the original relationship of a landlord and tenant. They contemplate a tenant paying rent and the landlord receiving rent, and so forth.

In the present case the cottage was a dwelling-house to which the principal Acts applied and the defendant contended that she was a "tenant" thereof within the meaning of the definition in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, which provides:

> (1) For the purposes of this Act, except where the context otherwise requires: . . . (*f*) The expressions "landlord," "tenant," "mortgagee," and "mortgagor" include any person from time to time deriving title under the original landlord, tenant, mortgagee, or mortgagor; (*g*) . . . the expressions "tenant and tenancy" include sub-tenant and sub-tenancy, and the expression "let" includes sub-let; and the expression "tenant" includes the widow of a tenant [dying intestate]* who was residing with him at the time of his death, or, where a tenant [dying intestate]* leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court; . . .

Counsel for the defendant submitted that she came within the express words of para. (*g*) as "a member of the tenant's family" who was "residing with him at the time of his death." Faced with the difficulty that the contractual tenancy undoubtedly vested in Mrs. Lush on the grant of letters of administration and that, accordingly, if the defendant became tenant at the death of the original tenant there must have been two tenants and two tenancies—one contractual and one statutory—subsisting at one and the same time from June 2 until Nov. 5, counsel argued that the defendant's statutory tenancy only took effect at the expiration of the notice to quit which determined Mrs. Lush's contractual tenancy. If this is correct, the curious result would appear to be that at any time between July 30 and Nov. 5 Mrs. Lush could have ejected the defendant, but as from Nov. 5, when Mrs. Lush's tenancy determined, the landlord would be unable to do so. It would also follow that in the case of a lease for 5 years a member of the deceased's family who happened to have been residing with him at his death at some date during the first year of the tenancy might become the tenant at the expiration of the lease some 4 years later although in the meantime he had been residing abroad. It is, of course, true that curious and even absurd situations may occur under these Acts whatever may be the proper interpretation of their provisions, but even so it appears to me that para. (*g*), read in conjunction with para. (*f*), must have been intended to provide that the tenancy thereby created should take effect from the date of the death of the deceased tenant and that counsel's ingenious attempt to get over the difficulty of the existence of two tenancies cannot succeed.

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* The Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1, amended para. (*g*) by directing that the words "dying intestate" should be omitted.

This by no means disposes of the case since it is necessary to give effect to the words of para. (*g*). I think the true view is, that, if possible, an interpretation must be given to this paragraph which will not run counter to all existing legal conceptions. There is no difficulty in finding such an interpretation. The language is clearly applicable where the deceased tenant was at the date of his death a " statutory " tenant. Such a tenant cannot transmit his purely personal right either by assignment or by will. Accordingly, on his death there is nothing which can vest in any one, and but for para. (*g*) his widow or other member of his family residing with him would be trespassers if they remained in occupation of the premises. Whether para. (*g*) may apply in the case of a contractual tenant on whose death no executor or administrator is ever appointed, it is not necessary to decide. It is, in my view, sufficient to say that it cannot apply where the tenancy which is vested in a contractual tenant at his death has passed by will or on an intestacy to some person other than his widow or member of his family residing with him at the time of his death, but that it clearly does apply where the deceased tenant was a " statutory " tenant unable to transmit his statutory interest. This is the view I have formed in the absence of authority and in the light of the decisions as to the nature of what is conveniently referred to as " a statutory tenancy."

We were referred to several authorities in the course of the argument, but I cannot derive much assistance from observations made in the course of judgments in cases where this question did not arise for decision. I think, however, that the *dicta* of McCardie, J., in *Mellows* v. *Low* (1) and of Greer, L.J., in *John Lovibond & Sons, Ltd.* v. *Vincent* (2) support the view I have expressed. In the former case McCardie, J., said ([1923] 1 K.B. 526):

> Paragraph (*g*) must be taken as applying only to cases where there is no executor or administrator; in other words to cases not falling within para. (*f*).

In *John Lovibond & Sons, Ltd.* v. *Vincent* (2) Greer, L.J., said ([1929] 1 K.B. 695):

> Curiously enough s. 12 (1) (*g*) under the expression " tenant " includes " the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court." If we were to read that definition as including a person deriving title from the original tenant, then in the case of intestacy there might be one or two next of kin other than the widow, who would be tenants under clause (*f*), and the widow under clause (*g*), and a most awkward situation would be created. I can only read clause (*f*) as confined to persons who derive title from the holder of the tenancy while his estate under the original contract of tenancy subsists.

Some reliance was placed by counsel for the defendant on the omission of the words " dying intestate " from para. (*g*) as a result of amendment by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1. It is remarkable that, notwithstanding the difficulties that had been expressed with regard to this paragraph, when a special Act of Parliament was passed for the sole purpose of amending it no attempt was made to elucidate its obscurities. I can only assume that Parliament was content to accept the limited view of its scope as expressed by Greer, L.J., and McCardie, J., and only considered it necessary to provide for the case of a statutory tenant who had left a will. Such a tenant could not pass his interest under his will, so it was necessary to give his widow or other member of his family residing with him the same measure of protection as was afforded under para. (*g*) on an intestacy. This was effected by omitting the words limiting its operation to cases where the tenant died intestate. For these reasons I think the decision of the county court judge in favour of the plaintiff was correct and that this appeal fails. Hard cases may, no doubt, arise where, for instance, a contractual tenant whose wife was residing with him at the time of his death by his will leaves the benefit of his tenancy to a mistress, but, in my view, it is for the legislature to provide a remedy in language which is effective to achieve its purpose without leaving the courts to solve the problem of two tenancies of very different natures existing at the same time in respect of one dwelling-house.

BUCKNILL, L.J.: The defendant is Beatrice Salmon, the sister of Ernest Salmon, who became tenant of the plaintiff in respect of the cottage in 1931. The agreement was in writing for a term of one calendar month and so on from month to month until either of the parties gave one month's notice. The rent of the cottage brought it within the provisions of the Rent Restrictions Acts. On June 2, 1946, Ernest Salmon died. He had been badly wounded in 1914 and his sister, Beatrice, lived in the cottage with him during his tenancy and, after Ernest's death, continued to live in the cottage, but the plaintiff did not accept any rent from her. On July 30, 1946, Mrs. Annie Lush, a married sister of Ernest Salmon and of the defendant, took out letters of administration of Ernest Salmon's estate. Subsequently, the plaintiff gave notice to quit to Mrs. Lush which expired on Nov. 5, 1946. Mrs. Lush did not at any time live in the cottage, but her sister, Beatrice, remained on there and was living there at the time of the hearing of the claim for possession. The defendant's defence to the claim for possession was that she was entitled to the protection of the Rent Restrictions Acts because she was living with her brother, the tenant, at the time of his death, and had been living there for more than 6 months immediately before his death in accordance with s. 13 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and, therefore, came within s. 12 (1) (*g*) of the Increase of Rent and Mortgage Interest Restrictions Act, 1920, as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1. Inasmuch as a member of the tenant's family includes a sister: see *Price* v. *Gould* (3), it seems clear that Beatrice Salmon is entitled to be regarded as a tenant within the meaning of the Act unless the sub-section only applies in a case where the deceased was a statutory tenant and not a contractual tenant at the time of his death.

The reasons of the county court judge for his judgment giving the plaintiff possession were that Mrs. Lush became the contractual tenant of the cottage after she had taken out letters of administration. Therefore, if the defendant were to be regarded as the statutory tenant and the administratrix were the contractual tenant, there would be certain difficulties inasmuch as both tenants would be liable to pay the rent. Also, a difficult question might arise as to who could assign the tenancy. The judge considered that these difficulties made it impossible for him to regard the defendant as the statutory tenant and as such entitled to the protection of the Act. With great respect to the judge I do not see that the mere fact that two different persons may be liable to pay the rent is sufficient to deprive the defendant in this case of the protection which *prima facie* para. (*g*) afforded her. There is no question of the right of assignment being vested in two persons because Beatrice Salmon as statutory tenant would not have the right to assign her interest in the cottage: see *Keeves* v. *Dean* (4).

No case was brought to our notice which was directly in point. *Lawrance* v. *Hartwell* (5) decided in effect that, if Mrs. Lush, as administratrix, had gone to live with her sister in the cottage, she could have held over as statutory tenant after the contractual tenancy had come to an end. The Act, therefore, did not intend that the death of the contractual tenant should *ipso facto* take the cottage out of the protection of the Act. The case also decides in effect that, if Beatrice Salmon had taken out letters of administration instead of her sister or jointly with her sister, she would have been entitled to claim the protection of the Act. Moreover, the cottage would not lose the protection of the Act if a member of the family who was living there with the tenant as a statutory tenant at his death continued to live there and claimed the protection of the Act. I do not see any sufficient reason for saying that para. (*g*) only applies in cases where the tenant was a statutory tenant at the time of his death and does not apply in cases where the tenant was a contractual tenant at the time of his death.

In my opinion, the plain and simple words of para. (*g*) should not be limited in this way. The word "tenant" in some parts of the Acts clearly includes a contractual tenant, as, for instance, in s. 3 of the Act of 1933, and I do not think it a sufficient reason for giving an artificial and restricted meaning to the word "tenant" in s. 12 (1) (*g*) of the Act of 1920 by limiting it to a statutory tenant because to give it its normal meaning might produce the result that two different persons were liable to pay the rent. It seems to me an unreasonable interpretation of para. (*g*) to hold that it applies in the case of a deceased tenant if he is a statutory tenant, but not if he is a contractual tenant. The material facts in each case may be the same except in that one particular respect. For instance, a married couple have lived all their married lives in the cottage of which the husband is the tenant. Then he dies intestate, his estate has no net assets, no one applies for letters of administration, and there is no rival claimant. Nevertheless, the widow, it is argued, may not plead para. (*g*) in answer to a claim by the landlord for possession if up to the time of her husband's death his landlord has not sought to obtain possession of the cottage and the tenant has not claimed the protection of the Rent Restrictions Acts. In the next cottage precisely the same facts may have arisen except that the deceased man has claimed the protection of the Rent Restrictions Acts and has become what is called a statutory tenant. In that case, it is argued, his widow is allowed to plead the protection of para. (*g*) in answer to the landlord's claim for possession. It may be that legal problems will arise if the legal personal representative of the deceased tenant claims an interest in the cottage, and there is also a tenant in possession of it by virtue of para. (*g*). If these problems arise and prove to be insoluble, (I myself doubt whether that is likely to happen), then Parliament may see fit to amend s. 12 of the Act of 1920. At present I think Beatrice Salmon clearly acquired the rights which are given by the words of para. (*g*), and I do not think she should be deprived of those rights because their exercise by her may possibly raise difficult legal problems as to the relative rights and obligations of herself and her sister with reference to the cottage. In my opinion, therefore, the appeal should be allowed.

ROXBURGH, J.: I am in complete agreement with the reasoning and conclusions of my Lord, TUCKER, L.J., I would add in support of the final paragraph that many hard cases, such as the case of a mistress, may be due to the shortcomings of a tenant or defects in his testamentary dispositions, and such matters entirely fall within the scope of these Acts.

Appeal dismissed.

Solicitors: *Ernest Bevir & Son*, agents for *Pinniger, Finch & Co.*, Westbury (for the defendant); *Church, Adams, Tatham & Co.*, agents for *Burges, Ware & Scammell*, Bristol (for the plaintiff).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

ALMEROTH *v.* W. E. CHIVERS & SONS, LTD.

[COURT OF APPEAL (Scott, Somervell and Evershed, L.JJ.), December 2, 3, 19, 1947.]

Nuisance—Negligence—Highway—Debris by kerb—Small heap left by repairers of property for collection.

A pedestrian walking along a pavement, or crossing a road on which there is no traffic and taking a step to get on the kerb, is not obliged to keep his eyes on the ground to see whether or not there is any obstacle in his path.

The plaintiff, a pedlar, left his barrow against the kerb on one side of a road to serve a customer on the other side. While doing so he was hailed by a customer at the barrow and re-crossed the road to serve that customer. In getting on to the kerb he tripped over a small pile of slates which did not overtop the kerb and which he had not previously seen. The slates had been left, for collection, by the defendants, who were engaged in demolishing and repairing war damaged property. There was no evidence that the work could not be carried on unless the debris could be put out in the street to be collected :—

Held : (i) while the pile of slates could not be said to cause an obstruction in the sense of preventing or impeding the flow of traffic or the passage of pedestrians the maxim *de minimis non curat lex* did not apply, and the slates constituted a nuisance.

(ii) a normally careful pedestrian might well overlook such a heap of debris, and the plaintiff was not guilty of contributory negligence. A

Principles laid down in Harper v. *Haden (G. N.) & Sons* ([1933] Ch. 298), *not applied.*

[As to Inappreciable Nuisances, see HALSBURY, Hailsham Edn., Vol. 16, p. 354, para. 483 ; and for Cases, see DIGEST, Vol. 26, p. 446, Nos. *1629-1632.*]

Cases referred to :

(1) *R.* v. *Bartholomew,* [1908] 1 K.B. 554 ; 77 L.J.K.B. 275 ; 98 L.T. 284 ; 72 J.P. 79 ; 26 Digest 446, *1632.* B

(2) *Harper* v. *Haden (G. N.) & Sons,* (1933) Ch. 298 ; 102 L.J.Ch. 6 ; 148 L.T. 303 ; 96 J.P. 525 ; Digest Supp.

Appeal by the plaintiff from a judgment of Lewis, J., dated Mar. 31, 1947. The plaintiff claimed damages for injuries received by him in tripping over a small pile of debris left by the defendants at the side of a road near the kerb. The learned judge held that the pile was a nuisance, but that the accident C was entirely due to the plaintiff's negligence in failing to see the debris. The appeal was allowed.

P. O'Connor for the plaintiff.

Beney, K.C., and *Norman Richards* for the defendants.

Cur. adv. vult.

Dec. 19. **SOMERVELL, L.J.,** read the following judgment of the court. D In this case the plaintiff claimed damages for personal injuries. The learned judge dismissed the claim on the ground that the accident which caused the injuries was due solely to the plaintiff's failure to take proper care.

The accident happened in the following circumstances. The plaintiff is a pedlar. On May 27, 1946, at about 7.30 p.m. he left his barrow against the kerb on one side of Caistor Park Road and crossed the road to deliver some goods to a customer. At the same time, another customer approached the E barrow, called out to the plaintiff, and asked him if he had a stick of shaving cream. The plaintiff re-crossed the road to get the shaving cream. In getting on the kerb he tripped over a small pile of slates which he had not seen previously and did not notice as he was stepping up on to the kerb. He tripped, fell, and received serious injuries. It was admitted in the course of the hearing that the defendants were responsible for this small heap of slates being by the F kerb. The learned judge found that the heap of slates constituted a nuisance. He was also satisfied that the plaintiff struck the top of the pile with his foot, and that it was this which caused the accident. He held, however, that the accident and the consequent injuries were entirely the plaintiff's own fault because he did not see the pile of slates. On this point we disagree with the learned judge. Earlier in his judgment he says what, we think, is right, *viz.* : "I am not for one moment saying that anyone walking along the pavement G has to keep his eyes on the ground to see whether or not there is any obstacle in his path." We think the same applies where a man is crossing a road on which there is no traffic and takes a step at the end to get on the kerb. He may, as in this case, be talking to someone, and we do not think he fails to take reasonable care if he does not constantly look down to his feet. The kerb was between 4 and 6ins. high. The small pile of slates did not overtop the kerb and, as it seems to us, might easily not be noticed by a reasonably careful H person crossing the road as the plaintiff did.

The main point that was raised was whether the pile constituted a nuisance, and a number of authorities were referred to. Counsel for the defendants cited *R.* v. *Bartholomew* (1) in which case Alverstone, C.J., started his judgment by saying ([1908] 1 K.B. 560) : "This case comes before us in an unsatisfactory way and in a form which will prevent us from laying down any ruling which will be of service in any subsequent case." We agree with that sentence and we do not think any real assistance can be derived from that case. It may be that some observations made are inconsistent with *Harper* v. *Haden (G. N.) & Sons* (2), a decision of this court. That case dealt with scaffolding and hoarding which had been put up by the defendants to enable another storey to be added to their property. The plaintiff alleged that this was an illegal obstruction and that it had caused him damage by impeding the access of the public to his shop. This court held that the scaffolding and hoarding were necessary for the purpose of the fresh building, and, there being no suggestion that they had been kept up unreasonably long or erected in an unreasonable manner, they were not an illegal obstruction. In the present case the defendants seek to invoke this principle, but, as it seems to us, they have failed to produce the necessary evidence. The defendants here were engaged, apparently, in demolishing and repairing war-damaged property. The principles laid down in the *Harper* case (2) cannot, in our opinion, apply. There was a good deal of such property in this neighbourhood and the plaintiff's witnesses, or some of them, were asked about the practice of those engaged in this work. The most precise answer is that given by a police constable to the learned judge. He said: "The usual practice with those builders doing bomb damage work is for them to place the debris and slates and such like in the gutter and then for a lorry to come along at the end of the day and pick the whole lot up." The fact that it is the practice does not, of course, make the procedure legal. It may well be that evidence could have been called in this case, or could be called in other cases, to show that this work could not be carried on, at any rate, in particular places or in relation to particular buildings unless the debris could be put out in the street to be collected. The defendants chose to call no evidence as to this, and we do not think, in these circumstances, the court ought to assume that there was justification, on the lines we have indicated, for the heap of slates being there. If the police constable's statement as to the fact is accurate, it rather looks as if the lorry, which may or may not have been the defendants', overlooked this heap of slates as it appears to be the only debris left at that time—7.30 p.m.—resulting from the day's work.

Subject, therefore, to the *de minimis* principle, we think that this heap of debris, not being justified on the principle laid down in *Harper's* case (2), was a nuisance. Does the *de minimis* principle apply? We think not. It could not, of course, be suggested that this small heap caused an obstruction in the sense that it prevented or impeded the flow of traffic or the passage of pedestrians. In the course of argument EVERSHED, L.J., gave an example of what would plainly be a nuisance, but equally would not obstruct the flow of traffic, *viz.*, a small hole dug in the surface of the road likely to make a horse fall if its foot went into it. In the same sort of way, we think a small heap of this kind which, as we have said, a normally careful pedestrian might well overlook, is likely to cause a pedestrian to trip and fall, as happened here.

The defence raised the issue of contributory negligence, and counsel submitted that, if he were wrong on his main points, the court should find that the accident was in part due to the contributory negligence of the plaintiff. We think this is a case in which there are only two possible conclusions—one, that to which the learned judge came, that the accident was entirely due to the fault of the plaintiff; the other that it was entirely due to the nuisance. If the plaintiff was negligent in not seeing the heap, then it is, we think, plain that the accident was entirely due to his fault, as it clearly would not have happened if he had seen the heap. As we have come to the conclusion that he was not negligent in failing to see it, there seems to us no evidence on which we could find him guilty of contributory negligence. The plaintiff also put his claim in negligence. The same reasoning, we think, leads to the conclusion that his claim succeeds also on that basis. The appeal must be allowed with costs.

Appeal allowed with costs.

Solicitors: *Hewitt, Woollacott & Chown* (for the plaintiff); *Pattinson & Brewer* (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

DE RENEVILLE *v.* DE RENEVILLE.

[COURT OF APPEAL (Lord Greene, M.R., Bucknill and Somervell, L.JJ.), November 11, 12, 13, 14, December 17, 1947.]

Conflict of Laws—Jurisdiction of court—Nullity—Non-consummation—Wife petitioner—Husband domiciled and resident in France—Marriage in France—Wife born in England of English parents, and resident in England when petition presented.

Divorce—Nullity—Jurisdiction—Domicil—Marriage in France—Petitioner (wife) born in England of English parents, and resident in England when petition presented—Respondent domiciled and resident in France.

In a suit brought by a wife for the dissolution of her marriage on the ground of non-consummation owing to the incapacity or wilful refusal of the husband, the husband entered an appearance under protest against the jurisdiction of the court. The wife was born in England, of English parents, and was now resident in England, but the husband, a Frenchman, was domiciled in France and had resided there at all material times. The marriage had taken place in Paris in 1935 and until 1939, except for a few months, the parties had resided together in France. No evidence was given whether, by French law, the marriage was void or voidable on either of the grounds mentioned in the petition:—

HELD: (i) whether the marriage was void or voidable was to be determined by reference to French law, either because that was the law of the husband's domicil at the date of the marriage, or, preferably, because it was the law of the matrimonial domicil at that date: *Brook* v. *Brook* ((1861) 9 H.L. Cas. 193) referred to; but, in the absence of evidence to the contrary, the court would presume that French law was the same as English law.

(ii) under English law, the marriage was voidable only, and not void, whether the ground on which the petition was based was incapacity or whether it was wilful refusal within the Matrimonial Causes Act, 1937, s. 7 (1) (*a*), and, therefore, the domicil of the wife was French at the institution of the suit and remained French until a decree of nullity was pronounced by a court of competent jurisdiction, and the English courts had no jurisdiction to entertain the suit, the only competent courts being the French courts.

(iii) since the husband was domiciled and at all material times resident abroad, the fact that the wife was resident in England when the petition was filed was not sufficient to confer jurisdiction on the English courts.

Roberts v. *Brennan* ([1902] P. 143), and *Robert* (*otherwise De La Mare*) v. *Robert* ([1947] 2 All E.R. 22), *disapproved.*

White v. *White* ([1937] 1 All E.R. 708) and *Hutter* v. *Hutter* ([1944] 2 All E.R. 368) *explained and distinguished.*

Decision of JONES, J. ([1947] 2 All E.R. 112) *affirmed.*

[AS TO VOIDABLE MARRIAGES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 640, 641, para. 937, and Supplement; and FOR CASES, see DIGEST, Vol. 27, pp. 265, 266, Nos. *2326-2338*, and Supplement.

AS TO JURISDICTION OF ENGLISH COURTS IN NULLITY SUITS, see HALSBURY, Hailsham Edn., Vol. 6, p. 303, para. 357, and Supplement; and FOR CASES, see DIGEST, Vol. 11, p. 428, Nos. *924-926*, and Supplement.]

Cases referred to:

(1) *Salvesen* (*or von Lorang*) v. *Austrian Property Administrator*, [1927] A.C. 641; 96 L.J.P.C. 105; 137 L.T. 571; Digest Supp.

(2) *Brook* v. *Brook*, (1861), 9 H.L. Cas. 193; 4 L.T. 93; 25 J.P. 259; *affg.*, (1858), 3 Sm. & G. 481; 11 Digest 414, *806*.

(3) *Inverclyde* (*otherwise Tripp*) v. *Inverclyde*, [1931] P. 29; 100 L.J.P. 16; 144 L.T. 212; 95 J.P. 73; Digest Supp.

(4) *Adams* v. *Adams*, [1941] 1 All E.R. 334; [1941] 1 K.B. 536; 110 L.J.K.B. 241; 165 L.T. 15; Digest Supp.

(5) *Dodworth* v. *Dale*, [1936] 2 All E.R. 440; [1936] 2 K.B. 503; 105 L.J.K.B. 586; 155 L.T. 290; 20 Tax Cas. 285; Digest Supp.

(6) *Fowke* v. *Fowke*, [1938] 2 All E.R. 638; [1938] Ch. 774; 107 L.J.Ch. 350; 159 L.T. 8; Digest Supp.

(7) *White* (*otherwise Bennett*) v. *White*, [1937] 1 All E.R. 708; [1937] P. 111; 106 L.J.P. 49; 156 L.T. 422; Digest Supp.

(8) *Turner* v. *Thompson*, (1888), 13 P.D. 37 ; 58 L.T. 387 ; 52 J.P. 151 ; 11 Digest 332, *214*.

(9) *Roberts* v. *Brennan*, [1902] P. 143 ; 71 L.J.P. 74 ; *sub nom., Brennan* (*otherwise Roberts*) v. *Brennan*, 86 L.T. 599 ; 18 T.L.R. 467 ; 11 Digest 428, *926*.

(10) *Graham* v. *Graham*, [1923] P. 31 ; 92 L.J.P. 26 ; 128 L.T. 639 ; 27 Digest *392*, *3867*.

(11) *Hutter* v. *Hutter* (*otherwise Perry*), [1944] 2 All E.R. 368 ; [1944] P. 95 ; 113 L.J.P. 78 ; 171 L.T. 241 ; Digest Supp.

(12) *Robert* (*otherwise De La Mare*) v. *Robert*, [1947] 2 All E.R. 22 ; [1947] P. 164.

(13) *Lewis* (*falsely called Hayward*) v. *Hayward*, (1866), 35 L.J.P. & M. 105 ; *revsg.*, S.C., *sub nom., L.* (*falsely called H.*) v. *H.*, (1865), 4 Sw. & Tr. 115 ; *subsequent proceedings, sub nom., L.* (*falsely called H.*) v. *H.*, (1866), L.R. 1 P. & D. 293 ; 27 Digest 270, *2382*.

(14) *Mason* v. *Mason* (*otherwise Pennington*), [1944] N.I. 134 ; Digest Supp.

(15) *Mehta* (*otherwise Kohn*) v. *Mehta*, [1945] 2 All E.R. 690 ; 174 L.T. 63 ; Digest Supp.

APPEAL by the wife from an order of JONES, J., dated May 22, 1947, and reported [1947] 2 All E.R. 112, on an application by the husband to determine whether the court had jurisdiction to entertain a suit brought by the wife for the nullity of the marriage on the ground of the incapacity or wilful refusal of the husband to consummate it. The wife was born in England of English parents and was now residing in England, but the parties were married in France and the husband, a Frenchman, was domiciled in France and had resided there at all material times. JONES, J., held that, since the marriage was merely voidable and not void, the wife was not domiciled within the jurisdiction of the court and the court had no jurisdiction to entertain the suit notwithstanding that she was resident within the jurisdiction. The wife appealed, but the Court of Appeal now dismissed her appeal. The facts appear in the judgment of LORD GREENE, M.R.

Karminski, K.C., and *Victor Russell* for the wife.
Holroyd Pearce, K.C., and *R. J. A. Temple* for the husband.

Cur. adv. vult.

Dec. 17. The following judgments were read.

LORD GREENE, M.R. : The appellant wife is seeking a decree of nullity against the husband on two alternative grounds, namely, incurable incapacity and wilful refusal to consummate the marriage. By his amended appearance the husband protested that the court had no jurisdiction to entertain the suit for the reason that the grounds stated in the petition, if established, would render the marriage voidable but not void *ab initio*. The result, he claimed, was that the domicil of the wife was the same as that of the husband who was domiciled and resident in the republic of France. By an order of the registrar, confirmed by the judge, it was ordered that an issue be tried as to the jurisdiction of the court, the husband to be plaintiff and the wife to be defendant. The wife, as defendant in the issue, by her answer to the amended appearance, asserted that, if either of her alternative grounds was established, the court would declare the marriage to be absolutely null and void to all intents and purposes in law whatsoever, that the effect of the declaration would be that the wife was never married to the husband and never acquired his domicil, but retained her own English domicil, that the domicil of the husband was not an essential ingredient to found the jurisdiction of the court, and that at all material times she was resident in England. The reply of the husband was a formal one. The issue was tried before JONES, J., on May 20, 1947, and he gave judgment on May 22. By some inaccuracy in drawing up the formal judgment, it wrongly described the issue as " the issue as to domicil " instead of the issue " as to jurisdiction " At the hearing the only evidence given was that of the wife.

The facts as found by JONES, J., were, shortly, as follows. The husband is a Frenchman domiciled and for many years resident in the republic of France. The wife is an Englishwoman and lived in England before her marriage. The marriage was celebrated in Paris on Aug. 1, 1935, at the Mairie, 6th Arrondissement. Apart from a few months spent in England with friends or relations in 1938 the parties lived together in various places where the husband held a military appointment in the French armed forces—Paris, the French Congo and Biskra in Algeria. At the outbreak of war in 1939 the wife returned to

England leaving the husband in Biskra. In April, 1940, she went to Biskra as the husband was seriously ill and she stayed there for six weeks. She then returned to England where she has lived ever since apart from the husband. I may supplement these findings by saying that from the evidence it is clear that when she left the husband in 1940 she intended never to return to him. JONES, J., held that a marriage subsequently annulled on the ground of incapacity is a voidable one, that until avoided it is a valid marriage, that on the marriage the wife acquired the domicil of her husband and still retained it, and that her case on the issue, so far as it rested on domicil, failed accordingly. On the alternative ground put forward as a basis for exercising jurisdiction, namely, that of the residence of the wife, JONES, J., held that the residence of a petitioner within the jurisdiction was insufficient when the respondent in the cause was resident abroad, at any rate when the respondent protested to the jurisdiction and (as he found here) no hardship was involved. JONES, J., evidently regarded the wife's alternative ground of wilful refusal as involving that the marriage was voidable and not void as, indeed, if English municipal law applies, he was bound to do in view of the language of the Matrimonial Causes Act, 1937, s. 7 (1).

Before the argument before us had proceeded very far it appeared that the procedure adopted of trying the question of jurisdiction on a preliminary issue, although, no doubt, a proper one, did, in the special circumstances of the case, lead to certain inconveniences. Two alternative matters of fact are alleged in the petition as grounds for a decree of nullity, neither of which was or could be proved or admitted on the trial of the issue. On one view of the law it appeared possible that our decision might be different according as the one or the other of these alternative allegations might be established. Thus, in so far as the answer to the issue as to jurisdiction might depend on domicil, the question what was the domicil of the wife at the institution of the suit might, as it seemed to us, depend on whether the marriage was a void or a voidable one, a question which in its turn might fall to be determined by the law of France on the ground either that the marriage was celebrated in that country or that the matrimonial domicil contemplated by the parties was French. If under French law the marriage was void, the result, as it then appeared to us, might well be that the domicil of the wife was English at the institution of the suit, a fact which, if established, would, according to some authority, give the English court jurisdiction to pronounce a decree of nullity. When these various possibilities and complications were adumbrated, the further difficulty emerged that, so far as the trial of the issue was concerned, no question of French law had been pleaded or raised in any way and that, in so far as any question has to be decided by reference to French law, that law must on ordinary principles, in the absence of proof to the contrary, be assumed to be the same as English law. On this basis the question whether the marriage was void or voidable would ultimately have to be decided in accordance with provisions identical with those of English law. As the result of some discussion, counsel on both sides were anxious, as was the court itself, to avoid the waste of money which would have been involved if the whole matter, including the issue of jurisdiction, had been sent back for trial. Accordingly, with the consent of counsel for both parties, we decided that the appeal should proceed on the basis that we would decide the question of jurisdiction on two alternative hypotheses, one that the marriage was void and the other that the marriage was voidable.

Various grounds have been suggested as forming foundations for the exercise of jurisdiction in nullity cases by the courts of this country. They may be listed as follows: (i) English domicil of both parties. (ii) English domicil of the petitioner alone. (iii) English residence of both parties. (iv) English residence of the petitioner alone. (v) The fact that the marriage took place here. (vi) Hardship. We are not concerned here to consider cases (iii), (v) or (vi). "Whether there cannot be jurisdiction, which is not that of the domicil, in restricted instances to entertain a suit for nullity is a question we have not before us for determination," said VISCOUNT HALDANE ([1927] A.C. 654) in *Salvesen* v. *Austrian Property Administrator* (1). This doubtful question remains to be answered by the House of Lords, and there is no need for us to attempt to answer it for the purposes of this appeal. I shall endeavour to confine myself to the questions actually raised.

The case presented on behalf of the wife was to the following effect. (A) It was said that, in so far as the basis of jurisdiction is to be sought in domicil alone, the domicil of the wife is sufficient ; that, if the marriage was a void marriage, the wife had never lost, or, alternatively, had resumed her English domicil of origin before the institution of the cause ; that, even if the marriage was only voidable, the effect of a decree of nullity would be to render it void *ab initio*, with the result that for the purposes of jurisdiction the wife ought to be regarded as already possessing the status of spinsterhood which, it was said, a decree would give her by its retroactive operation ; and that, accordingly, the fact that the husband was domiciled in France is irrelevant on the question of jurisdiction. (B) Alternatively, it was said that, if the wife's case as to jurisdiction based on domicil cannot be supported, the court has jurisdiction by reason of the fact that at the inception of the suit she was resident in England, and that notwithstanding the fact that the husband was then, as he still is, resident in France. I will deal with these two alternatives in the order in which I have stated them.

(A) That the courts of the country in which the parties are domiciled have jurisdiction to pronounce a decree of nullity whether the parties were or were not married in that country is set beyond doubt by the decision of the House of Lords in *Salvesen* v. *Austrian Property Administrator* (1). It will be noticed that I have said "the parties" since in that case, as in most other cases in which domicil as a basis of jurisdiction has been discussed, the domicil of the parties was the same. In nullity cases the parties will have the same domicil at the date of the institution of the suit in one of two events, namely, (i) if the marriage is by the proper law voidable and not void, in which case the wife will have acquired the same domicil as the husband by the mere fact of marriage and retains that domicil until the marriage is annulled ; (ii) if the marriage is void but, nevertheless, the wife on the facts acquired a domicil of choice in the country contemplated as that of the matrimonial domicil and has not subsequently changed that domicil. This occurred in the *Salvesen* case (1), where the wife acquired, in fact, the husband's German domicil, and, therefore, it was unnecessary to consider what the position would have been if the marriage had been a void marriage and the domicils of the parties had been different. Throughout the opinions delivered in that case the word "parties" in the plural is used, and it is right to point out that LORD PHILLIMORE said ([1927] A.C. 670) that as to matters of status "the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively." I do not, however, read this as an expression of opinion on a point which did not arise and was not for consideration, namely : Has such a court jurisdiction where one only of the parties is subject to its law, that is, domiciled in its country. I will return to this later. So far as English law is concerned, there is a clear distinction between void and voidable marriages. "Wilful refusal" is by s. 7 (1) (*a*) of the Matrimonial Causes Act, 1937, a ground for treating the marriage as voidable, not for treating it as void. In an earlier statute the same distinction appears. Before the Marriage Act, 1835, a marriage within the prohibited degrees was voidable. It could only be annulled in the lifetime of the parties and by a decree of an ecclesiastical court : see *Brook* v. *Brook* (2) *per* LORD CRANWORTH (9 H.L. Cas. 223), and *per* LORD WENSLEYDALE (*ibid.*, 240). The result was that, unless and until such a decree had been obtained, the status of children of the marriage could not be definitely known during the lifetime of their parents. The Act remedied this state of affairs by prescribing that such marriages should be absolutely void.

In what, for present purposes, does the distinction consist ? It is argued that there is no real distinction by reason of the fact that in each case the form of the decree is the same and pronounces the marriage "to have been and to be absolutely null and void to all intents and purposes in the law whatsoever." It is, perhaps, unfortunate that a form of decree which was appropriate when a marriage was regarded as indissoluble and could only be got rid of by decreeing that it had never taken place is still used indiscriminately in the cases of both void and voidable marriages. It is particularly anomalous in the case of the new grounds of nullity laid down by the Act of 1937. In *Inverclyde (otherwise Tripp)* v. *Inverclyde* (3) BATESON, J., rightly, in my opinion, insisted on the necessity of looking behind the form and regarding the substance of the

matter. The substance, in my view, may be thus expressed. A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it; a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction. In England only the Divorce Court has this jurisdiction. The fact that in both cases the form of the decree is the same cannot alter the fact that the two cases are in this respect quite different. This difference is illustrated by the Marriage Act, 1835, to which I referred a moment ago. Before that Act a marriage within the prohibited degrees could only be got rid of by a decree of an ecclesiastical court. After the Act every court was bound to treat it as never having taken place. Other illustrations of the effect of the distinction are to be found in *Adams* v. *Adams* (4), *per* Scott, L.J. ([1941] 1 All E.R. 337, 338); *Dodworth* v. *Dale* (5); and *Fowke* v. *Fowke* (6).

In the present case the question whether at the relevant date the wife had an English domicil cannot, in my view, be answered until two other questions are answered, namely, (*a*) was the marriage a void or voidable one, and (*b*) by reference to what law will the English court decide whether it was void or voidable? The importance for present purposes of the distinction between "void" and "voidable" lies in this. If the marriage was voidable, it must, in my opinion, be regarded as having had the effect of giving to the wife, as a matter of law, the French domicil of her husband and as precluding her from casting off that domicil before a decree of annulment is actually pronounced. It appears to me to be quite impossible to suggest that she is to be treated as having resumed proleptically, so to speak, her English domicil, merely because she has presented a petition for a decree of nullity to which, in point of substance, she might or might not be able to establish her claim. To hold otherwise would be to allow oneself to be misled by the mere wording of a form of decree which was adopted in the past for reasons which are no longer appropriate. The fact that a domicil has been acquired by reason of a voidable marriage is a fact the existence of which cannot be undone by a declaration of nullity. Such a declaration sets the wife free to change her domicil in the future; it cannot, in my opinion, change it retrospectively in the manner here claimed. If, however, the marriage is by its proper law a void marriage, no decree of any court is required to avoid it. The wife in that case did not acquire the French domicil of the husband by operation of law. She was free to acquire it or not as she chose, and, if she acquired it, to abandon it or change it for a different domicil of choice. It is clear on the facts that, if she was competent to do so, she did abandon her French domicil (which I am assuming she had acquired) and that she thereby resumed her domicil of origin, which was English. Her domicil, therefore, on the hypothesis that the marriage was void, was English. This at once raises a question as to the jurisdiction of the English courts to entertain a petition for nullity by a supposed wife who is in a position to prove that her supposed marriage was void and that her domicil on that basis is English at the date of the presentation of the petition. This situation seems never to have arisen before *White* (*otherwise Bennett*) v. *White* (7), which was decided by Bucknill, J., when a judge of first instance. Before I examine that case, I must point out that we are not on this hypothesis concerned to do what I have declined to do in the case of a voidable marriage, namely, to give to a decree of nullity, which it is assumed will be obtained, what I have called a proleptic operation in conferring on a wife a domicil which, until she obtains the decree she is seeking, she is incapable in law of possessing. In the present case, if the marriage was void, the domicil of the wife is English. It would be held to be English by any court in the country before whom the relevant facts were established, for example, in matters of succession no decree of the Divorce Court would have to be produced to show that she had possessed that freedom in the choice of a domicil which the law denies to a woman so long as her status is that of a married woman. The fact that she has an English domicil can be established in the nullity proceedings themselves as she attempted to establish it here, on a preliminary issue, whereas, if all she could show was a voidable marriage, the trial of a preliminary issue could only result in a finding that at the date of the presentation of the petition she was domiciled in France.

In *White* v. *White* (7) BUCKNILL, J., used words with which (save as regards the reference to residence which was, in my opinion, unnecessary) I respectfully agree. He said ([1937] 1 All E.R. 713) :

> . . . it seems to me just to the petitioner, and also in the public interest, that the petitioner, being domiciled and resident in this country, should have her status as a single or as a married woman judicially established by this court . . .

This view does, of course, theoretically at least, open up the possibility of conflicting judgments by the courts of the respective domicils, but, if it be not the right view and if the only court with jurisdiction is a court in a country where both are domiciled, the problem of jurisdiction based on domicil in the case of a void marriage where the domicils are different would appear to be insoluble. BUCKNILL, J., attached importance to the fact that the respondent in *White* v. *White* (7) had not objected to the jurisdiction. With great respect, I cannot agree with this. In the case before him the English domicil of the petitioner did, in my opinion, give the court jurisdiction whether or not the respondent objected. Moreover, I should have thought that, on principle, the exercise of jurisdiction in matrimonial causes affecting status could not depend on the submission of the respondent or his refusal to submit to the jurisdiction. In the present case, if the marriage was void and not merely voidable, the fact that the husband has protested cannot, in my opinion, deprive the English court of jurisdiction to declare the status of a domiciled Englishwoman. Conversely, if the marriage is voidable only, no such jurisdiction exists and could not be created by the fact, if fact it had been, that the husband had not protested.

But the problem remains, by what law ought the question whether the marriage was void or merely voidable to be determined ? If by English municipal law alone, the answer to the present appeal is, in my opinion, a clear one. Whichever of the grounds on which the petition is based is made good, the marriage is a voidable marriage and the English court, as JONES, J., rightly held, has no jurisdiction. That marriages governed by English law are, on the ground of incapacity, voidable and not void must now, I think, be accepted : see *Turner* v. *Thompson* (8), *Inverclyde* v. *Inverclyde* (3), and *Adams* v. *Adams* (4), *per* SCOTT, L.J. ([1941] 1 All E.R. 338). Wilful refusal, as I have said, makes the marriage voidable only. Neither in the pleadings nor on the trial of the issue was any reference made to any law other than English law. If the true view be that the question into which class the marriage falls is for French law to decide, either because the marriage was celebrated in France or because the husband's (or the matrimonial) domicil was French, then the court has not been put into possession of what, in my view, would be a crucial matter of fact.

In my opinion, the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows. The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided ? In my opinion, by the law of France, either because that is the law of the husband's domicil at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicil in reference to which the parties may have been supposed to enter into the bonds of marriage. In *Brook* v. *Brook* (2), the marriage in Denmark (by the law of which country, assuming it applied, it was valid) of two persons domiciled in England was held to be void on the ground that, although the *lex loci* governed the forms of marriage, its essential validity depended on the *lex domicilii* of the parties. LORD CAMPBELL, L.C., said (9 H.L. Cas. 207) :

> But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.

In the case of a void marriage, the matrimonial domicil contemplated will clearly be the same as that contemplated in the case of a voidable or non-voidable marriage, since the parties presumably intend to live together. In the present case, the matrimonial domicil was clearly French, and it is, in my opinion, by reference to French law that the question whether the marriage

was void or voidable on the grounds alleged must be referred. In the *Salvesen* case (1), the provision of French law by reference to which the German court had annulled the marriage was one which was regarded, apparently, as relating to form and not to substance. "The validity of the marriage depended on French law, that being the law of the *locus celebrationis*," *per* VISCOUNT DUNEDIN ([1927] A.C. 663).

I may summarise my conclusions on the questions of jurisdiction as based on domicil in the following manner. (i) If (contrary to my view) English municipal law applies as such, or if that law is applicable on the basis that French law is or must be deemed to be the same as English law, (*a*) the marriage was voidable only and not void whichever ground put forward for annulling the marriage be taken; (*b*) the domicil of the wife was French at the date when the suit was instituted; (*c*) the domicil of the wife cannot be notionally regarded as other than French: it remains French until a decree of nullity is pronounced by a court of competent jurisdiction; (*d*) the only competent courts are the courts of France. (ii) If, as in my opinion is the case, the question whether the marriage is void or voidable is to be determined by reference to French law then (*a*) if by that law (as theoretically, at least, is possible) it is void on both grounds put forward, the English court has jurisdiction to pronounce a decree whichever of those grounds is established; (*b*) if by that law the marriage is void on one ground (for example, impotence) but voidable on the other (for example, wilful refusal) the English court has jurisdiction to pronounce a decree on the ground of impotence, but, if that is not established, it has no jurisdiction to pronounce a decree on the ground of wilful refusal; (*c*) if by French law the marriage is in both cases voidable and not void, the English court has no jurisdiction. I have pointed out the difficulty which arises by reason of the applicability of French law and the omission to appreciate its applicability, but I think that in the circumstances the wife ought to have an opportunity of submitting (if she be so advised) that the issue should be sent back to the judge to ascertain whether by French law the marriage is void or voidable for either, and, if so, for which, of the two reasons put forward in the petition. The decision of the judge on this question, should we consider that the wife ought to be allowed to raise it, would carry the consequences which I have indicated. We will hear argument on this matter when my brethren have delivered their judgments. I may add that it would be for the English court, after hearing evidence of French law, to decide whether in French law the marriage was void or voidable, not merely in a verbal sense, but in the sense of the words as understood in this country, that is, as indicating or not indicating, as the case might be, that the marriage would be regarded in France as a nullity without the necessity of a decree annulling it.

So much for the question of domicil. I turn now to (B), the alternative ground of residence. I will assume that residence of both parties (a matter left open, as I think, by the House of Lords in the *Salvesen* case (1)) is sufficient to found jurisdiction. Is the residence of the petitioner alone sufficient? I agree with JONES, J., that it is not. Counsel for the wife placed in the forefront of his argument the decision of JEUNE, P., in *Roberts* v. *Brennan* (9). This was a case of bigamy and the wife was petitioning for a decree of nullity. The ceremony was performed in the Isle of Man. The domicil of the man was Irish; the woman was born in Wales. Some 2½ years later the man confessed that at the date of the ceremony he was already married. As a result the woman left the man in Glasgow. It does not appear where she was domiciled at the date of the petition, but, as the marriage was a bigamous one, she was entitled to acquire any domicil she liked. If her domicil was English, the English court had, if my view is right, jurisdiction on that ground, but JEUNE, P., said that in nullity cases jurisdiction is based not on domicil but on residence. Before the woman left the man they had lived together in the Isle of Man, in England and in Scotland. The report is unsatisfactory. Although it was decided that the court had jurisdiction on the ground of residence, the facts as regards the residence of the respective parties at the date of the presentation of the petition are nowhere stated in the report in the LAW REPORTS. The case is, however, reported at 18 T.L.R. 467, where it appears that the man was served with the petition in Ireland. HORRIDGE, J., in a later case (*Graham* v. *Graham* (10)) discovered that the petitioner had given an English address. The "residence" referred to by JEUNE, P., cannot have been the temporary residence in England before the parties went to Scotland that is referred to in the statement of facts. In the TIMES LAW REPORTS, JEUNE, P., is reported as having said that the jurisdiction of the ecclesiastical courts would have depended on the "matrimonial residence" of the parties. In the LAW REPORTS the word "matrimonial" does not appear. The decision is also unsatisfactory in that it excludes domicil as a basis of jurisdiction. In this the decision was clearly wrong. In any case I am quite unable to accept *Roberts* v. *Brennan* (9) as an authority for the proposition that the mere residence of a petitioning wife in England is sufficient to give the court jurisdiction to entertain a nullity suit when the respondent husband is not resident here. If it be thought that *Roberts* v. *Brennan* (9) does so decide, I am unable to agree with it.

On the question of residence as a basis for jurisdiction, reliance was also placed on *White* v. *White* (7). That again was a case of bigamy. The ceremony took place in Australia when the man had a wife alive. The petitioner (the wife) was "domiciled and resident" in England and the husband was domiciled and resident in Australia or Malta. These statements in the report I read as referring to the time of the Australian ceremony. The husband did not appear. As the marriage was a void marriage, BUCKNILL, J., had no difficulty in finding on the facts that the wife was domiciled in England at the date of the petition. This circumstance, in my opinion, as I have said, was sufficient to give to the English court jurisdiction to determine her status by a decree in a nullity suit, that court being the court of her domicil and thereby a court competent to determine her status. The judgment refers to the fact that the wife was both domiciled and resident here, but the reference to residence was, as I have said, in my view, unnecessary for the decision. I cannot read this decision as meaning that residence of the petitioning wife alone is sufficient to found jurisdiction on the ground of residence even in the case of a void marriage. In *Hutter* v. *Hutter* (*otherwise Perry*) (11) PILCHER, J., had to deal with a petition by a husband for nullity of a marriage celebrated in England which had never been consummated owing to the wilful refusal of the wife. The husband was domiciled in the U.S.A. Wilful refusal was proved. Both parties were resident in England at the date of the petition. The actual decision was that the court had jurisdiction, the short ground being stated as follows ([1944] 2 All E.R. 372):

> It would seem, therefore, that both on principle and on authority there is good ground for saying that in suits for nullity the mere residence of the parties in this country is sufficient to found the jurisdiction of the court . . .

This case is no authority for the view that residence of the petitioner alone is sufficient. In *Robert* (*otherwise De La Mare*) v. *Robert* (12), the parties were domiciled and the respondent husband was resident in Guernsey. The wife who was petitioning for a decree on the ground of wilful refusal by her husband, was resident in England. BARNARD, J., held that the residence of the wife was sufficient to give him jurisdiction to entertain the suit. In so holding, BARNARD, J., was, in my respectful opinion, in error, and *White* v. *White* (7), on which he relied, does not support his decision.

These are the only authorities which appear to touch on the point of residence of the petitioner alone, and, without expressing an opinion on the question whether residence of both parties within the jurisdiction is sufficient, I am clearly of opinion that they cannot be accepted as establishing the proposition contended for. That a wife who is resident but, *ex hypothesi*, not domiciled here can compel her husband who is both domiciled and resident abroad to come to this country and submit the question of his status to the courts of this country appears to me to be contrary both to principle and to convenience.

BUCKNILL, L.J.: In this case the husband entered an appearance under protest to the petition by the wife on the ground that this court had no jurisdiction to entertain the suit. He further submitted that the allegations in the petition, if established, would render the marriage, which was not celebrated in England, voidable but not void *ab initio*, and, therefore, that the wife's domicil could not be other than the domicil of the husband, who was at all material times domiciled and resident in France. On the application of the wife the court ordered the trial of the issue as to the jurisdiction of the court. The wife in her plea admitted that the husband was at all material times domiciled

in France, but contended that his domicil here was not essential to found the jurisdiction of this court. In support of this contention the wife submitted that, if either of her allegations as to impotence or wilful refusal were established, the court would declare the marriage to be absolutely null and void and that the result of this declaration would be that the wife never acquired the husband's domicil but retained her English domicil. Having regard to this fact and to the fact that she was at all material times resident in England, the wife asserted that this court had jurisdiction to entertain her petition for a declaration of nullity. On May 22, the judge gave judgment that the court had no jurisdiction to hear the suit. On appeal, this court during the hearing intimated to counsel that, if the marriage was not consummated owing to the impotence of the husband, it might be argued that the marriage was void *ab initio* by French law and that the question of jurisdiction in such a case might not turn on the same considerations as would apply if the marriage was merely voidable. The court, therefore, could not decide whether it had jurisdiction until the cause of the non-consummation of the marriage had been established and also until it had been decided what law would be applicable in each case. With the consent of both counsel and to avoid costs being thrown away, the court agreed to deal with the question of jurisdiction on two alternative hypotheses: (i) that the husband was incurably impotent, and (ii) that the husband had wilfully refused to consummate the marriage, and on two further hypotheses, namely, that (*a*) English law or (*b*) French law applied to the case.

The main questions for the consideration of the court seem to me to be these. (i) According to English law does incurable impotence render a marriage void *ab initio*, in the same way for instance that a marriage is void *ab initio* if one of the parties is already married? (ii) According to French law does incurable impotence render the marriage absolutely void *ab initio* in the same sense as in question (i)? (iii) Assuming that by English law incurable impotence renders the marriage voidable and not void, but that French law renders the marriage void *ab initio* in the same sense as in question (i), ought this court, when deciding whether it has jurisdiction to make a decree of nullity on the ground of incurable impotence, to apply English or French law as to the legal effect of impotence on the validity of the marriage? (iv) If the marriage is not void but voidable, either by French or English law, ought the English court to exercise jurisdiction in this case?

In my opinion, the right answer to the first question is that such a marriage is not void *ab initio* but voidable, notwithstanding the form of the decree which declares that "the marriage was null and void *ab initio*." This form was used by the House of Lords in *Lewis* (*falsely called Hayward*) v. *Hayward* (13). The form of decree in use in the Divorce Division is somewhat different and is that:

> . . . the marriage in fact had and solemnised be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever . . . and that the petitioner be pronounced to have been and to be free from all bond of marriage with the respondent unless sufficient cause be shown to the court why this decree should not be made absolute.

Notwithstanding the retrospective nature of the decree, there are several decided cases to the effect that, if the parties to the marriage ceremony are legally competent to enter into it and the ceremony is legally performed, the law regards it as a valid marriage until a decree is made annulling it on the ground of impotence. On the other hand, the decree of nullity is retrospective in some respects, and the decided cases are not easy to reconcile on the point as to how far the decree makes invalid past acts. The matter is thoroughly examined by ANDREWS, L.C.J., ([1944] N.I. 159 *et seq.*) in his considered and helpful judgment in *Mason* v. *Mason* (*otherwise Pennington*) (14). In my opinion, incurable impotence is a physical defect which may not be established as a fact until after the lapse of years of trial and medical treatment. Thus, in *Lewis* v. *Hayward* (13) the parties lived together for 14 years and during nearly the whole of the time occupied the same bed. During those years the parties should surely be regarded in the eyes of the law as man and wife. To hold otherwise would be, in my opinion, contrary to public policy and to common sense. The Matrimonial Causes Act, 1937, makes wilful refusal to consummate the marriage a ground for avoiding the marriage, together with other grounds on which a marriage may be voidable. Such refusal and the physical or mental incapacity to tolerate sexual intercourse, which may be taken as evidence of impotence, are so closely allied, that, in my opinion, it would be an error to make one a ground for saying that the marriage is void *ab initio* and the other a ground for saying that the marriage is voidable.

An authority on the point is the decision of Bateson, J., in *Inverclyde* v. *Inverclyde* (3). In that case the wife petitioned for nullity of marriage on the ground of the impotence of her husband. The marriage took place in London on Mar. 21, 1929, and on Aug. 1, 1930, the wife filed her petition. The petition alleged that at the time when the petition was filed both parties were domiciled in Scotland. The wife alleged that she was resident in England and that the husband had places of residence both in England and Scotland. The husband appeared under protest to the jurisdiction, and took out a summons asking for the dismissal of the petition for want of jurisdiction on the ground of the Scottish domicil of both parties and on the ground that the question involved in the petition was whether a voidable marriage should be declared void. It was argued on behalf of the husband that the petition was akin to one for divorce and that the only forum was that of the domicil. Bateson, J., in his judgment said that the question for his determination was whether the court had jurisdiction to try a suit for nullity on the ground of impotence when the parties were domiciled abroad. He said ([1931] P. 41, 42):

> The marriage being voidable and not void and the decree affecting and involving an alteration of status and being a judgment *in rem* binding on all the world, there can be no jurisdiction in this court unless the parties are domiciled in this country . . . To call it a suit for nullity does not alter its essential and real character of a suit for dissolution.

Bateson, J., referred to *Roberts* v. *Brennan* (9). In that case Jeune, P., granted a decree of nullity on the ground of residence within the jurisdiction, and the basis of the petition was that it was a bigamous marriage. With reference to this case, Bateson, J., said ([1931] P. 48):

> In truth bigamy cases help very little, as in them as distinct from this there never has been a marriage, and the argument that there is no distinction . . . between the two classes of cases seems to me untenable.

Question (ii). The answer to the question whether by French law incurable impotence renders the marriage void *ab initio* cannot be given until the evidence has been tendered on the point to the court. In the absence of any evidence to the contrary, this court presumes that French law is the same as English law on the point.

As regards question (iii), in my view, the English court should be guided by French law. The wife consented to marry her husband in France and intended to live with him there and also impliedly intended to take her husband's French domicil on the assumption that the marriage was valid. In these circumstances it seems to me that the question as to the validity of the marriage should be decided by French law. I do not see any good reason why it should be decided by English law. True, the wife's domicil before marriage was English, but, on the other hand, her husband's domicil was French, and, the two parties to the marriage having different domicils, it seems to me that the law of France should prevail. To hold that the law of the country where each spouse is domiciled before marriage must decide as to the validity of the marriage in this case might lead to the deplorable result, if the laws happened to differ, that the marriage would be held valid in one country and void in the other country. For this reason I think it essential that the law of one country should prevail and that it is reasonable that the law of the country where the ceremony of marriage took place and where the parties intended to live together and where they, in fact, lived together should be regarded as the law which controls the validity of their marriage. Assuming, therefore, that by French law the marriage is void *ab initio*, in the sense that a marriage is void *ab initio* because one of the parties is incapable of entering into a valid marriage, the petitioner then would not be the respondent's wife, and has not lost her English domicil, unless she has done so in fact by making France her permanent home. In such a case I think this court should exercise jurisdiction. I do not know of any authority directly in point. In *White* v. *White* (7) the court assumed jurisdiction to make a decree of nullity in the

case of a void marriage on the ground of bigamy, because the petitioner wif was domiciled and resident in England. In *Mehta* (*otherwise Kohn*) v. *Mehta* (15 BARNARD, J., exercised jurisdiction and declared void a so-called marriag which had taken place in Bombay. The petitioner wife was at all materia times domiciled in England, the respondent was an Indian, and the case mad by the petitioner was that she had no intention of marrying the responden and misunderstood the nature of the ceremony, which the judge held was a fraud perpetrated on the petitioner. The only other court, in cases of nullity *ab initio*, and where there is no common or matrimonial domicil in fact, seems to be the court of the country where the marriage was celebrated. But suc a court might be extremely inconvenient to both parties, and, if neither party were domiciled or resident in the country, it is difficult to see what interes that country would have in his or her matrimonial status.

As regards question (iv), if the marriage is merely voidable by French o English law, either for impotence or wilful refusal, the marriage, in my view, is a valid marriage until a decree is made annulling it. Therefore, the wif has the domicil of her husband by operation of law and the court should regard that as the test when considering whether it has jurisdiction. It is not necessary to decide in the present case the question whether the court will exercise jurisdiction over voidable marriages where both parties have a permanent residence within the jurisdiction or where the marriage has taken place within the jurisdiction, because, as I have already said, the husband did not at any time have such a residence in England, and certainly was not residing in this country and was not even present in it when the petition was filed. The marriage in this case was celebrated in Paris. I do not think the fact that the wife before marriage was domiciled within the jurisdiction and is resident here at the time when the petition is filed is sufficient in a voidable marriage to confer jurisdiction on this court where the husband is domiciled and at all material times resident abroad.

For these reasons the appeal, in my opinion, should be dismissed, unless the wife asks that the case be remitted to the trial judge for evidence to be taken as to French law on the question of the effect of impotence on the validity of the marriage.

SOMERVELL, L.J.: I agree. The reasons which have led me to the conclusion that this appeal should be dismissed have already been expressed and, if I may say so, very fully and clearly expressed, in the judgment delivered by the MASTER OF THE ROLLS, and I do not desire to add anything to what he has said.

[Their Lordships then heard argument on the question whether leave should be given for the issue to be remitted to the court below for a decision, on evidence, whether the marriage was, or was not, void under French law.]

LORD GREENE, M.R.: In this case the wife throughout has based her claim on the provisions of English law. We have taken the view that the fundamental question whether the marriage was or was not void is a matter for French law. No such point has been raised in the issue so far either on the pleadings or in the issue as heard and decided. We consider that to allow that point to be reopened now by sending the issue back to have it decided would be inconvenient, unfair to the husband and, so far as the wife is concerned, would be of a highly doubtful value because the probabilities, at any rate, appear to me to be very strong that, if French law decided that the marriage was void, it would do so only on one of the two alternative grounds alleged. In consequence, a failure on that issue if it were tried here would not settle the matrimonial differences of the parties because the wife would then have to go to France if she wished to continue on the other issue. I cannot myself imagine anything more inconvenient or anything which would be such a misfortune for the wife herself. In all the circumstances of the case, we consider that the wife should not be allowed to reopen this issue, with the result that, in accordance with our judgments, the appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Charles Russell & Co.* (for the wife); *Peacock & Goddard* (for the husband).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

SACHS *v.* MIKLOS AND OTHERS.

[COURT OF APPEAL (Lord Goddard, C.J., Tucker, L.J., and Jenkins, J.), December 15, 16, 17, 1947.]

Agency—Agency of necessity—Gratuitous bailee—Sale of bailed goods—Instructions unobtainable.

Damages—Measure of damages—Detinue and conversion—Gratuitous bailee—Notification to bailor of intention to terminate bailment—Instructions unobtainable—Sale without instructions—Value of goods—Date at which assessable—Knowledge or supposed knowledge of bailor.

In 1940 a bailor arranged with a bailee that the latter should gratuitously store his furniture in her house. In 1944 the bailee, wishing to terminate the bailment, wrote to the bailor at his supposed address, requesting him to remove the furniture. Receiving no reply, she wrote once more stating her intention, failing instructions, to sell the furniture, and again received no reply. Attempts were also made by telephone to get in touch with the bailor, but without result. In July, 1944, the furniture was sold by auction and realised £13. In an action for detinue and conversion, commenced in 1946, the bailor claimed the current value of the furniture, which was assessed at £115 :—

HELD : (i) the bailee was not an agent of necessity and in selling the furniture was guilty of conversion.

(ii) while the measure of damages for both conversion and detinue was usually the value of the goods at the date when judgment was given, nevertheless, if the bailor knew or ought to have known at an earlier date that the conversion had taken place or was about to take place and took no immediate steps to recover the goods, the measure of damages was the value of the goods at the date of his knowledge or supposed knowledge and not the date when judgment was given.

Rosenthal v. *Alderton & Sons, Ltd.*, ([1946] 1 All E.R. 583), *distinguished.*

[AS TO AGENCY OF NECESSITY, see HALSBURY, Hailsham Edn., Vol. 1, p. 207, para. 364 ; and FOR CASES, see DIGEST, Vol. 1, p. 293 and Supp.

AS TO MEASURE OF DAMAGES IN DETINUE AND CONVERSION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 138-140, paras. 178, 179 ; and FOR CASES, see DIGEST, Vol. 43, pp. 519-526, Nos. *574-630*.]

Cases referred to :

(1) *Gwilliam* v. *Twist*, [1895] 2 Q.B. 84 ; 64 L.J.Q.B. 474 ; 72 L.T. 579 ; 59 J.P. 484 ; 1 Digest 390, *941*.

(2) *Jebara* v. *Ottoman Bank*, [1927] 2 K.B. 254 ; 96 L.J.K.B. 581 ; 137 L.T. 101 ; *on appeal sub nom. Ottoman Bank* v. *Jebara*, [1928] A.C. 269 ; Digest Supp.

(3) *Rosenthal* v. *Alderton & Sons, Ltd.*, [1946] 1 All E.R. 583 ; [1946] K.B. 374 ; 115 L.J.K.B. 215 ; 174 L.T. 214 ; Digest Supp.

APPEAL by the plaintiff, Mr. Sachs, from an order of His Honour JUDGE HARGREAVES, made at West London County Court and dated Apr. 28, 1947, dismissing a claim for damages and conversion against the first and second defendants, Mr. and Mrs. Miklos, and the third defendants, Messrs. Coe, a firm of auctioneers. The learned judge held that, in selling, without the plaintiff's instructions, the plaintiff's furniture (which they held as gratuitous bailees), Mr. and Mrs. Miklos were acting as agents of necessity, and, therefore, had an implied authority to sell, The appeal was allowed and the case remitted to the county court judge.

Goodenday for the plaintiff.

Quintin Hogg for the first and second defendants.

Malcolm Wright for the third defendants.

LORD GODDARD, C.J. : This is an appeal from a judgment of His Honour JUDGE HARGREAVES in an action in detinue and conversion brought by the plaintiff against the defendants, Mr. and Mrs. Miklos and Messrs. Coe, a firm of auctioneers, for having wrongfully converted certain furniture left by the plaintiff with the defendant, Mrs. Miklos, before her marriage and accepted by her for keeping as a gratuitous bailee. The facts of the case are that the plaintiff, who knew Mrs. Miklos before she married her present husband, was possessed of some dining-room furniture, which, in 1940, was of no great value. At some time in that year he persuaded Mrs. Miklos, who was then keeping a boarding house at 62, Drayton Gardens, to store this furniture. He took the precaution of getting her to sign a document, dated Jan. 27, 1941, in these terms: "I, the undersigned, hereby confirm that I have in my house stored, without any charges, the following mentioned complete dining room suite, which is the property of Mr. Morris Sachs of 62, Blomfield Road, London, W.9, and stays in my residence for his disposal when required." Then there is a schedule of the furniture. In 1941 the plaintiff, who had been in the habit of visiting the Miklos' house ceased to do so, and A to all appearances he took no further interest in his furniture. He did not even keep Mrs. Miklos informed of his various changes of address. In 1943 the house was damaged by enemy action, and, as a result, the room in which the furniture was stored was required for letting. Nobody knew where the plaintiff had gone. Two letters were written by Mr. Miklos to an address supplied by the plaintiff's bank and attempts were made to communicate with him by telephone, but no information could be obtained of his whereabouts. B Eventually, Mr. and Mrs. Miklos sent the furniture to Messrs. Coe to be sold by auction and it was sold in July, 1944.

The question that arises is whether they had any legal right to sell the furniture. The learned judge held that in the circumstances they became agents of necessity and, therefore, had an implied authority to sell. Counsel for the plaintiff has satisfied me that they cannot possibly be held to be agents C of necessity. Agents of necessity, until very modern times, were confined to two classes of persons, those who accepted bills of exchange for the honour of the payee and masters of ships who found themselves in foreign parts and unable to get immediate instructions from their owners when they wanted money for unlooked-for expenses and so forth. They then had power to pledge, sell, or hypothecate the ship, and, in some cases, to deal with the cargo as agents of necessity. As recently as 1895, LORD ESHER in *Gwilliam* v. *Twist* (1) D expressed considerable doubt whether it was possible to enlarge the classes of person who could be regarded as agents of necessity, but the courts have not found any difficulty in applying the doctrine where a necessity, which means an emergency, has arisen in the case of carriers by land. When it becomes impossible, or commercially impossible, or extraordinarily difficult (as may happen in the case of a strike or breakdown of communications), for a carrier to communicate with the owner of goods, there is no reason why he E should not be entitled to sell or dispose of them in the same way as a master of a ship, subject to this, that I know of no case in which the doctrine of the agency of necessity has been applied to carriers by land except where the goods are perishable or where they are in a somewhat similar category, *e.g.*, livestock, which have to be looked after, fed and watered. I think it is clear from the judgment of SCRUTTON, L.J., in *Jebara* v. *Ottoman Bank* (2) that the courts should be slow to increase the number of classes of people who can F be looked on as agents of necessity. They are selling or disposing of other people's goods without the authority of the owners, and certain it is that they have never been entitled so to act unless there is a real emergency.

In this case, whatever else there may have been, there was no emergency. It was not a case of the house being destroyed and the furniture left exposed to thieves and the weather. There was nothing perishable here in the sense G in which that term is used when applied to goods. The fact was that Mr. and Mrs. Miklos wanted to get rid of this furniture which was in their way. If they were not entitled to sell as agents of necessity, however hard it may be, I cannot avoid the conclusion that, in sending the property to the auction rooms for the auctioneers to sell, they were guilty of a conversion. They were selling the plaintiff's property without his authority.

I pause here to say that this case must go back to the county court judge H because, although he has found that Mr. and Mrs. Miklos sent letters to the plaintiff as well as telephoning to him, he has not found whether the plaintiff received the communications. The importance of that is this. If a gratuitous bailee writes to the bailor and says: "I am no longer willing to hold your property. Please remove it," and the bailor makes no answer and takes no step, and if that letter is followed up by another, which he receives, saying in effect: "As you have not answered my letter and taken any steps to remove your property, please understand that I shall sell it if you do not remove it or tell me what to do with it," and again there is no answer, it might be that a court could infer that the owner of the property was so disinterested in it that he was impliedly assenting to the sale. There are, of course, certain difficulties in the way of finding that because of the doctrine that silence does not give consent, but, for the reasons which I shall develop in a moment, the question of receipt or non-receipt of these letters has a much more important bearing on the question of the measure of damages in this case. So far as the sale or the sending of the goods for sale is concerned, much as I sympathise with the position in which Mr. and Mrs. Miklos found themselves, I feel myself constrained to hold that their action did amount to a conversion, and I can find nothing either in the pleadings or in the arguments which have been addressed to us which afford a justification for the sale. It follows that the auctioneers are also guilty of a conversion. That is one of the risks of their profession.

We now come to the question of the measure of damages. That question did appear to present some difficulties and I do not think it can be satisfactorily determined until the county court judge has given his decision whether these letters were received. The position with regard to the money aspect was this. The goods realised in July, 1944, a net sum of something over £13. The sale took place at a time when prices for furniture were exceedingly depressed, owing to enemy bombing and the fact that the war was still continuing. Immediately hostilities ceased, when people were desperately anxious to buy furniture and none was being made, prices of second-hand furniture increased enormously, and this furniture has been found by the learned judge to be of the value of no less than £115. Are Mr. and Mrs. Miklos and the auctioneers liable for that amount ? Counsel for the plaintiff has relied principally on a recent case in this court *Rosenthal* v. *Alderton & Sons, Ltd.* (3). What that case lays down is, I think, correctly stated in the headnote ([1946] 1 K.B. 374) :

> In an action of detinue, the value of the goods to be paid by the defendant to the plaintiff in the event of the defendant failing to return the goods to the plaintiff must be assessed as at the date of the verdict or judgment in his favour and not at that of the defendant's refusal to return the goods, and the same principle applies whether the defendant has converted the goods by selling them or has refused to return them for some other reason.

That headnote states—in my opinion, rightly—that the measure of damages is the same in conversion as it is in detinue, except possibly where a defendant had the goods in his possession and could hand them over and would not do so, but there is one great distinction to be drawn between *Rosenthal's* case (3) and the present case. In *Rosenthal's* case (3) there was no question of the defendant wanting to bring the bailment to an end and doing his best to find the bailor and asking him to remove them. The plaintiff had surrendered his lease to the defendants and the defendants had agreed that he should leave his barber's plant and fixtures on the premises and that they would take care of them. They did not take care of them but sold them, and when the plaintiff came back from the war he asked for his plant and fixtures and could not get them. I think the matter can be clarified in this way without in any way impinging on the decision in *Rosenthal's* case (3). The value of the goods converted at the time of their conversion was £13, but it does not follow that that £13 is the extent of the plaintiff's loss. The question is : What is the plaintiff's loss ? What damage has he suffered by the wrongful act of the defendants ? If that is kept in mind, this case may well become clear when the county court judge has found one way or another whether the plaintiff received those letters or not. If the plaintiff knew or ought to have known in July, 1944, that, if he did not remove those goods, Mr. and Mrs. Miklos intended to sell them, then, it seems to me, this great rise in value which has taken place since is not damage which he can recover, because it is damage which flowed, not from the wrongful act of Mr. and Mrs. Miklos, but from his own act. If he did not know or ought to have known that his goods had been sold and did not find out that his goods had been sold until January, 1946, then, it seems to me, however unfortunate it may be for the defendants, that it is impossible to say that he is not entitled to recover the value of the goods at that time. He can in that case say : "If you had not committed this tort I should be in possession of property worth £115. I have, therefore, lost that £115. Pay me that damage." The case will be remitted to the county court judge for him to find whether or not those letters were received by the plaintiff or came to his knowledge. If he finds that those letters were received, then he has to assess the damages on the footing I have indicated. If, on the other hand, he finds that the letters were not received and that the plaintiff did not know, and ought not to have known, of the sale, he must assess damages on the other footing. He must also, I think, consider this point. It is clear that the plaintiff knew of this sale in January, 1946. It is equally clear that he did not begin his action until January, 1947. If the county court judge should find that there has been an undue delay in bringing the action and that the result of that undue delay has been a rise in price between January, 1946, and January, 1947, then that allowance must be made. The appeal will be allowed and a new trial will be ordered on the points that I have mentioned.

TUCKER, L.J.: I agree.

JENKINS, J.: I agree.

Appeal allowed.

Solicitors: *Alexander Fine, Hawkins & Co.* (for the plaintiff); *Trower, Still & Keeling* (for the first and second defendants); *MacDonald & Stacey* (for the third defendants).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Considered. LANGFORD PROPERTY CO., LTD. *v.* GOLDRICH. [1948] 2 All E.R. 439.

Followed. LANGFORD PROP. CO. *v.* GOLDRICH. [1948] 2 K. B. 423

SELWYN *v.* HAMILL.

[COURT OF APPEAL (Tucker and Bucknill, L.JJ., and Roxburgh, J.) December 5, 1947.]

Landlord and Tenant—Rent restriction—Possession—House required by landlord—Suitable alternative accommodation—Two dwelling-houses under same roof, but separated by third dwelling-house—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *s.* 3 (3) (*b*).

Practice—New trial—Refusal—Impossibility of inferior court coming to decision different from that of appellate tribunal.

A landlord, who had become landlord by purchase in 1945, claimed possession of a controlled dwelling-house, offering the tenant alternative accommodation consisting of a living room, kitchen and bathroom in one dwelling-house and a bedroom in a separate dwelling-house, the two premises, although under the same roof, being divided by a third dwelling-house.

HELD: (i) the accommodation offered did not consist "of premises to be let as a separate dwelling" as required by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (3) (*b*), and was not, therefore, "suitable" within the meaning of the section.

Sheehan v. *Cutler* ([1946] K.B. 339) *applied.*

(ii) as there was no evidence on which any court could hold that the living-room, kitchen and bathroom alone constituted suitable alternative accommodation, a new trial would not be ordered.

[AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-334, paras. 392-399; and FOR CASES, see DIGEST, Vol. 31, pp. 576-584, Nos. *7256-7330.*]

Cases referred to:

(1) *Sheehan* v. *Cutler*, [1946] K.B. 339; 115 L.J.K.B. 337; 62 T.L.R. 261; 174 L.T. 411; Digest Supp.

(2) *Davies* v. *Warwick*, [1943] 1 All E.R. 309; [1943] K.B. 329; 112 L.J.K.B. 245; 169 L.T. 130; Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE ARCHER, K.C., made at Brighton and Lewes County Court on Apr. 17, 1947, by which possession of a dwelling-house was granted to the landlord. The Court of Appeal now held that the alternative accommodation offered to the tenant did not comprise a "separate dwelling" within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (3) (*b*), and, therefore, was not "suitable." The facts appear in the judgment of TUCKER, L.J.

Distinguished. LANGFORD PROPERTY CO., LTD. *v.* GOLDRICH. [1949] 1 All E.R. 402.

J. C. Lawrence for the tenant.
Gumbel for the landlord.

TUCKER, L.J.: This is an appeal by the tenant from an order, dated Apr. 17, 1947, made by His Honour JUDGE ARCHER whereby he ordered that possession of certain premises, namely, 4, Roedean Terrace, Brighton, should be given up on Oct. 17, 1947, the learned judge being satisfied that suitable alternative accommodation had been offered to the tenant. At the rear of the house, 4, Roedean Terrace, there are some buildings which, the evidence shows, were constructed by the Admiralty and are now equipped for living in. The one at the rear of No. 4 is called 4A, and 2A and 3A are at the rear of 3, Roedean Terrace. The landlord having purchased the premises in 1945, it was necessary for her to satisfy the court that suitable alternative accommodation was available for the tenant, or would be available for him when the order took effect. By the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (3), it is provided that, in the absence of the certificate referred to in sub-s. (2), the " . . . accommodation shall be deemed to be suitable if it consists either—(*a*) of a dwelling-house to which the principal Acts apply; or (*b*) of premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply, and is, in the opinion of the court, reasonably suitable to the needs of the tenant and his family as regards proximity to place of work . . ." Section 3 (3), which has been held to mean that accommodation which does not come within this description is not reasonably suitable, therefore, requires that the alternative accommodation must consist of a dwelling-house to which the principal Acts apply or of premises to be let as a separate dwelling. The point taken by the tenant is that the alternative accommodation which was offered consisted of No. 4A and No. 2A which, although under the same roof, are separated by 3A, and so, the tenant says, taken together they cannot be regarded as a separate dwelling-house. In support of that proposition he refers us to *Sheehan* v. *Cutler* (1) in which the headnote says (62 T.L.R. 261):

> A landlord, who claimed possession of premises, offered to the tenant as alternative accommodation a tenancy of another house and, in addition, a tenancy of one room in the house of which he claimed possession. HELD, that sub-clauses (*a*) and (*b*) of s. 3 (3) of the Act of 1933 each contemplated a separate dwelling-house, and that the requirements of the sub-section were not complied with by an offer of accommodation in two different houses.

The headnote correctly sets out the results of the judgments on this part of the case and I do not think it is necessary for me to refer to those judgments. The only question for our decision in the present case is whether on the evidence it can possibly be said that No. 2A and No. 4A constitute a separate dwelling. I think it is impossible to say that they can. They are clearly two separate dwellings. What was being offered was a living room, kitchen and bathroom, etc., in one house, No. 4A, and a bedroom in a separate house, No. 2A, these two premises being divided by No. 3A. On the facts, the case seems to me clearly to come within the decision of *Sheehan* v. *Cutler* (1).

It is said by counsel for the landlord that, this point not having been taken in the court below and the judge's attention not having been drawn to *Sheehan* v. *Cutler* (1), we ought to send the case back for a new trial to give the judge an opportunity of considering whether No. 4A alone might not constitute reasonably suitable accommodation. As it appears clear from the judge's note that this point, which is a pure point of law, was never taken in the court below, if there were any possibility that, on a further investigation of the facts, the judge might come to the conclusion that No. 4A was reasonably suitable accommodation, I should certainly have been disposed to send the case back for a new trial because it is most unsatisfactory that cases should be dealt with without the tribunal to which jurisdiction is given under these Acts having had an opportunity of investigating the facts fully and properly. On the facts of this case, however, I am driven to the conclusion that it would be impossible as a matter of law for the judge to find that No. 4A by itself was reasonably suitable accommodation for this family which consists of an elderly invalid lady and two grown-up daughters who are working. The living-room which would have to be used as a bed-sittingroom and kitchen could not possibly be said to be accommodation which was reasonably suitable for these ladies. I, therefore, think that it would not be right to order a new trial and we are bound to allow this appeal.

The fact that this point was not taken in the court below, does not preclude the tenant from relying on it in this court, as was decided in *Davies* v. *Warwick* (2). In cases under the Rent Acts it is the duty of the court to be satisfied that all the requirements of the Acts have been fulfilled before an order for possession is made. If they have not been satisfied, the court has no jurisdiction to make the order. That is the result of *Davies* v. *Warwick* (2). Therefore, we are bound to take notice of this point when it is brought to our attention. Having regard to the fact that *Sheehan* v. *Cutler* (1) was not cited to the judge, this is a case in which I think that, although the appeal must be allowed, the tenant should not be allowed any costs.

BUCKNILL, L.J. : I agree. I would only add a few words on the point which counsel for the landlord raised, that the case should be sent back for a new trial. Before the judge can order possession, he must be satisfied that the alternative accommodation is reasonably suitable to the needs of the tenant and his family, and, therefore, the size of these rooms in No. 4A are important, bearing in mind that three grown-up people are to live in them, one being a very old lady and sick. The kitchen, which contains the bath, is 8ft. 10ins. by 9ft. 3ins. long and seems to be a very small room in which to eat, and the bed-room in which these three ladies are to sleep is 11ft. 10ins. broad by 13ft. long. To suggest that in a room of that size there could be three beds, a dining-room table, the necessary chairs and chest-of-drawers—incidentally, there are no cupboards in the room—seems to me to be quite ridiculous. No reasonable judge could possibly hold that No. 4A by itself was reasonably suitable in view of the extent and needs of this family. I also agree that no costs should be given to the tenant for the reasons given by my Lord.

ROXBURGH, J. : I agree.

Appeal allowed.

Solicitors : *Reynolds & Co.* (for the tenant) ; *Gordon Gardiner, Carpenter & Co.*, agents for *F. H. Carpenter & Oldham*, Brighton (for the landlord).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

R. *v.* COUNTY OF LONDON QUARTER SESSIONS. *Ex parte* COMMISSIONER OF METROPOLITAN POLICE.

[King's Bench Division (Lord Goddard, C.J., Humphreys and Atkinson, JJ.), December 11, 19, 1947.]

Magistrates—Summary jurisdiction—Appeal—Conviction—"Blemishing the peace"—Order that defendant should enter into recognizance—Stat. (1360-1) 34 *Edw. III, c.* 1.

A magistrate's order binding over a defendant under stat. (1360-1) 34 Edw. III, c. 1, to be of good behaviour does not involve a conviction, and, therefore, there is no right of appeal therefrom to quarter sessions.

So *held* by Lord Goddard, C.J., and Humphreys, J. (Atkinson, J., *dissentiente*).

[As to the Right of Appeal to Quarter Sessions from Decisions of Magistrates, see HALSBURY, Hailsham Edn., Vol. 21, pp. 699-700 ; and for Cases, see DIGEST, Vol. 33, pp. 390-392, Nos. *1011-1025*.

For stat. (1360-1) 34 Edw. III, c. 1, see HALSBURY'S STATUTES, Vol. 11, p. 212.]

Cases referred to :

(1) *Lansbury* v. *Riley*, [1914] 3 K.B. 229 ; 83 L.J.K.B. 1226 ; 109 L.T. 546 ; 77 J.P. 440 ; 23 Cox, C.C. 582 ; 33 Digest 366, *755*.

(2) *Willes* v. *Bridger*, (1819), 2 B. & Ald. 278 ; 106 E.R. 368 ; 33 Digest 365, *746*.

(3) *Ex parte Davis*, (1871), 24 L.T. 547 ; 35 J.P. 551 ; 33 Digest 367, *765*.

(4) *Ex parte Seymour* v. *Davitt*, (1883), 15 Cox, C.C. 242 ; 14 Digest 494 (Ir.).

MOTION for an order of prohibition.

The defendant was charged on an information brought before a metropolitan magistrate with acting in a manner likely to cause a breach of the peace by eavesdropping, contrary to stat. (1360-1) 34 Edw. III, c. 1. The magistrate struck the words "by eavesdropping" out of the charge, but found that the defendant had "acted in a manner whereby the peace is blemished," and ordered him to find sufficient surety for his good behaviour during the ensuing twelve months by entering into his own recognizance in the sum of £25. The defendant appealed against the order to London Quarter Sessions. The Commissioner of Metropolitan Police moved for an order of prohibition prohibiting the justices from hearing the appeal.

Melford Stevenson, K.C., and *Vernon Gattie* for the Commissioner of Police. *Slade, K.C.*, and *Cridlan* for the defendant.

Cur. adv. vult.

Dec. 19. The following judgments were read.

LORD GODDARD, C.J.: In this case the applicant moved for an order of prohibition addressed to the appeals committee of the County of London Quarter Sessions prohibiting them from hearing an appeal by Stanley Arthur Williams against an order made by a metropolitan magistrate requiring him to enter into his own recognizance in the sum of £25 to be of good behaviour for a period of 12 months. The said Stanley Arthur Williams gave notice of appeal to the quarter sessions against this order, and entered into a recognizance to prosecute it, and the ground on which the order is moved is that the magistrate's order is not a conviction, and, consequently, no appeal lies.

It is elementary law that, where an order is made or judgment given by a court of competent jurisdiction, an appeal will not lie to any court unless it is expressly given by statute, and with regard to orders made by magistrates acting as a court of summary jurisdiction there are three statutes conferring and regulating the right of appeal from their decisions. The first is the Summary Jurisdiction Act, 1879, s. 19, which gives a right of appeal to a person adjudged by a conviction or order of a court of summary jurisdiction to be imprisoned without the option of a fine, provided he did not plead Guilty or admit the truth of the information or complaint. Secondly, by the Criminal Justice Administration Act, 1914, s. 37, any person aggrieved by any conviction of a court of summary jurisdiction who did not plead Guilty may appeal, even though sentence of imprisonment is not passed. Finally, by the Criminal Justice Act, 1925, s. 25, a right of appeal against his sentence is given to a person although he pleaded Guilty. In each case, therefore, it is necessary that there should be a conviction, and no provision is anywhere to be found giving a right of appeal in criminal matters against an order of justices who are not sitting as a court of summary jurisdiction, so it is clear that the only question for the court in this case is whether the order of the learned magistrate was a conviction.

The facts, so far as they need be stated for the purposes of this case (and I emphasise that we are not here concerned whether the learned magistrate came to a right or a wrong decision), are that Williams was brought before the magistrate on a charge that he was found acting in a manner likely to cause a breach of the peace by eavesdropping contrary to the stat. (1360-1) 34 Edw. III, c. 1. The magistrate, having heard the evidence, struck the words "by eavesdropping" out of the charge, as he did not consider that Williams had been acting in a manner which could fairly be so described, but nevertheless he considered that it was a case in which he had been acting in a manner calculated to blemish the peace, to use the expression found in the statute, and, accordingly, bound him over, the order which has been drawn up being in these terms:

> Whereas Stanley Arthur Williams is brought before me this 8th day of August, 1947, pursuant to the provisions of 34 Edw. III, and whereas I find him to be a person of good fame but who has acted in a manner whereby the peace is blemished, I therefore by virtue of the powers conferred on me by statute above-mentioned do order him to find sufficient surety for his good behaviour towards the King and his people, that is to say, to enter into his own recognizance in the sum of £25 to be of good behaviour during the period of 12 months now next ensuing.

This order is made, as its terms clearly show under the statute 34 Edw. III, c. 1, which empowers justices of the peace, among other things, "to restrain the offenders, rioters, and all other barrators, and to pursue, arrest, take and chastise them according to their trespass or offence . . . and to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people, and the other duly to punish; to the intent that the people be not by such rioters or rebels troubled nor endamaged nor the peace blemished . . ." The argument of counsel who appeared to oppose the order was that, although he admitted that a justice could bind to good behaviour a person who was suspected of a breach of the peace or one who was thought to be likely to cause a breach of the peace, yet in this case it must be taken that the magistrate convicted Williams of some offence and it must be one of the offences mentioned in the statute. He founded his argument on the words in the order that the magistrate finds Williams to be a person who has acted in a manner whereby the peace is blemished.

In my opinion, the Act of 34 Edward III does not create any offence. It deals with people who break or are likely to break the peace or cause a breach of the peace. The words "rioters" or "barrators" in the Act appear to me only to mean people who create a disturbance or brawlers. They do not, in my opinion, refer either to the offence which has become known as barratry or to the common law offence of riot. Justices and constables always had the power to arrest and deal with persons taking part in what is technically described as a riot, which needs the presence of three or more persons acting tumultuously. No doubt, the Act, as is the case with so many mediaeval statutes, is obscurely worded. It is curious, among other things, that not only the English translation, which appears in the Statutes at Large, but many writers and commentators, including Lord Coke and the authors of Dalton's Countrey Justice and Burn's Justice of the Peace, all insert the word "not" before the words "good fame" although a negative does not appear in the Norman French, the language in which it is inscribed on the Statute Roll. The author of Burn's Justice of the Peace, which is a work of great authority, explains this by saying (Vol. 5, p. 756) that the words "that be not of good fame" mean "that be defamed and justly suspected that they intend to break the peace," the defaming, apparently, consisting of the complaint to the justice, and there is clear authority in *Lansbury* v. *Riley* (1), that, whatever the meaning may be, the word "not" is immaterial and that justices can bind over whether the person is or is not of good fame. It is said of this statute in Burn's Justice of the Peace, Vol. 5, at p. 755, that "whatever the natural and obvious sense of it may be when compared with the history and circumstances of those times" (that is, the time when it was passed) "it is certain that it hath been carried much further by construction, and the purport of it hath been extended by degrees, until at length there is scarcely any other statute which hath received such a largeness of interpretation." This is not at all an uncommon experience when one is dealing with statutes passed in the reigns of the Plantaganets. To take two instances, the Statutes of Conspiracies and the Statutes of Treasons have, by judicial construction through the centuries, been given far wider interpretation than that which their original words would seem to bear, and in the case of the present statute there is a consensus of opinion to be found in the books extending back for some 400 years that this Act, which was described by both Coke and Blackstone as an Act for preventive justice, does enable justices at their discretion to bind over a man, not because he has committed an offence, but because they think from his behaviour he may himself commit or cause others to commit offences against the King's peace. It is abundantly clear that for several centuries justices have bound by recognizances persons whose conduct they consider mischievous or suspicious, but which could not, by any stretch of imagination, amount to a criminal offence for which they could have been indicted.

In Dalton's Countrey Justice, a work of the highest authority, a catalogue is given, not intended, I think, to be exhaustive, of a large number of instances which would justify sureties for good behaviour being taken. He starts with rioters and barrators, and goes on to such cases as nightwalkers and eavesdroppers, suspected persons who live idly and yet fare well, or are well apparelled having nothing whereon to live, and common gamesters. None of these was ever an indictable offence. Eavesdroppers are first defined in Termes de la Ley as "such as stand under walls or windows by night or day to hear news, and to carry them to others, to make strife and debate amongst their neighbours." Though it is said in RUSSELL ON CRIMES that eavesdropping was dealt with in the Sheriff's Tourn and Courts Leet as an offence, so far as I am aware no instance can be found in the books of any indictment being preferred for this offence at common law. It follows, therefore, that nobody can be convicted of eavesdropping or nightwalking or of many of the other matters which are mentioned by DALTON, although, no doubt, in modern times A the necessity for good government in towns and cities has caused the legislature to pass Acts which make what in earlier days were regarded as no more than bad behaviour, criminal offences, and it is necessary to bear in mind that, in the present case which we are considering, no charge of having committed any offence against a statute, such as one of the Metropolitan Police Acts, was preferred. Let it be admitted at once that, if a court of summary jurisdiction convicts a person of an alleged offence, which, however, is one not known to B the law, the convicted person would have a right of appeal to quarter sessions, and he may also take proceedings to have the conviction brought up by *certiorari*, but in the present case I cannot agree that the order of the magistrate in any way amounts to a conviction. It is an exercise of the powers which have been exercised by justices for many centuries as a measure of preventive justice to take security from persons whose behaviour leads them to suspect that they will cause a breach of the peace, although up to the time they are brought C before the court they have not done anything which could form the subject of a criminal charge.

In this connection, I may refer to *Willes* v. *Bridger* (2). That was an action for false imprisonment brought against a justice who had required the plaintiff to find sureties for keeping the peace and had committed him to prison in default of his finding sureties for two years, and it was argued that a justice had no power D to bind over at his discretion, but could only take sureties for the appearance of the person bound to appear at the next sessions for the county. The court rejected that contention. The LORD CHIEF JUSTICE (afterwards LORD TENTERDEN) said (2 B. & Ald. 286):

> The authority of a justice of the peace to require, upon due complaint made to him in his judicial character, sureties for the keeping of the peace, and to commit a person to prison for want of such sureties, is not nor could be denied ; . . .

E There is no suggestion to be found in that case, or in any other, that before sureties can be required a person must have committed a criminal offence or that by ordering him to enter into sureties the court either expressly or impliedly convicts him of a criminal offence. Where a magistrate merely requires a person brought before him, not for having committed a criminal offence, but for having acted in a way that may cause a breach of the peace F to enter into a recognizance, there is no pretence for saying that he has convicted him of anything. He is merely taking a precaution against the defendant committing an offence. It is true that the order in this case states that Williams is a person who has acted in a manner whereby the peace is blemished, and not "may be blemished," but that does not seem to me to be in any sense a fatal objection. There is no such offence known to the law as blemishing the peace. Therefore, the order does not recite that Williams G has committed an offence, and by offence I mean an offence known to the law for which a person can be brought before a court and punished.

One small matter which I may mention as showing that the taking of a recognizance in these circumstances and under this Act does not amount to a conviction is that it appears both from DALTON and BURN and other works of authority that it can be ordered by one justice alone. Now, the jurisdiction of justices out of session to convict of criminal offences is purely statutory. H Justices out of session could never try a criminal case and convict a person except in pursuance of a statute giving them express power to deal with that particular offence, and justices sitting as a court of criminal jurisdiction quite apart from and before the Summary Jurisdiction Acts could never act alone. The court must always have consisted, as it must today, of two justices. Stipendiary and police magistrates are, of course, an exception, but they are given the powers of two justices, yet there seems no doubt whatever that over a very long period of time powers under this statute of Edward III have been exercised by one justice and the right of one justice to take a recognizance under that statute has never been denied. I may, perhaps, mention, though further authority is not needed, that the statute is considered in Coke's Fourth Institute. After dealing with the first part of the statute Lord Coke says (p. 180): " . . . now followeth an express authority given to the justices, for prevention of such offences before they be done, *viz.*" and then he quotes the material words beginning with: " And to take of all them that be not of good fame," again showing that this is a provision, not for convicting persons, but merely for taking sureties for their good behaviour. It is also to be noticed that by the statutes relating to summary jurisdiction at the present day all convictions, if drawn up, must be in statutory form. Of course, if a court did convict a person, he could not be deprived of his right of appeal because the conviction was not drawn up in the statutory form, but the fact that the statutory form has not been used here, when the case has been dealt with by a metropolitan magistrate of great experience, is a clear indication that the magistrate did not think he was dealing with a case which would result in a conviction, and by his order had no intention of convicting Williams. We are not concerned with the question whether or not it would be desirable to allow an appeal in a case of this description. We are only concerned to see whether there is any statutory provision whereby an appeal is granted in such a case, and as, in my opinion, the order here is in no sense a conviction, it follows that Williams who was required to enter into a recognizance cannot appeal. The order of prohibition will, accordingly, go.

HUMPHREYS, J.: I am of the same opinion. The suggested answer to this application for an order of prohibition is that on Aug. 8, 1947, at Bow Street police court Stanley Arthur Williams was convicted in respect of an offence. If that is shown, he is entitled to appeal to quarter sessions by virtue of the Criminal Justice Administration Act, 1914, s. 37. Otherwise there is no right of appeal and the prohibition must go. The proper and usual way of proving that a person has been convicted of an offence is by the production of the statutory record of the conviction. It is provided by the Summary Jurisdiction Rules, 1915, r. 53, that a formal conviction is in a court of summary jurisdiction not to be drawn up unless it is required for an appeal or some other legal purpose, but, when it is necessary for such a purpose, the conviction must be in one of the forms set out in the schedule to the rules. Rule 3 provides for the keeping by the clerk of the court of a register, and by r. 6 the court, on convicting a person of an offence, is required to show clearly by the entries in the register relating to the case of what offence it convicts the defendant. No document remotely resembling a record of conviction as set out in the schedule and no copy of an entry in the register of the court has been produced in this case, but the order made by the court has been produced to us attached to an affidavit by the learned magistrate. In my judgment, that order shows plainly that the defendant, Williams, was not convicted. If we are at liberty to regard the terms of the affidavit—and both sides have invited us to do so—it is manifest that the charge made against the defendant was not proved to the satisfaction of the magistrate. The order requires the defendant to enter into his own recognizance in the sum of £25 to be of good behaviour for 12 months. Why are we to assume that there was a conviction of an offence by a magistrate who tells us that " in the circumstances the evidence of the conduct of the defendant did not appear to prove any punishable offence " and whose order is completely silent as to the commission of any offence? If the defendant were in a position to argue that it is only on a conviction that a person can be bound over to keep the peace the position would be understandable, but *Ex parte Davis* (3) is a direct authority to the contrary. In that case the justices dismissed a charge of assault and gave the defendant a certificate to that effect, but they required him to enter into a recognizance to keep the peace. The court approved their action, Blackburn, J., observing that the course adopted was only a precautionary proceeding to prevent a breach of the peace. Pressed to say what was the offence of which the defendant had been convicted, counsel relied on the words in the order describing his client as " a person who has acted in a manner whereby the peace is blemished," arguing that those words indicated that the defendant had been guilty of a breach of the peace—contrary to the provisions of the stat. 34 Edw. III c. 1. Without stopping to discuss the exact meaning of the expression " blemishing the peace," it is sufficient to point out that the statute creates no such offence, but merely authorises justices of the peace to take sureties of some and to punish others " to the intent that the people be not . . . troubled nor endamaged nor the peace blemished."

It is, in my opinion, too late in 1947 to cast doubts on the series of decisions, ancient and modern, which explain the purpose and effect of this venerable statute. It was one of many statutes defining the duties of justices of the peace, an office first formally instituted by the same monarch in the year 1327. A It gave to them extensive powers of arrest and punishment of malefactors. It confirmed to them the duty of hearing and determining all manner of felonies and trespasses done in the county, and, in particular, authorised the taking of sureties for their good behaviour towards the King and his people from certain persons. Whether Williams was a person whose conduct justified the magistrate in requiring him to enter into recognizances is a question which does not arise in these proceedings. The magistrate considered that his conduct B was such as to endanger the peace and to give just ground for apprehension that the peace might be endangered in the future, which is sufficient. In my judgment, the magistrate had ample jurisdiction, derived from his commission as a justice of the peace, to require surety for good behaviour in this case quite apart from the statute: see *Ex parte Seymour* v. *Davitt* (4) and *Lansbury* v. *Riley* (1). It would appear from his affidavit, and it must be presumed that the magistrate acted under both powers. However that may be, I am satisfied C that there was here no conviction of any offence, and, therefore, no right of appeal. I would grant the order of prohibition asked for.

ATKINSON, J.: The question in this case is whether Stanley Arthur Williams has a right of appeal against a finding and an order made by a metropolitan police magistrate. The answer depends on whether that finding and order amount to a conviction. A conviction is an act of a court of competent D jurisdiction adjudging a person to be guilty of a punishable offence. The sentence or resulting order is something distinct from the conviction. On Aug. 8, 1947, Williams appeared before the court to answer a charge that he, on Aug. 7, was found acting in a manner likely to cause a breach of the peace by eavesdropping at the Public Trustee's Office, contrary to the stat. 34 Edw. III, c. 1, that is to say, that he had done something which was forbidden by that Act. After hearing the evidence, the magistrate amended the complaint E by striking out the two words " by eavesdropping." The charge then was that Williams had been found acting in a manner likely to cause a breach of the peace, contrary to the said statute. This clearly remained a charge of an offence against that statute. The learned magistrate, according to his affidavit, found that the conduct of Williams, as proved before him, was such as to endanger the peace, and, further, to give just ground for apprehension that the peace F might be endangered in the future. In other words, he found the amended charge proved. The order then made contained no reference to apprehension that the peace might be endangered in future. That had not formed part of the charge. It seems plain that the magistrate used the word " blemished " as meaning the same thing as " endangered," and used it because that is the word used in the statute. Be that as it may, there was an order recording a finding that Williams had acted in a manner either forbidden by the provisions G of the stat. 34 Edw. III, c. 1, or punishable under those provisions. In my opinion, that was a conviction, and a conviction of something for which, but for his good fame, Williams could have been sent to prison. A conviction is none the less a conviction because the ensuing penalty is not imprisonment or fine, but the finding of sureties for good behaviour. If Williams had not been a person of good fame and had been sent to prison, could it have been said that he had not been convicted of anything ? I, of course, accept without H reservation that orders may be made under 34 Edw. III, c. 1, in cases where nothing has, in fact, been done by the person involved when there is evidence of an intention to do something which may offend against the peace. A meeting may be advertised by a man which the police think will in all probability lead to breaches of the peace. A much-advertised fight was once forbidden for that reason, but the statute is not confined to cases of mere intention. It also gives power to deal with actual " offenders, rioters, and all other barators, and to pursue, arrest, take, and chastise them according to their trespass or offence " and to take of them sufficient surety for their good behaviour. If authority be needed for that, I find it in AVORY, J.'s judgment in *Lansbury* v. *Riley* (1) where, having read the words giving power to bind over, he said ([1914] 3 K.B. 236) :

> Those last words clearly include all the persons who are mentioned in the first part of the section. I think, therefore, that the power to bind over applies to all persons who come within the description of "offenders rioters and all other barators."

If there is a finding of fact that a man is an offender or a rioter within that Act, it seems to me that he has been found Guilty of an offence.

It is unnecessary to enquire whether conduct tending to endanger the peace was or was not an offence before that Act. Whether it was or was not, that Act clearly imposed punishment for such conduct. The finding that a person has been guilty of such conduct at once exposes him to the risk of punishment, and such a finding must, in my view, be a conviction of something which the law regards as an offence and punishes accordingly. A charge was made against Williams of doing something contrary to the Act. He was found Guilty on that charge, and dealt with accordingly. He was ordered to give surety for good behaviour, not because there was evidence of mere intention to offend in future, but because he had been found to have been guilty of conduct which endangered the peace and for which he could be punished. I think that was a conviction, and this order of prohibition should be discharged.

Order for prohibition granted.

Solicitors : *The Solicitor for the Metropolitan Police* (for the Commissioner of Police) ; *Hamlins, Grammer and Hamlin* (for the defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Reversed in part. C.A. [1949] 1 All E.R. 701.

THE SOBIESKI.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), February 3, October 21, 22, 23, November 10, 1947.]

Shipping—Collision—Ship in convoy, escorted by naval escort, and vessel on crossing course—Escort vessels equipped with radar and linked with convoy by radio-telephone communication—Failure of senior naval officer to warn convoy—Liability for negligence.

In the early morning of Apr. 13, 1945, S.S. Esperance and S.S. Sobieski collided in the English Channel. The Esperance, having been detached from an up-channel convoy, was making her way, in dense fog, towards the Nab Tower in order to enter the Solent. The Sobieski was the commodore ship of a fast two-ship convoy proceeding from the Solent to Havre with troops and escorted by five naval craft in command of the senior escort officer, L., who was on board H.M.C.S. Loch Alvie. The escort vessels were fitted with radar and the Sobieski was not, but the Sobieski and the other vessel in the convoy and each of the escort vessels were linked by radio-telephone communication. It was the duty of escorts, besides giving the convoy protection against enemy attack, to keep a radar watch for surface vessels which might involve the units of the convoy in the risk of collision, and it was the practice for the senior naval officer to advise the commodore of any alteration of course which he might consider necessary to avoid crossing traffic. After the escorts joined the Sobieski's convoy and about twenty minutes before the collision, the Loch Alvie's radar picked up a surface vessel, unquestionably the Esperance, and, after further reports of its movements, L. formed the view that there was a probability that it would be necessary to advise the Sobieski to make an alteration of course, but, before he had decided to communicate with the Sobieski, and about ten minutes before the collision, an enemy submarine was detected, and, in accordance with routine orders, L. went into the attack and, with other units, dropped depth charges, as a result of which the radar apparatus on the Loch Alvie was temporarily put out of action and remained so until after the collision. On discovering that his radar was out of action, L. sent a signal, about five minutes before the collision, to another unit of the escort asking whether the Sobieski was "standing into danger" and after a delay of several minutes was answered in the negative. In the meanwhile, the Sobieski, which had heard signals for a pilot (sent out, in fact, by the Esperance), had signalled by radio-telephone to the Loch Alvie asking whether the signals were from her, to which the Loch Avlie replied in the negative.

HELD: L., as a servant of the Crown, owed certain public duties to the Crown; by his negligence in not warning the Sobieski of the presence of the Esperance or to advise her to alter course before the attack on the submarine was delivered he had failed to perform those duties; and he was personally liable to the owners of the Sobieski for the damage sustained by them.

[AS TO TORTS BY SERVANTS OF THE CROWN, see HALSBURY, Hailsham Edn., Vol. 6, p. 489, para. 602; and FOR CASES, see DIGEST, Vol. 38, pp. 62-66, Nos. *378-412.*]

ACTION by the plaintiffs, the owners of S.S. Esperance, and her master, officers and crew against the first defendants, the owners of S.S. Sobieski, in respect of damage arising out of a collision which occurred between the two ships in the English Channel in the early morning of Apr. 13, 1945. By their defence, the first defendants charged both the plaintiffs and the senior officer in charge of the escort attending the Sobieski with negligence causing the collision. The plaintiffs, accordingly, obtained from the Treasury Solicitor the name of the naval officer in charge of the escort, Commander Layard, and joined him as a second defendant. The plaintiffs subsequently discontinued their action against Commander Layard, and the first defendants instituted an action by counterclaim citing both the plaintiffs and Commander Layard as defendants. Commander Layard put in a defence to the action by counterclaim. PILCHER, J., held that both the Esperance and the Sobieski were free from blame for the collision, but gave judgment for the first defendants against Commander Layard on the ground that he had been negligent in failing to warn the Sobieski of the presence of the Esperance or to advise her to alter course. The facts appear in the headnote.

Hayward, K.C. and *Bucknill* for the plaintiffs.
Porges and *Vere Hunt* for the first defendants.
Carpmael, K.C., *Naisby, K.C.*, and *J. B. Hewson* for Commander Layard.

Cur. adv. vult.

Nov. 10. **PILCHER, J.**, read a judgment in which, after reciting the facts and finding that both the Sobieski and the Esperance were free from blame for the collision, he continued: The Esperance having abandoned her claim against Commander Layard, the only remaining matter which I have to consider is whether the contention of the owners of the Sobieski that the damage to their vessel was due to the personal negligence of Commander Layard is made out. Counsel for Commander Layard took a preliminary point. He submitted that his client, while owing a duty to His Majesty, owed no duty to the Sobieski either to inform her of the presence of surface craft which might constitute a danger to her or to give her any advice or instructions as to alterations of course or speed which might be necessary to avoid such craft. It is quite clear on the evidence that, whether or not Commander Layard owed any such duty in law, he regarded it as his duty in fact to give the Sobieski advice as to any course alteration which might be called for to avoid other surface craft. He said in the witness-box that, if the Sobieski had not taken his "advice" as to a course alteration, he would have "taken other steps," or some such words, to see that she followed it. I took him to mean by that that he would have given her a peremptory order, and I have no doubt whatsoever that he would have done so. Escort and convoy were here performing a joint operation. The commodore of the convoy was responsible for speed and course and the escort was responsible for ensuring, in so far as possible, that the convoy reached its destination safely, without sustaining damage by enemy attack or by collision with surface craft whilst navigating at high speed in fog. There was no misunderstanding between Commander Layard and the commander of the Sobieski as to their respective duties in the joint operation which they were carrying out under the orders of the naval authorities. The owners of the Sobieski are here suing Commander Layard in respect of his own personal negligence which, they say, caused or contributed to the collision between their vessel and the Esperance. Commander Layard was a servant of the Crown and owed certain public duties to the Crown, which in this instance were well understood by him and by those on board the Sobieski. If by negligence he failed to perform these duties and if as a consequence of his negligence the owners of the Sobieski sustained damage, I fail to see how he can escape personal legal liability for the result of his negligence.

The question whether Commander Layard was personally guilty of negligence contributing to this collision is one that has caused me very considerable difficulty. On the documents of the Esperance it is reasonably clear that the Loch Alvie delivered her attack on the submarine about eight to ten minutes before the collision. Ten minutes before the collision the Esperance and the Sobieski were some two miles apart, so that when the attack was delivered the Loch Alvie must have been over two miles ahead of the Sobieski. If the attack took place, as I think it did, on the starboard quarter of the Esperance, the latter was already, when the attack commenced, inside the Sobieski's escort screen. If Commander Layard's recollection is right that the first report put the Esperance at 10,000 yards, this report must have been received over twenty minutes before the collision. Commander Layard thus had a good ten minutes before the attack was delivered in which to decide whether to warn the Sobieski or suggest an alteration of course. Commander Layard gave his evidence with admirable candour. In cross-examination he admitted that, viewing the matter in the light of after events, it would have been prudent to inform the commodore of the presence of the unknown vessel when the Loch Alvie went in to attack. He added that in the ordinary way he would have suggested helm action to the commodore ship rather than given her information. It is clear that this collision occurred because the Sobieski did not get any warning or advice from Commander Layard, and the question whether he can be said to have been negligent for failing to give such warning or advice is, therefore, crucial. He himself was not immediately concerned with the navigation of the Loch Alvie nor with the details of the delivery of the attack. He was, however, concerned to ensure that either the Loch Alvie or one of the other escort craft gave the Sobieski timely advice which would enable her to avoid the Esperance. In the result, in going in to attack, the Loch Alvie seems to have got fairly close to the Esperance, and, indeed, allowed her to get inside the escort screen, without warning the Sobieski. The Loch Alvie closed the Esperance from a distance of some five miles to a comparatively short distance without giving any warning or advice. All this time she had the use of her radar. It was not until she was close to and had almost certainly passed the Esperance that she delivered her attack and lost the use of her radar. While I am loath to convict so helpful and candid a witness as Commander Layard out of his own mouth, I cannot resist the conclusion that he should have conveyed some appropriate warning or advice to the Sobieski before the Loch Alvie actually delivered her attack. It is clear that the Loch Alvie must have changed course more than once in going in to attack and in delivering the attack. This would, no doubt, have made it difficult for Commander Layard to judge from the radar bearings of the Esperance during this period whether the Esperance was continuing to constitute a danger to the convoy. The convoy was proceeding at high speed and the distance between the Esperance and the Sobieski was lessening rapidly. All this could have been ascertained before the attack was actually delivered and before the Loch Alvie's radar failed.

In the circumstances, although I feel considerable sympathy for him, I find it impossible to acquit Commander Layard of negligence for failing either to warn the Sobieski of the presence of the Esperance or to advise her to alter course before the attack was delivered. If the fact that the Loch Alvie was herself manoeuvring in connection with the attack rendered it difficult for Commander Layard to judge whether the situation was continuing to be dangerous, he should, in my view, have detailed one of the other escort craft to keep in touch with the situation and give the Sobieski any necessary advice.

If, as has been assumed, the radar apparatus of the Loch Alvie was put out of action by the dropping of the depth charges, this should have been known about six minutes before the collision and at a time when the vessels were still 1½ miles apart. In view of my finding that Commander Layard was guilty of negligence contributing to the collision prior to his losing the use of his radar, it is not necessary that I should deal in any detail with his action subsequent to this point of time, except to say that I should have expected him to be
A rather more active than he was in his efforts to find out what the situation was by communicating with another escort instead of waiting several minutes for the Monnow to reply. He could, moreover, have advised the Sobieski to alter course as a measure of precaution. If he had done this, the collision would have been avoided. Since reaching my conclusion I have consulted the Elder Brethren and I may say that they both agree with the conclusion at which I have felt compelled to arrive. The result, therefore, is that the plaintiffs'
B claim against the defendants in the original action fails and will be dismissed and that the owners of the Sobieski, as plaintiffs in the action by counterclaim, succeed against Commander Layard by counterclaim.

Judgment for the defendants in the action. Judgment for the first defendants against the second defendant on the counterclaim.

Solicitors: *Waltons & Co.* (for the plaintiffs); *Constant & Constant* (for
C the first defendants); *Treasury Solicitor* (for Commander Layard).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

BECKETT *v.* NURSE.

[Court of Appeal (Lord Goddard, C.J., Tucker, L.J., and Jenkins, J.),
D December 19, 1947.]

Sale of Land—Contract—Form—Memorandum in writing—Admission of existence of contract—Evidence—Admissibility to prove real bargain different from that contained in document—Law of Property Act, 1925 (c. 20), s. 40 (1).

In an action in which the plaintiff claimed specific performance of an alleged agreement for the sale of land a document in the following terms was put in evidence: "Received from E.B. of Thorpe Cottages Thorpe
E Audlin the sum of seventeen pounds being a deposit for a field situate near the Fox Inn. Sold for £50." The document bore a 2d. stamp with a date (Feb. 1, 1946) and the signature of the defendant written over it. To the right of the stamp and towards the bottom of the document the signature of the defendant again appeared, and below the stamp and the signatures was a sketch plan showing the situation of the inn and of an adjacent field.

F Held: (i) although it contained a plan and was signed at the foot as well as over the stamp, the document, on its true construction, constituted a receipt and not a contract.

(ii) if the plaintiff had to rely on an oral agreement and on the document as a memorandum or note thereof in writing within s. 40 of the Law of Property Act, 1925, it was open to the defendant to cross-
G examine the witness called to prove the oral agreement to show that the real bargain between the parties was different from that contained in the memorandum, and, further, himself to give and call evidence to prove the accuracy of what had been put to the plaintiff's witness in cross-examination.

(iii) if the document was received in evidence as an admission of the existence of a previous contract, it was not conclusive against the defendant
H and it was permissible for him to prove that the oral agreement between the parties was different from that recorded in the document.

[As to Memorandum in Writing, see HALSBURY, Hailsham Edn., Vol. 29, pp. 240-243, paras. 323, 324; and for Cases, see DIGEST, Vol. 40, pp. 21-32, Nos. *74-172.*]

Cases referred to:

(1) *Hawkins* v. *Price*, [1947] 1 All E.R. 689; [1947] Ch.D. 645; [1947] L.J.R. 887; 177 L.T. 108.

(2) *Johnson* v. *Humphry*, [1946] 1 All E.R. 460; 174 L.T. 324; Digest Supp.

Appeal by the defendant, the alleged vendor, in an action for the specific performance of an alleged contract for the sale of land. The matter turned on the true construction of the document which was alleged to constitute the contract between the vendor and the purchaser. The county court judge held that the document did constitute such a contract, but the Court of Appeal now reversed that decision. The facts are stated and the document is set out, in the judgment of Tucker, L.J.

J. A. Armstrong for the defendant. A
Lindner for the plaintiff.

LORD GODDARD, C.J.: Tucker, L.J., will deliver the first judgment.

TUCKER, L.J.: This is an appeal by the defendant from a decision of His Honour Judge Essenhigh whereby he gave judgment in favour of the plaintiff on a claim by which the plaintiff asked for specific performance B of an agreement for the sale of a plot of land. The plaintiff was the widow and administratrix of one Ernest Beckett deceased, and by her particulars of claim she alleged an agreement contained in a memorandum dated Feb. 1, 1946, by which, she said, the defendant agreed to sell to her husband for the sum of £50 a field situate in Wentbridge Lane, Thorpe Audlin, in the West Riding of the county of York. Alternatively, she pleaded that, if the agreement was oral, it was partly performed by the defendant's permitting C the said Ernest Beckett to enter on the field, to deliver materials there, and to lay foundations for and construct the footings of a bungalow. Then she alleged that the defendant had failed to complete the sale and asked for specific performance. By his defence the defendant pleaded that no agreement subsisted between Ernest Beckett and himself. Alternatively, he said:

> If, which is denied, there was any agreement, it was an express term and condition D thereof that the said Ernest Beckett should erect and complete a bungalow on the land which is the subject of the alleged agreement and personally reside therein as a servant of the defendant employed to look after the defendant's adjacent agricultural land, and that, in the event of the said Ernest Beckett failing to erect or complete the said bungalow or to reside or to continue to reside therein as such servant of the defendant, the said agreement should be void, or if, in any such event, the said land had by then been conveyed by the defendant to the said Ernest Beckett, the same should be reconveyed to the defendant. E

Further, he alleged:

> . . . that by reason of the death of the said Ernest Beckett before the erection or completion of the said bungalow or residence therein by him as such servant or at all, the said agreement, if any, has become void.

He also denied the part performance.

The widow, in support of her claim, produced in evidence a document bearing F the defendant's signature which she relied on as constituting the agreement. The document which is headed: "Wayside Garage, Darrington, nr. Pontefract. Feb. 1, 1946," is in these terms:

> Mr. E. Beckett, Thorpe Audlin. Received from Mr. E. Beckett of Thorpe Cottages Thorpe Audlin the sum of seventeen pounds being a deposit for a field situate near the Fox Inn. Sold for fifty pounds.

G

Then there is a twopenny stamp with the date Feb. 1, 1946, and the signature "T. Nurse" over it, and just to the right of it there is again the signature "T. Nurse, West Lodge, Darrington." Lower down on the document there is a little sketch plan showing the position of the Fox and Hounds. There are written in the words: "Roadway referred to," although in the remainder of the document no roadway is mentioned, and then is shown a field of a certain area. H

The first question for decision is whether that document was a contract. In my view, it was not. It does not, on the face of it, bear any signs of being intended to be a contractual document, a document by which both parties bound themselves to certain terms. It is only signed by one of them. That is not conclusive, but I think it is significant. It is in the form of a receipt and purports to be nothing else. It contains all the necessary ingredients of a receipt. A receipt, to be of any value, must show the sum paid and I think where the sum paid is a deposit or instalment it should also show the total price in respect of which it is an instalment, and it should show who paid it and who received it and identify the property in respect of which it is paid. It seems to me that those are matters which are properly to be included in a receipt. This document is, perhaps, a little unusual in that it contains a plan, but in the circumstances of this case, where it was only a portion of a field which had been sold—because there is no doubt that the land had been sold, the question being on what terms it had been sold—I do not think that the fact that the document has this plan on it to identify the situation of the land being dealt with is conclusive. It is also significant that it is signed twice, once over the stamp and once in another part of the document, but neither of those is a matter which leads me to the view that this document, standing by itself, constituted a contract between the parties. If that is so, then the learned judge was wrong in the decision which he reached.

If it was not a contract, it becomes necessary to consider whether it was a sufficient memorandum under the statute of the agreement relied on by the plaintiff or whether it was open to the defendant to prove that, in fact, a contract in different terms from those recorded in this memorandum was the real contract between the parties. If it was not an agreement in writing, then the plaintiff must be suing on an oral agreement, but, the statute having been pleaded, it is insufficient for her to prove an oral agreement unless she also produces a note or memorandum of that oral agreement signed by the party to be charged. The first thing that she has to prove is the oral agreement. If Mr. Beckett had been alive, it would have been necessary for him to go into the witness box and prove what the oral agreement was in respect of which he was suing and to produce a note or memorandum in writing of that agreement, and if the note or memorandum which he produced differed in a material term from the oral agreement which he had proved, he would fail because it would not be a note or memorandum of the agreement on which he was suing. That is clearly illustrated by the two cases which were cited before us—*Hawkins* v. *Price* (1), a decision of EVERSHED, J., and *Johnson & Humphry* (2), a decision of ROXBURGH, J. Those are both instances of cases where the plaintiff, in the course of his evidence, had proved a contract different from that contained in the memorandum on which he was relying. That being so, if Mr. Beckett had been alive and had been called, it would have been open to the defendant to cross-examine him to show that the real bargain between the parties was different from that contained in the memorandum which he produced. If it would have been permissible for the defendant to ask that question, it seems to me it must also have been permissible for the defendant to go into the witness box and prove the accuracy of what was being put to the plaintiff in cross-examination. I can see no reason for excluding the defendant from showing what the real bargain between the parties was in a case where a plaintiff is suing on an oral agreement and can only succeed by producing a note or memorandum containing the terms of the agreement on which he sues. In the present case, Mr. Beckett was not alive and his widow had to put in this document. In my view, by putting it in, she would establish a *prima facie* case that an agreement had been made in the terms recorded in the document. I think it was received in evidence, not only as a receipt, but also as an admission that there was a previous contract in its terms. But it is not conclusive against the defendant. It is only evidence against him, and I think it is permissible for him, notwithstanding the admissibility of that document by way of an admission, to go into the witness box and try to persuade the judge that, in fact, the oral agreement between the parties was different from that recorded in the document.

For those reasons, although I regret having to come to this conclusion, I think the case must go back to the county court judge to decide what was the oral agreement between the parties. I think this appeal succeeds.

JENKINS, J.: I am of the same opinion. The sole question in this appeal is whether oral evidence was admissible to support the allegation made in the defence that the contract sued on included terms other than those mentioned in the document of Feb. 1, 1946. The county court judge held that the document of Feb. 1, 1946, amounted to an agreement in writing, and, accordingly, held that no oral evidence was admissible to contradict or vary it. The question for this court is whether he was right in that view. The principles to be applied are conveniently stated in PHIPSON ON EVIDENCE, 8th ed., ch. 45, in the form of a rule and an exception. The rule is thus stated at p. 564 :

> When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from, the terms of the document.

The relevant exception is exception 2 at p. 566 : "Private documents when (*a*) informal, or (*b*) *inter alios*." (*a*) is the material part here and on that branch of the question it is stated thus :

> (*a*) *Informal* : evidence is, in general, admissible to contradict or vary any document intended by the parties to operate merely as a collateral or informal memorandum of a transaction, and not as a contract or other binding legal instrument. Thus, a *receipt* will not, even between the parties, unless amounting to an estoppel, exclude extrinsic evidence to contradict the writing.

Applying those principles to the present case, the question is whether the document of Feb. 1, 1946, was a written agreement or a reduction into writing of all the terms of the bargain, or whether it was merely a collateral memorandum. In my judgment, it plainly was not an agreement. It is described as a receipt and its actual object was to operate as a receipt. It is signed by one party only, *i.e.*, by the recipient of the money, and it does not contain as part of the writing any consensus on the part of the other party. It presupposes only on the face of it an antecedent agreement pursuant to which the sum acknowledged is paid.

That does not conclude the matter, for I do not think the reference to an informal document in the quotation to which I have referred necessarily means that, wherever a document is of an informal character, it cannot be intended by the parties to embody all the terms of the agreement reached by them. Being an informal document and not being itself the agreement, can it be described as a memorandum intended by the parties to set out exhaustively all the terms of the agreement ? That question depends on the construction of the document, and, in my judgment, there is nothing which one can collect from the terms of the document in question here to show that it was intended to amount to an exhaustive statement of the terms. It is expressed to be a receipt for the sum of £17. It is true that the document goes on to state what was the transaction in respect of which the £17 was received, but that was necessary to make it effective as a receipt, the sum of £17 being a deposit for a field sold for £50. It is possible that the terms stated might be the only terms. On the other hand, it seems to be equally possible, though, perhaps, less probable, that there were other terms which it was not considered necessary to state in a document which was plainly intended to operate as a receipt. The fact that the land in question is identified by means of a plan is a point which, perhaps, suggests that the document is something more than a receipt, but it does not seem to me to be by any means conclusive.

Therefore, as a matter of construction of this document I can find no conclusive indication that it is intended by the parties to have any greater operation than that of a receipt, or that the reference to the contract is anything more than an incidental reference to show what was the transaction to which the payment related without purporting to state all the terms of the contract. I, therefore, think it follows that it is open to the defendant, when sued on the footing that this document contained all the terms of the bargain, to raise the defence that there were other terms and to support that allegation by extrinsic evidence. It may well be that it will be difficult for him to persuade the court that, if the true bargain had been of the highly conditional and hypothetical character which he suggests, he would have put his hand to a receipt referring to the field as being sold for £50, but that goes to the weight or credibility of the evidence he seeks to give and not to its admissibility. I appreciate the desirability of adhering wherever possible to contemporary written evidence as opposed to the contradiction and ambiguity of oral evidence. On the other hand, I feel that it is important that a man should not be held to a bargain he never made because *per incuriam* he signed a document *alio intuitu* containing a loose, and, perhaps, incomplete, reference to a particular bargain. For these reasons I agree that the learned county court judge should have admitted the evidence as to the other terms alleged by the defendant, and that this appeal should be allowed.

LORD GODDARD, C.J.: In view of the conclusions which my Brothers have reached, I will not dissent. No useful purpose will be served by elaborating the doubts which I still feel about the true construction of this document, a matter on which different minds might come to different conclusions. I will only say that, while I think the document is open to the construction that it is an agreement to sell to the deceased for £50 a field shown on the plan, as the county court judge thought it did, the fact that it only bears one signature does afford some ground for saying that it is only intended as a receipt. That it is a receipt does not mean that it might not also be a memorandum of an agreement, and on reconsideration the county court judge will consider what weight he should attach to the document and to the evidence as the condition is a different one from that which is pleaded.

Appeal allowed with costs.

Solicitors: *Blundell, Baker & Co.*, agents for *Carter, Bentley & Cundill*, Pontefract (for the defendant); *Biddle, Thorne, Welsford & Barnes*, agents for *Moxon & Barker*, Pontefract (for the plaintiff).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

BLACKPOOL CORPORATION *v.* LOCKER.

[COURT OF APPEAL (Scott, Asquith and Evershed, L.JJ.), November 12, 13, 14, 17, December 18, 1947.]

Emergency Legislation—Requisition of land—Dwelling-house—Delegation of power—Delegation to local authority—Exercise of power by authority—Conditions in circulars issued by Minister of Health—Purported ratification and adoption by Minister—Defence (General) Regulations, 1939 (*S.R. & O.*, 1939, *No.* 927 (*as amended*)), *reg.* 51 (1) (5)—*Supplies and Services (Transitional Powers) Act,* 1945 (*c.* 10), *s.* 1 (1).

Practice—Discovery—Privilege—Local authority—Correspondence between departments—Correspondence between authority and Ministry of Health—Reports and proceedings of committees of authority.

The Defence (General) Regulations, 1939, reg. 51, provides: "(1) A competent authority, if it appears to that authority to be necessary or expedient so to do [for any of the purposes specified in s. 1 (1) of the Supplies and Services (Transitional Powers) Act, 1945] may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land . . . (5) A competent authority may, to such extent and subject to such restrictions as it thinks proper, delegate all or any of its functions under paras. (1) to (3) of the regulation to any specified persons or class of persons."

As a competent authority the Minister of Health, acting under para. 5, delegated his power to take possession of dwelling-houses under para. 1 to local authorities, including the plaintiffs, by means of "circulars," which contained "conditions" *inter alia* that (i) no chattel on the premises might be requisitioned and the requisition notice should contain a direction as to the disposal of any chattel therein, and (ii) where within 14 days the owner notified his intention to occupy the house, the authority should not proceed further in the matter unless the local authority was satisfied that to allow the owner to occupy the premises would result in serious under-occupation. The defendant was the owner of a house at B. in which he occupied one room only, letting the remainder to a tenant. When the tenant left, the defendant began negotiations for the sale of the house. The prospective purchaser paid a deposit on June 18, 1946, but on June 20 a requisition notice was served on the defendant under reg. 51 (1) stating that the town clerk of B. had that day taken possession of the premises. A substantial quantity of the defendant's furniture remained on the premises, but the requisition notice contained no direction as to its disposal.

The proposed purchaser withdrew from the transaction, and on June 26 the defendant went into occupation of the house, intimating to the town clerk that he intended to use it as his own residence. On July 29, in the course of correspondence which ensued, the town clerk stated that the Minister of Health wished him to emphasise that the defendant had committed an offence under the Defence Regulations, that he was a trespasser, and that the premises must be vacated forthwith. On Aug. 20, in a letter to the defendant's solicitors, the Minister of Health purported to confirm the town clerk's actions, and on Nov. 28 (after the commencement of this action) the Minister, by letter to the town clerk, purported to ratify all the actions of the town clerk in connection with the premises. The plaintiffs, the corporation of B., sought possession of the dwelling-house, damages for trespass, and an injunction.

Held: (i) the provision of housing for the inadequately housed was within the term "supplies and services" as employed in s. 1 (1) of the Act of 1945, and was, therefore, within the scope of reg. 51, as amended.

(ii) the original attempt at requisition on June 20 was inoperative because, in breach of the conditions or limitations applicable to the delegated powers, the notice purported to requisition the house and its contents and contained no direction as to the exclusion or disposal of the chattels.

(iii) (by Scott and Asquith, L.JJ., Evershed, L.J., *dubitante*), on June 26, on the notification by the defendant of his intention himself to occupy the premises, the plaintiffs ought not to have proceeded further in the matter, being legally debarred therefrom by the terms of the circulars.

(iv) the result of the letters of July 29 and August 20 was not to effect a requisitioning of the premises by the Minister himself, because (*a*) the Minister had not in his sub-delegated legislation reserved power so to act; and (*b*) the Minister did not, in fact, then requisition or take possession of, the premises.

(v) (*a*) the Minister, when delegating his powers, had for the time being divested himself of those powers, and, therefore, he had no power to ratify the purported requisition of June 20, and (*b*) neither the plaintiffs nor the town clerk were acting as the Minister's agent.

Claims made on behalf of the B. corporation of privilege from disclosure to the defendant of (*a*) correspondence between departments of the corporation and (*b*) correspondence between the corporation and the Ministry of Health, *held*, not to disclose any legal grounds of privilege. *Held*, also, that copies of reports, proceedings and instructions of committees of the corporation were not privileged from disclosure save in so far as they emanated from or were addressed to the legal advisers of the corporation for the purposes of the litigation.

Observations on the importance and desirability of facilitating the ascertainment by the private citizen of the manner in which his rights are effected by sub-delegated legislation.

[For the Defence (General) Regulations, 1939, reg. 51, see HALSBURY'S STATUTES, Vol. 38, p. 707, 708.

For the Supplies and Services (Transitional Powers) Act, 1945, s. 1, see HALSBURY'S STATUTES, Vol. 38, p. 631.]

Cases referred to:

(1) *Macara (James), Ltd.* v. *Barclay*, [1944] 2 All E.R. 589; [1945] 1 K.B. 148; 114 L.J.K.B. 188; 172 L.T. 8; Digest Supp.

(2) *Huth* v. *Clarke*, (1890), 25 Q.B.D. 391; 59 L.J.M.C. 120; 63 L.T. 348; 55 J.P. 86; 33 Digest 17, *68*.

(3) *Hall & Co.* v. *London, Brighton & South Coast Ry. Co.*, (1885), 15 Q.B.D. 505; 53 L.T. 345; *on appeal*, (1886), 17 Q.B.D. 230; 42 Digest 658, *667*.

(4) *Lewisham Borough Council* v. *Maloney*, [1947] 2 All E.R. 36; [1947] L.J.R. 991; 177 L.T. 175.

(5) *Point of Ayr Collieries, Ltd.* v. *Lloyd-George*, [1943] 2 All E.R. 546; Digest Supp.

(6) *Ancona* v. *Marks*, (1862), 7 H. & N. 686; 31 L.J.Ex. 163; 5 L.T. 753; 6 Digest 187, *1161*.

Appeal by the defendant from an order of His Honour Judge R. Peel, K.C., made at Blackpool County Court on Feb. 6, 1947, whereby the plaintiffs were granted an injunction restraining the defendant from continuing in the use and occupation of a dwelling-house and nominal damages for trespass.

The county court judge held that, while the original requisitioning of the house by the town clerk of Blackpool was unauthorised, subsequent letters to the defendant's solicitor and to the town clerk had the effect of validating the town clerk's excess of authority. The Court of Appeal now reversed that decision. The facts appear in the judgment of SCOTT, L.J.

N. H. Lever and *L. Lester Rose* for the defendant.
Harold John Brown for the plaintiffs.

Cur. adv. vult.

Dec. 18. The following judgments were read.

SCOTT, L.J.: This appeal raises several important questions about the delegated legislation enacted by the Ministry of Health under reg. 51 of the Defence (General) Regulations, 1939, during the war and since the enactment of the Supplies and Services (Transitional Provisions) Act, 1945, in connection with the requisitioning of houses. There is one quite general question affecting all such sub-delegated legislation and of supreme importance to the continuance of the rule of law under the British Constitution, namely, the right of the public affected to know what that law is. That right was denied to the defendant in the present case. The maxim that ignorance of the law does not excuse any subject represents the working hypothesis on which the rule of law rests in British democracy. That maxim applies in legal theory just as much to written as to unwritten law, *i.e.*, to statute law as much as to common law or equity, but the very justification for that basic maxim is that the whole of our law, written or unwritten, is accessible to the public—in the sense, of course, that, at any rate, its legal advisers have access to it at any moment as of right. When a government Bill is brought before Parliament in a form which, even in regard to merely executive or administrative matters, gives a wide and unlimited discretion to a Minister and objection is made, the answer is sometimes given that the Minister may be trusted by the House to use his powers with a wise and reasonable discretion. The answer may be perfectly *bona fide*, but *tempora mutantur* and another Minister or another government may use the unlimited powers indiscreetly or oppressively. If that happens, the only remedy practically open to the aggrieved citizen is action in Parliament to which alone the Minister is responsible. The Act, when passed, may contain delegated powers to a Minister of the Crown to legislate, and the Minister may within his powers make rules or orders which constitute binding legislation. Again, the aggrieved citizen has no legal remedy against the legislative act of the Minister. He is bound by the terms of the delegated legislation, but in both types of legislation, Parliamentary and delegated, the aggrieved citizen at least knows or his lawyers can tell him just what his rights and duties and restrictions are under the new law because each kind of statutory law is at once published by the King's printer, whether as Acts of Parliament or as statutory instruments. On the other hand, if the power delegated to the Minister is to make sub-delegated legislation and he exercises it, there is no duty on him, either by statute or at common law, to publish his sub-delegated legislation, and John Citizen may remain in complete ignorance of what rights over him and his property have been secretly conferred by the Minister on some authority or other and what residual rights have been left to himself. For practical purposes the rule of law, of which the nation is so justly proud, breaks down because the aggrieved subject's legal remedy is gravely impaired. When executive or administrative directions falling short of legislation accompany the sub-delegated legislation, as they may often do, the omission to publish such directions raises no legal issue, or, at any rate, none relevant to the present appeal, but such cases as the present do appear to me *ex debito justitiae* to demonstrate the crying need of immediate publication of all matter that is truly legislative. That might mean, I think, an amendment of the Statutory Instruments Act, 1946, but I will revert to this aspect later when I have illustrated its urgency by the facts of this appeal.

It is an appeal by the defendant against whom the county court judge, at the instance of the plaintiff corporation, granted an injunction restraining him from continuing in the use or occupation of a house, No. 131, Squires Gate Lane, Blackpool, and made an order for payment by him to the plaintiffs of £5 damages for trespass, with costs on scale "C," and special allowances. The house was the defendant's own freehold property, but on June 20, 1946, it happened to be temporarily unoccupied, the defendant having through a local agent succeeded in finding a willing buyer, at the price of £2,800, who had agreed to buy " subject to written contract " and had paid the 10 per cent. deposit. The defendant was not a man of large means, being by profession an interpreter and earning thereby a small income, chiefly in the Manchester County Court. He had also a house in Cheshire, of which he was tenant, I think, under a lease, but he suffered from chest trouble, and, finding the climate of Cheshire too damp, had made up his mind to live in Blackpool. His freehold house there, however, was larger than he wanted, and he had, therefore, decided to sell it in order to raise capital with which to buy a smaller house more suitable to his needs. At that time the housing problem in Blackpool was acute, and was causing great difficulty to the corporation in its double capacity of housing authority and delegate from the Minister of Health of his requisitioning powers under the Defence Regulations. In June it decided to exercise those powers in respect of the defendant's house. The delegation to the corporation had been effected by the Minister of Health under the express provisions of the Defence (General) Regulations, 1939, reg. 51 (5), as amended and continued by an Order in Council (No. 1616 of 1945) pursuant to the Supplies and Services (Transitional Powers) Act, 1945, s. 1. In that amended form reg. 51 was in full force in June, 1946. The Minister of Health's power to delegate was conferred by reg. 49 (also continued by the Act of 1945) which put the Minister of Health into the list of " competent authorities " contained in the regulation read with reg. 51 which conferred and described his powers. The phrase " competent authority " is not defined either in the Ministry of Supply Act, 1939, or in the Act of 1945, or in the regulations, except that reg. 100, which purports to define it, refers back to the list of Ministers, etc., in reg. 49. The judge held that the corporation's claim to have validly requisitioned the defendant's house on June 20, 1946, was ill-founded, and I agree with him, but he also held that the Minister of Health himself had obtained possession either in July or in August, or, alternatively, that the corporation's ineffective efforts to requisition on June 20 and to retain possession thereafter had been " ratified " by the Ministry of Health subsequently in either September or November on the footing that the Blackpool Corporation had been acting, not as delegate exercising in its own right the powers delegated to it, but as agent for the Minister. These latter conclusions of the judge are on issues of law, not fact, and I disagree with them. There are three or four aspects of public importance involved in the consideration of the Minister of Health's instruments of delegation and of the corporation's failure to observe their conditions, and in the gravely erroneous character of the claims and contentions put forward by both the corporation and the Minister of Health and the senior officers of his department and also evinced in the actions and attitude of both Ministry and corporation towards the rights of the individual owner under reg. 51 and the circulars. The liberty of the subject would have, in my view, been seriously and wrongfully prejudiced had these claims and contentions been enforced. For these reasons a careful investigation into the facts and especially into the correspondence is essential.

The delegation of powers, both executive and legislative, was effected by what the Minister of Health styled " circulars." The instruments of delegation were justly entitled to that name as they were on their face addressed to all councils with powers of local government above the level of parish councils. A tentative contention was addressed to us by the defendant's counsel that the corporation was in the event the wrong plaintiff in the present action, and that, if anyone was entitled to the relief claimed, it was not the corporation but its clerk, but this point was dropped, and it was conceded that for the decision of the present appeal it does not matter whether the delegation was to the corporation or its clerk. For that purpose I agree that there is no substance in the distinction, and that the delegation of power was in reality to the corporation. The series of delegations which finally came before the judge and on appeal before us was progressive in the sense that, as the housing need increased, the scope was from time to time extended and more and more houses were brought within the compulsory powers. To get a clear picture of the delegated legislation, it is best to follow the progressive extensions chronologically, but then to treat the series as a whole.

It began with No. 1949 dated Jan. 18, 1940. The subject-matter of that circular was the occupation of premises under reg. 51 for three services—first aid, ambulance and mortuary. It contained a withdrawal of existing delegations of power to requisition, and substituted a delegation to the clerks of local authorities of all necessary powers under reg. 51, but subject to the conditions set out in its enclosure (para. 2). One condition, (3) (i), forbade requisitioning of houses unless unoccupied, and another, (3) (iii), provided that requisition was only to last for the period to which the senior regional officer had given consent. By (3) (v): "the requisition is subject to the right of the Minister at any time to direct the authority to hand over the premises to the person otherwise entitled to possession." That condition is of indirect importance because it shows conclusively the nature of the devolution of powers effected, namely, that it was true law-making delegation of power to do things which otherwise the delegate would have had no legal right to do. It was essentially not a creation of agency. The Minister of Health was not principal and the local authority was not agent. The reservation of the right of control would have been superflous had it been agency. That relationship manifests itself again in the contrast between Form C.S.4 (in the appendix to Circular 1949 of 1940) for the delegate to use when taking possession, and Form C.S.5 for his giving up possession, pursuant to condition 3 (v). Circular No. 2242 of Dec. 20, 1940, was for providing housing for munition workers and applied to unoccupied and unfurnished houses. It was pointed out that the relationship of landlord and tenant would not be established by mere requisition and occupancy, but that a charge might be made to the occupier as if he were tenant. Prior consent of the senior regional officer was again required. Condition 3 (v) of No. 1949 was repeated. No. 2350 of Apr. 22, 1941, followed, and extended the last circular to unoccupied though furnished premises, but required the requisition notice to include a direction to remove to a designated part of the premises all chattels not included in the requisition. Condition 3 (v) of 1949 was repeated. Circular No. 2747 of Jan. 5, 1943, conferred authority on the local authorities concerned to take legal proceedings against persons "accommodated in requisitioned houses" in arrears of payment for the privilege of occupying. No. 2845 of Aug. 4, 1943, was "for families inadequately housed"; it was issued to give effect to a report by a conference of associations of local authorities and made powers of requisitioning more widely available. Under para. 3 powers delegated earlier remained unaffected. By para. 5 the Minister of Health extended the powers already delegated, but subject to the conditions in the appendix. Paragraph 9 throws light on the very reasonable attitude encouraged by the Minister of Health:

> The authority will appreciate that the purpose of granting the extended powers is to enable accommodation to be brought into occupation which would otherwise remain empty or be retained for occasional use. Experience shows that many houses which are unoccupied on a particular day are merely changing tenants in the ordinary way, and it is not intended that the powers should be used to hamper such transfers. When, therefore, requisitioning is being considered in relation to a particular property the intention of the owner or tenant should be ascertained and he should be afforded a reasonable opportunity for letting or re-occupation as the case may be before requisitioning is applied. Typical cases where the power of requisitioning might suitably be exercised are houses which are either let or unlet, but which, whether furnished or not, have remained unoccupied. Where furniture, *which must not be requisitioned*, is removed by the local authority for storage in default of the owner or tenant, an inventory should be carefully compiled and kept.

The previous conditions were mostly repeated in the appendix, *e.g.*, that as to furniture. No. 138 of July 20, 1945, in its Part II dealt with the requisitioning of unoccupied houses, but contained effective precautions to ensure fair protection to owners. Paragraph 3 first referred to the powers and conditions of No. 2845, namely, (1) that the prior approval of the senior regional officer of the Ministry of Health was obtained: (2) that reasonable opportunity was given to the owner or tenant to let or occupy the house, and then continued:

> These conditions have in some districts led to difficulty and delay in bringing unoccupied houses into occupation to the fullest possible advantage. In view of the present and increasing urgency of the housing need, the Minister has decided to vary these conditions so as to simplify and expedite procedure, and to authorise clerks of local authorities during the period up to Dec. 31, 1945, to

> requisition unoccupied houses for the inadequately housed, *subject to the conditions that after the requisitioning of the house but before it is actually brought into occupation*—(1) notice that the house has been requisitioned shall be posted on the premises in every case and also sent to the owner or agent through the post if his name and address are known to the authorities, (2) the house shall not be brought into occupation until fourteen days after this action has been taken, and (3) where within this period the owner notifies his intention to occupy the house by himself or his family the authority shall not proceed further in the matter; consideration should *also* be given on their merits to other proposals for the occupation of the house submitted by the owner within this period. Where action by the authority has been suspended on an intimation that the owner or his family intend to re-occupy the house or where the authority has agreed to some other proposal by the owner, they should take steps within a reasonable period, say three weeks, to ensure that the owner has in fact carried out his intention and should report to the senior regional officer of the Ministry of Health any cases in which this has not been done.

The "conditions" above stated were, in my opinion, conditions subsequently resolutive in effect. The first part of No. 3 means what it says. "Shall not proceed further in the matter" is mandatory and imperative. It is also self-contained, *i.e.*, independent of any other condition. This aspect is emphasised and borne out by the later sentences in the condition, additional to and separate from the first, but not as imperative as the first. The authority is directed, but subject to its own discretion, *also* to give consideration etc. This interpretation is consistent with the considered policy of the whole series to which I have already drawn attention. No. 5 of Jan. 1, 1946, extended the current delegation period from Dec. 31, 1945, to June 30, 1946. No. 141 of June 28, 1946, further extended the period to Dec. 31, 1946, and added a new condition:

> In the present shortage of housing accommodation it is necessary to ensure as far as possible that all houses are reasonably fully occupied, and this is the main intention of the requisitioning powers which the Minister has delegated to the clerks of local authorities. Accordingly, where an owner notifies his intention to occupy the house by himself or his family the clerk to the local authority is authorised to retain possession of the premises if the local authority are satisfied that to release the house for occupation by the owner or his family would result in serious under occupation of the house, subject to the owner, if he so desires, being allowed to occupy such proportion of the premises by himself or his family as the local authority deem reasonable for his needs, and on such terms as to payment and otherwise as the local authority may approve.

I draw attention to the stringent conditions to the new authorisation of the local authority to retain possession in spite of the owner's intention himself to occupy, for the judge found as a fact that that condition was not satisfied. It is obvious that that extension was prospective and not retrospective, and that the purported requisition of June 20, if invalid, was not validated.

Before I approach the history of the ways in which in the present case the corporation, on the one hand, and the Ministry, on the other, sought to use or misuse the provisions of the circulars, it is necessary to consider their true legal effect. As I have already indicated, they seem to me to have been well drafted for the purpose of effecting a considerate and fair adjustment between the public duty of housing the homeless and the private rights of the individual householder in possession, carefully differentiating between the occupied and the unoccupied, the furnished and the unfurnished, house, and between a passing interruption of occupation and a continuing state of unoccupation with no present prospect of its termination. The startling feature of the whole story before the court is that both the corporation and the officers of the Ministry of Health, when writing the letters in the correspondence and taking the views and actions therein appearing, radically misunderstood their own legal rights and duties, and appear to have been oblivious of the rights of the private house-owner affected. That the Minister's "circulars" were not mere executive directions, but delegated legislation with statutory force, conferring powers on the corporation which they would not otherwise have possessed and imposing on them duties for the reasonable protection of the individual house-owner, does not seem to have entered the minds of either the corporation or the Ministry of Health, yet the nature of delegated legislation is quite plain and the senior officials of the Ministry had no excuse for ignorance. The report of the Ministers' Powers Committee (Cmd. 4060 of 1932), which led to the appointment by the House of Commons of the present Select Committee on Delegated Legislation and the passing of the Statutory Instruments Act, 1946, explains the whole subject quite clearly. I was chairman of the committee at the time we had to consider our report and the drafting committee consisted of LORD SCHUSTER, LORD SIMONDS and myself, and I still think the committee's description and analysis of delegated legislation is correct. It is shortly stated in para. 2 on p. 15 :

> The word " legislation " has grammatically two meanings—the operation or function of legislating and the laws which result therefrom. So too " delegated legislation " may mean either exercise by a subordinate authority, such as a Minister, of the legislative power delegated to him by Parliament, or the subsidiary laws themselves, passed by Ministers in the shape of departmental regulations and other statutory rules and orders.

The report goes on to point out that in the terms of reference the phrase " delegated legislation " has been used in the former sense, but that, in order to advise as asked, the committee had to consider the delegated " laws " which had resulted in the past. In this appeal the court is concerned with both meanings of the phrase, logically in the first instance with the former, namely, the law-making function entrusted by reg. 51 (5) to the Minister of Health, and only in the second instance with his " circulars "—the name he gave to his sub-delegated output of " laws." As the committee point out on p. 19, the content of any given instrument issued by a Minister in exercise of a power of delegated legislation may include administrative or executive instructions and directions and other matter not legislative in character, which (to use the committee's own phrase on p. 19) " might equally well be expressed in a circular letter." It is the substance, not the form, of the content which matters. I am tempted to wonder whether someone in the Ministry of Health thought the name " circulars " would save them from recognition as delegated legislation. As the Ministers' Powers Committee itself pointed out, it is the substance, and not the form or the name, that matters. In delegated legislation law-making is the essential feature, and law-making (except in the case of mere codification) means altering the existing law—whether written or unwritten—and, therefore, means interfering with existing rights vested in persons affected. The committee, in para. 3 (pp. 20-1) discuss " the essentially subordinate character of delegated legislation." After pointing out the unlimited power of Parliament (under our English Constitution) to legislate, the committee go on to refer to the two fundamental principles of our constitution (p. 21) :

> It is a principle of our constitution that whatever laws are passed by Parliament are binding, as the law of the land, on everybody. But it is also a principle of our constitution that no one may be deprived of his liberty or of his rights except in due course of law—that is, unless he has done something which the law says specifically shall have that effect. In the absence of a common law or a statutory authority, " A " cannot be deprived of rights by an executive act of a Minister ; and if the Minister claims to have made a regulation entitling him to interfere with " A's " rights, the court will interfere to stop the Minister unless he can show by what authority, statutory or otherwise, he has made the regulation in question. It follows, therefore, that to safeguard the second of the two principles just mentioned the precise limits of the law-making power, which Parliament intends to confer on a Minister, should always be defined in clear language by the statute which confers it.

It is just in that protection for the liberty of the subject that sub-delegated legislation such as that authorised by reg. 51 (5) is so dangerously lacking. Paragraph 1 of the regulation had, subject to certain limitations in para. (3), given the Minister powers which are as unlimited as they are undefined. For defence purposes on the outbreak of war that may have been necessary, but when the Supplies and Services Act, 1945, authorised the continuance of *inter alia*, reg. 51 with amendment, the new Order in Council should surely have defined the Minister's own powers in accordance with the recommendations of the above advice of the Ministers' Powers Report, in view of the fact that para. (5) of the regulation was to be continued, for that paragraph conferred power on the Minister to delegate " all or any " of his unlimited powers without any new qualification. Fortunately, successive Ministers exercised their power with great care for the protection of the individual when they handed over their powers by their circulars, but I cannot help thinking that much of the legal misconceptions in the minds both of the Ministry of Health and of the corporation about the extent and scope of powers remaining vested in the Minister after he had delegated almost all of them to the corporation was due to the mistaken belief that he was, under para. (1), still retaining general power of supervision. I find it impossible to understand most of the letters from the Ministry of Health on any other hypothesis.

The Rules Publication Act, 1893, and the Statutory Instruments Act, 1946, which repealed the former and re-enacted an amended edition of it, had publicity as well as control by Parliament as a main object, but both have what seems to me the grave defect of not being applicable to any but primary delegated legislation. They are both expressly limited to such delegated legislation as is made under powers conferred by Act of Parliament, whether on His Majesty in Council or on a Minister of the Crown. Such primary delegated legislation has now (and had under the Act of 1893) to be printed forthwith by the King's printer and published as a statutory rule or order, etc., but for delegated legislation made under powers conferred *by a regulation or other legislative instrument not being itself an Act of Parliament* there is no general statutory requirement of publicity in force today. Of such secondary or " sub-delegated " legislation, as I call it for clarity, neither the general public, of which the defendant in this case is typical, nor the legal adviser of an affected member of the public, however directly he may be affected, has any source of information about his rights to which he can turn as of right and automatically. The modern extent of sub-delegated legislation is almost boundless, and it seems to me vital to the whole English theory of the liberty of the subject that the affected person should be able at any time to ascertain what legislation affecting his rights has been passed under sub-delegated powers. So far as I know, this is the first case where that aspect of delegated legislation has come before the courts for direct consideration.

One can easily see how it has happened. The Defence Regulations, old and new—*i.e.*, both during hostilities and in the transitional period from war to peace—were duly printed and published because they came equally within the earlier Rules Publication Act, 1893, and the present Statutory Instruments Act, 1946. During both periods an endless stream of delegated and sub-delegated legislation was poured out, but the tragedy of it has been that the protection afforded by automatic publication of the sub-delegated legislation has been denied to the public affected by it. The present case is a glaring illustration of the danger of that denial. The defendant's solicitor had the greatest difficulty in ascertaining from either the corporation or the Ministry what his client's rights were. I shall draw attention to those difficulties in a few moments when I turn to the correspondence and the facts (which nearly all appear in the letters), but to bring out clearly the really monstrous character of some of the contentions and actions of both corporation and Ministry, I want first to analyse a little the legal relationships created by the circulars as sub-delegated legislation, first, as between the Minister of Health and the corporation (to which he had handed over most of his own powers in Blackpool), secondly, as between the Minister and the defendant house-owner, and, thirdly, as between the corporation and the defendant, because it is only on understanding what those legal relations were that one realises the full gravity of this almost incredible case.

On June 20 the town clerk caused a notice, in the Form C.S.4 of Circular 1949 (January, 1940), to be affixed to the door of the defendant's house and demanded (and next day obtained) the keys from the defendant's agent under threat of putting a new lock on the door. The judge found as a fact that the defendant had " a considerable amount of furniture " in the house. There was no reference to that in the notice, and no instruction was given to the defendant by the corporation about it—two failings by the corporation to implement the conditions precedent imposed by the circulars on its power to requisition. That same day the defendant's solicitor, who had effected the sale of the house, wrote to the town clerk's department, giving the name of the owner, telling him of the contract of sale with vacant possession, and asking for sympathetic treatment on the ground that, if the sale were allowed to go through, the house would be occupied. On June 21, because of the requisition, the sale was called off by the purchaser. On Saturday, June 22, the defendant's solicitor gathered in a telephonic conversation with the town clerk's department that the defendant had 14 days within which he might elect himself to occupy the house. I infer that he was told something about the 14 days' condition being in a " circular," presumably No. 138, but he was not offered even inspection of any circular, much less a copy. That same day he wrote to the senior regional officer of the Ministry of Health at Manchester asking for " a copy of the circular in order to advise my client." On June 24 the town clerk replied to the solicitor's letters of June 20 and 22, about the falling through of the defendant's sale as if the defendant, as vendor, had wanted to get out of it, which seems to me incomprehensible. The town clerk admits, however, that his assistant had been told on June 22 that the defendant wanted the house for his own occupation. He goes on to refer to " the relevant government circular " (obviously No. 138) and to note the conditions which I have already cited from cl. 3 (2) and (3) of No. 138, " where the owner notifies his intention to occupy . . . the authority shall not proceed further," but, wholly ignoring the intimation already given him by the defendant's solicitor that his client was intending to occupy the house himself, he goes on to refer to the irrelevant alternative contained in the condition, namely, of " proposals for the occupation " of the house—which meant, of course, occupation by somebody other than the owner—and asks " therefore " for the defendant's proposals not later than July 3 (when the 14 days would expire). He adds the irrelevant comment that it would be as obvious to the solicitor as to himself that, as the owner has agreed to give his purchaser vacant possession on completion, the owner did not *need* it for his own occupation. On June 25 the defendant's solicitor paid to the purchaser's solicitor the conveyancing costs thrown away of £10 17*s.* 6*d.* On June 26 a regional officer at Manchester, having evidently been informed of the position by the town clerk, steps into the arena with an answer to the letter from the defendant's solicitor, in which the latter had asked for a copy of the circular. In it he makes the astounding statement that he is " directed by the Minister of Health " to reply " that the circular cannot be made available to the public." His next paragraph is this :

> It is desired, however, to add for your information that the Minister has delegated his powers to clerks to local authorities to take possession of empty houses for the rehousing of inadequately housed persons subject to representations made by the owners or persons having title to occupation and it is therefore suggested that you should approach the appropriate local authority.

No reference is there made to the duty of the local authority to go out on the owner intending to occupy. On June 27 the defendant's solicitor wrote to the town clerk that his " client has gone into possession of the premises, to use the same for the purpose of his own residence," and he asked for the return of the keys. He adds some paragraphs of which three are worth noting, because if true, they disclose an unreasonable attitude on the part of the town clerk's department :

> (2) When I was informed of the matter, and telephoned your Mr. Duerden, he informed me that a line had to be drawn as at the date of requisition, and that no proposals for the future use of the house could be taken into consideration. At our interview of Saturday last, the 22nd instant, when you kindly intimated that my client should be allowed to proceed with the sale, Mr. Duerden again insisted that the date of the requisition was the only material date for consideration. (3) On Monday, the 24th instant, I received the usual form of notice, but this omitted what I understand is the routine form, that is to say, the notice at the foot informing the owner of his rights. (4) On the 24th instant I telephoned your Mr. Duerden, complaining that, despite repeated requests, I had not received the information as to my client's rights in the matter, and it is apparently in response to this that I received your letter now under reply. It is clear, therefore, that Mr. Duerden was not aware of the true position, and did not convey to me the information which my client should have had immediately after June 20.

That letter is not answered by the town clerk till July 3, the very day when the fourteen days' period expired. The defendant's solicitor would probably not get it till July 4, and, in considering it, it must be borne in mind that from June 26 onwards the town clerk and his corporation were legally debarred by the statutory inhibition of the circulars from " proceeding further in the matter " since they had definite knowledge of the owner's intention to occupy the house himself. The letter begins with three misleading statements about his own legal position, namely, (1) that " on June 26 " (when the defendant went into occupation) the premises were " already under his control " ; (2) that he was there as agent for the Minister of Health ; and (3) that, if the owner entered without his permission, he would commit an offence under the Defence Regulations. He adds that on June 26, after the interview between the defendant's solicitor and himself, his assistant had telephoned to the senior regional officer of the Ministry and read to him the town clerk's letter of June 24 to the solicitor. The letter then says :

> The official agreed that any representations your client wished to make must be submitted in writing and the information asked for in the fourth paragraph of my letter must be supplied as evidence of good faith before the question of release and your request for the keys could be considered.

That statement most improperly suppresses altogether the corporation's absolute duty, as I interpret the circulars, to stop the whole business—" to proceed no further in the matter." The four numbered paragraphs are contrary to the considerate spirit of the circulars, and inconsistent with their express conditions. In addition, they repeat the utterly wrong refusal of a copy of " the circular," with the implicit misrepresentation that there was only one relevant circular. His long penultimate paragraph seeking to apply the new circular No. 141 of June 28, 1946, was improper, both because he had lost his right, if he ever had one, " to proceed further in the matter," and because the circular could not be enforced retrospectively so as to modify the defendant's right vested in him (even if the June 20 requisition had been effective) by previous circulars even then to require the corporation " to proceed no further in the matter." That criticism is, however, academic, as the judge has found as a fact that the new requirements " of No. 141 were satisfied " by the defendant. Anyhow, on July 8 the defendant's solicitor replied with a tactful letter giving the information requested and asking for the return of the keys. The town clerk's reply of July 9 asking about the defendant's Cheshire house seems to me oppressive in existing circumstances as a demand by Blackpool, but the important comment called for by that letter is on the last sentence : " I shall then be in a position to take the instructions of the Ministry of Health on this matter." The Ministry of Health had no business to be giving the town clerk of Blackpool " instructions on the matter," for the corporation had an independent duty under the subdelegated legislation and was not a mere agent of the Minister. However, on July 12 the solicitor complied with the town clerk's request, enclosing the defendant's own letter. The town clerk sent copies to the senior regional officer and after seventeen days—presumably employed in telephonic conversation and correspondence with that officer—wrote a letter to the defendant's solicitor on July 29, which led the judge to hold that from that date the defendant's possession of the house became unlawful on the ground thus expressed :

> In the letter of July 29 we find the competent authority—*i.e.*, the Minister—giving directions as to the vacation of the house, through the medium, it is true, of the town clerk—but of the town clerk acting merely as the mouthpiece of the Ministry and not acting on his own discretion as a delegate of the functions of the competent authority under the regulation. The matter is made still more clear in the subsequent letter of Aug. 20 where we find the senior regional officer giving, on behalf of the Minister, directions—couched, it is true, in the terms of request, but obviously intended to be understood as a command—to the defendant, through his solicitor, to vacate the house. . . . For those reasons I hold that the defendant's retention of the possession of the house became unlawful at any rate as early as the receipt of the letter of July 29.

Before criticising that passage in the judgment, I will follow up the correspondence to Aug. 20. The defendant's solicitor had been called away and only returned to his office on Aug. 9. On that day he wrote to the senior regional officer and sent the town clerk a copy saying that he wrote because he had been told on the telephone by the senior regional officer's office that the senior regional officer would not grant an interview. He assumes, on the misleading authority of the town clerk's letter of July 26, that the new circular applies to regulate his client's rights, and he, therefore, states the facts, a statement which the judge accepted as satisfying the condition imposed by that circular which I have already quoted. The letter was courteous and gave all necessary information. There was no reply from the senior regional officer till a letter dated Aug. 20, the whole of which I must read :

> I am directed by the Minister of Health to refer to your letter of Aug. 9 in connection with the above-mentioned property and to say that, after full consideration of the matter, the Minister is satisfied that the property was properly requisitioned

> on June 20, 1946, by the town clerk of Blackpool in the exercise of powers duly delegated to him by the Minister. Your client's entry on the premises at a subsequent date was, therefore, unauthorised and illegal. I am, accordingly, to request that your client will take immediate steps to vacate the house, and I am to add that the town clerk of Blackpool has been instructed that he is to take all possible action as from Aug. 31, 1946, to recover vacant possession. When your client has complied with this request, the town clerk of Blackpool will be willing to consider any reasonable claim your client may wish to make to occupy part of the house on licence.

These are my comments: (1) It looks as if the interval of ten days had been occupied by an investigation by the Ministry in London into the facts of the case and that the letter was directed by it. That may or may not be so. (2) "The Minister" is represented as having given quasi-judicial consideration to a justiciable issue about past events, namely, as to who was right about what happened on June 20, and as having come to a decision in favour of the corporation and against the house-owner. (3) "The Minister" assumes power to instruct the town clerk to "take all possible action to recover possession as from Aug, 31." (4) On the justiciable issue the Minister purports to decide (*a*) without allowing the owner's solicitor to have copies of the subdelegated legislation, (*b*) without inviting the owner's solicitor to come and argue his case. (5) No reason for the Minister's decision is given. I can only call the letter an example of the very worst kind of bureaucracy.

On Aug. 23 the town clerk, mistakenly accepting, as he had previously done, the position of mere agent for the Minister, wrote to the defendant's solicitor that, if the house was not vacated by Aug. 31, he would start proceedings for possession. This produced a very proper letter from the solicitor on Aug. 31 which I must read:

> Thank you for your letter of the 23rd instant. I have taken my client's instructions and consulted counsel in regard to the threat to institute proceedings. In view thereof, I now on his behalf formally require that I be furnished with copies of (*a*) the instrument by which the Minister delegated to you his powers under Defence Reg. 51; (*b*) all circulars or instructions of the Minister under which you have acted or purported to have acted in the requisitioning of this property, or, alternatively, that I be afforded an opportunity of inspecting and taking such copies. I would add for your information that these are required for the purpose of investigating and considering the validity of the requisitioning in the light of the judgment in a certain recent case before the courts.

No answer was sent, but a notice to quit was served on the owner's housekeeper. On Sept. 11 the solicitor wrote to the town clerk protesting. On the same day the town clerk wrote saying he had sent the solicitor's letter of Aug. 31 to the Ministry of Health and was awaiting their instructions. On Sept. 13 the defendant's solicitor again asked for an answer to his letter of Aug. 31, but no reply came. Instead, an astounding document dated Sept. 24 comes like a bolt from the blue from the Ministry of Health in London, officially signed by an assistant secretary, which I must read *verbatim*:

> Whereas the premises whereof particulars are set out in the schedule hereto are in the possession of the Minister of Health by virtue of reg. 51 of the Defence (General) Regulations, 1939, and the council of the county borough of Blackpool are, under the authority of the Minister, using the said premises for purposes authorised by the said regulation: Now therefore the Minister, being of opinion that it is expedient in connection with such use of the said premises so to do, hereby authorises all such acts, including the taking of any legal proceedings, as a person having an interest in the premises by virtue of which he is immediately entitled to possession thereof would, by virtue of that interest, be entitled to do for the purpose of securing the removal from the said premises of persons not entitled to occupy the same. Schedule: 131, Squires Gate Lane, Blackpool. 20 Dorset Street, Blackpool. Given under the official seal of the Minister of Health this 24th day of September, 1946. (Signed) F. L. Edwards.

I can only suppose that this was an attempt to put into a semblance of legal form the decision of the Minister expressed in the letter of Aug. 20, which, incidentally, the Minister had not the shadow of jurisdiction to make. The attempt was so great a breach of constitutional propriety that I do not know any legal epithet suitable for it, and this court is not concerned with the Minister's responsibility to Parliament. From the judicial point of view I content myself with saying it was a *brutum fulmen*, but obviously intended, and improperly so intended, to help the corporation in their endeavour to get legal possession. The plaintiffs' summons was issued in the county court about Oct. 23 "on the instructions received from the Ministry of Health ": see the town clerk's letter to the defendant's solicitor of that date in which the town clerk did belatedly offer inspection, by appointment, at his office of the circulars relating to requisitioning. An interview followed, and then, on Nov. 14, a further very reasonable letter from the solicitor asking for copies as asked on Aug. 31 " in order to consider the validity of the requisition," which was the cardinal issue in the pending litigation. By another most reasonable letter of Nov. 21 the solicitor said that the town clerk had been " only prepared to produce two of the documents asked for," requested further and better particulars, and said he would apply for discovery of documents. On Nov. 28 another extraordinary letter from the Ministry of Health came into existence from the senior regional officer at Manchester. It was addressed to the town clerk and was as follows :

> I am directed by the Minister of Health to refer to your letter of Nov. 19 and to previous correspondence on the above-named subject, and to say that in order to remove all doubt as to the power of the town clerk of the county borough of Blackpool to retain possession of the premises No. 131, Squires Gate Lane, in the county borough of Blackpool, the Minister hereby ratifies and confirms all the actions of the said town clerk in connection with the taking possession of the said premises and the Minister in the exercise of his power under reg. 51 of the Defence (General) Regulations, 1939, hereby delegates to the town clerk all his functions under paras. (1) to (3) of the said reg. 51 in relation to the taking possession of the above-named premises.

The letter therein referred to from the town clerk of Nov. 19 to the senior regional officer is not in the bundle of correspondence, no doubt because the town clerk took the view that it came within his claim for privilege in his affidavit of documents sworn a few days later on Nov. 30 by his assistant solicitor. To that affidavit I shall refer presently. The object of the letter of Nov. 28 is self-evident. It was an eleventh hour attempt retrospectively, after action brought, to strengthen a legal position open to serious attack, and as such I cannot conceive how the Ministry could have thought it consistent with justice to the defendant. On it was founded the argument addressed below and to us, that the town clerk was a mere agent for the Minister, that the act of requisition on June 20 had been performed by him as agent, and that, therefore, the Minister as principal could ratify. In my opinion, that view of the legal relationship between them is radically mistaken. As I have already said, the circulars contained (together with much explanatory matter) ministerial legislation with statutory force transferring to the local authorities concerned the Minister's legal power to over-ride the common law rights of individual members of the public for the purposes defined in the circulars and limited by their conditions. In any area of local government, where the Minister had by his legislation transferred such powers to the local authority, he for the time being divested himself of those powers, and, out of the extremely wide executive powers, which the primary delegated legislation contained in reg. 51 (1) had conferred on him to be exercised at his discretion, retained only those powers which in his sub-delegated legislation he had expressly or impliedly reserved for himself. The constitutional justification for the delegation permitted by reg. 51 (5) was obviously that local needs and opportunities relevant to the housing problem would necessarily be infinitely more within the local knowledge of the local authorities than in the Ministry, whether central or regional. The letter of Nov. 28 presumably sent on direction from London was, in my opinion, *ultra vires* the Minister and legally a nullity.

My conclusions on the whole case are as follows : (1) The original attempt at requisition on June 20 was inoperative for these reasons : (*a*) because the notice purported to requisition the house and its contents, whereas the corporation was by the terms of the sub-delegated legislation forbidden to requisition furniture (see circular No. 2845, para. 9, *ante*, p. 89) ; (*b*) because a similar illegal usurpation of power was attempted in the corporation's omission to have the furniture contents put into a separate room at the time of requisition, or immediately after it. Thus, the notice, combined with the taking of the keys *colore officii*, involved an actual taking possession of both house and furniture, which in law was a trespass by the corporation. (2) On the notification by the defendant on June 26 of his intention himself to occupy, the corporation ought to have taken their hands right off (" shall not proceed further in the matter "). The house was never, in fact, " occupied " by the corporation, and when the defendant entered he occupied an unoccupied house of which the corporation never had any such possession in law as would make him then or thereafter a trespasser. My conclusions on this appeal are :—On both (1) and (2) *supra* the judge took the right view of the law, and there was ample evidence on which he could decide any issues of fact, supporting those conclusions of law. (3) (*a*) circular No. 141 of June 28, 1946, never had any application. It did not legalise the illegal requisitioning of June 20 because it only operated prospectively and not retrospectively. It only concerned a future lawful exercise of requisitioning powers. (*b*) The judge found as a fact that its express condition subsequent in favour of the house-owner was satisfied and that finding of fact would be binding on this court even if we felt doubt about it as a finding of fact unless there was no evidence to support it. Here there was plenty. (4) The view of the judge that, by the letters of July 29 and Aug. 20, the Minister of Health himself requisitioned and thereby came into possession is wrong on the grounds : (*a*) that he had not in his sub-delegated legislation reserved power so to act : (*b*) that neither the corporation nor its town clerk was acting as his agent, and (*c*) that he did not, in fact, then requisition or take possession. (5) The argument that, by any of his letters to the town clerk or the defendant, the Minister ratified the inoperative requisition by the corporation on June 20 is, for the reasons I have already stated, wholly misconceived.

To one other matter I feel constrained to refer, namely, the affidavit of documents sworn in the action on behalf of the corporation by its assistant town clerk, himself a solicitor, putting forward various untenable claims for privilege, particularly for the circulars on which alone the right of the corporation to requisition the property in question rested. In the second part of sched. I are set out four descriptions of documents as follows : " *Section* 1. Original and copy correspondence between the various departments of the plaintiff corporation. *Section* 2. Copies of reports to and proceedings of various committees of the plaintiff corporation. *Section* 3. Correspondence between the Ministry of Health and the town clerk, Blackpool, with reference to and in anticipation of the present proceedings. Circular letters from the Ministry of Health to the town clerk, Blackpool." The claims to privilege appear in para. 3 of the affidavit :

> (*a*) The plaintiffs object to produce the documents in s. 1 of the second part of sched. I because these documents consist of confidential letters between the departments of the corporation, which are by their nature privileged. (*b*) The plaintiffs object to produce the documents in s. 2 of the second part of the said sched. 1 because these documents consist of confidential reports and instructions received in anticipation of and in connection with this action. (*c*) The plaintiffs object to produce the documents in s. 3 of the second part of the sched. I because these documents consist solely of professional communications of a confidential nature which, in view of this action, whilst it was anticipated, and since its commencement, have passed between the town clerk and the Minister for the purpose of reporting and obtaining instructions with reference to such action.

Those claims call for these comments : (*a*) discloses no legal grounds of privilege from disclosure to the opposite party : (*b*) discloses no ground, in the absence of the necessary condition, namely, that the reports and instructions emanated from or were addressed to the corporation's legal advisers for the purposes of the litigation : (*c*) the communications between the town clerk and the Minister there described are obviously not privileged because (i) they are *not* " professional communications of a confidential nature in view of this action whilst it was anticipated and since its commencement " ; (ii) the town clerk was acting as an officer of, not as the solicitor to, the corporation in its capacity of delegate of statutory powers from the Ministry of Health, and when so acting he was representing his corporation in an executive and not in a professional capacity ; (iii) the corporation's cause of action rested entirely on those very circulars. In regard to the claims made by the officers of the Ministry of Health in the letters, I recognise that in the difficult field of disclosure and production of documents by the central departments of government questions in regard to the risk of disclosure causing danger to the public interest often arise, but when a claim on that ground for privilege from disclosure occurs, it is the Minister who personally signs the letter of objections stating that he withholds disclosure because it is against the public interest to disclose. No such privilege has yet, so far as I know, been conceded by the courts to any local government officer when his employing authority is in litigation. Public interest is from the point of view of English justice a regrettable and sometimes dangerous form of privilege though at times unavoidable, but no such ground was put forward in the plaintiffs' affidavit. No attempt was made before this court to justify or excuse these extraordinary claims. By way of explanation we were informed that the claim was made by an accidental slip, and in all the circumstances —and having regard particularly to the statement by the defendant's counsel that the assistant town clerk had, in fact, been helpful to his client at the hearing —we thought it unnecessary to enforce the intimation we had given requiring the explanation and informed counsel that we should not require the attendance before us of the town clerk and the assistant town clerk, as officers of the court, as we had previously intimated. The explanation having been given and accepted, I say nothing more of this particular affidavit. I think it right, however, to emphasise in the clearest possible terms that solicitors, who act as officers of local authorities, and in that capacity swear affidavits of documents, owe a duty to the court, to the opposite party, and to their own profession, to take proper care in the making of such affidavits, and, as solicitors, they cannot be heard to say that they do not understand the nature of the obligation imposed in swearing such affidavits. One last observation. No counterclaim was put forward in the county court. Since writing this judgment I have read that of Evershed, L.J. I agree with it all except his doubt about the condition subsequent in the circulars. I do not share his doubt. The appeal must be allowed with costs, here and below, and there on scale "C" with all proper special allowances. **ASQUITH, L.J.**, has read this judgment and asks me to say that he agrees with it.

EVERSHED, L.J. : I agree that this appeal should be allowed, though in certain respects I do not, I think, go as far as Scott, L.J., has indicated in the judgment which he has just delivered.

The so-called "requisitioning" was by the corporation or its town clerk on June 20, 1946. The "requisitioning" was effected by serving notice on the defendant or his agent and by affixing a further notice to the premises, and all this was done, admittedly, in pretended exercise of the powers delegated to the corporation or its clerk by the Minister of Health under Defence Regulation, 51 (5). Logically, therefore, the first question to determine is whether the "requisitioning" was a valid exercise of delegated power under the regulation. Counsel for the defendant has maintained that the "requisitioning" was in any event invalid on the ground that the purpose in view, namely, the provision of housing for the inadequately housed, is not within the ambit of the regulation or of the Supplies and Services (Transitional Powers) Act, 1945, from which the regulation now derives its efficacy, as not properly falling within the formula "supplies and services." The point was argued before, and was rejected by, the county court judge and, in my judgment, his conclusion on it was correct. The foundation of counsel's argument was s. 6 (1) of the Act, which provides that for the purposes of the Ministry of Supply Act, 1939, "articles" which the Ministry of Supply is empowered to acquire, produce and dispose of are to be deemed to include any "supplies" which the Minister of Supply is satisfied that it is necessary or expedient to maintain, control or regulate, for any of the purposes specified in s. 1 (1) of the Act. It was, therefore, contended by counsel that, if the supply of houses was within the ambit of the word "supplies," the Minister of Supply would, by virtue of s. 6 of the Act, be empowered to acquire and build houses, a result which was claimed to be absurd. For my part, I think it very doubtful whether in the context in which it appears in s. 6 the word "supplies," deemed to be included in the word "articles," could fairly be said to comprehend houses, but I think also that a limited construction of the word in s. 6 by no means necessarily involves an equally limited construction in s. 1 (1). In my judgment, when regard is had to the known circumstances in which the Act of 1945 was passed, including the circumstances of a grave shortage of accommodation as a result of the war, the phrase "supplies and services" should *prima facie* be regarded as a phrase of the widest import covering all those tangible and intangible requirements of society of which there was and is a shortage, and, with all respect to the county court judge who thought otherwise, I think there is great force, too, in the argument of counsel for the plaintiffs by reference to reg. 68AB. The language of that regulation makes it quite plain that the provision of housing accommodation was regarded as falling within the scope of reg. 51 (1), and not so regarded in the regulation only, but also in the Act itself, which by s. 1 (4) expressly makes that section applicable to the regulations in Part IV of the Defence (General) Regulations, 1939, including both reg. 51 and reg. 68AB. I conclude, therefore, that the purpose in view in the present case of providing housing accommodation for those without homes was within the scope of reg. 51.

The main point on this part of the case, on which the county court judge decided adversely to the plaintiffs, is whether the acts of the corporation or its clerk were within the scope of the power delegated under reg. 51 (5). I observe here that the terms " requisition " or " requisitioning " are nowhere used in the regulation. What the competent authority (and it is admitted for the defendant that the Minister of Health as regards the present case answers that description) may do under para. (1) of the regulation is (*a*) to take possession of land (including, of course, houses) and (*b*) to give directions in connection with such taking of possession, and, by para. (5) of the regulation, the Minister of Health, as competent authority, may delegate to specified persons or classes of persons his powers under para. (1) to such extent and subject to such restrictions as he may think proper. There was some discussion before us about the nature of the right or interest acquired by the corporation or its clerk as a result of the serving and affixing of the notices to which I have referred and the obtaining of the keys of the premises on the following day, June 21, assuming such acts to have been validly done, and reference was made to the decision of this court in *Macara* v. *Barclay* (1), in which it was held that the serving of a (valid) notice of requisition conferred on the local authority in question such an immediate interest in possession as disabled a vendor of the property from giving to his purchaser vacant possession in accordance with the terms of his contract. In my judgment, it is not, on the view I take of the case, necessary to pursue the point, for, in my judgment, the county court judge was right in concluding that the acts done by the corporation or its clerk on June 20 and the succeeding day were in excess of the powers conferred on them, so that there was in this case no valid " requisitioning " of the property as a result of those acts, and, consequently, no interest in the property thereby acquired by the corporation sufficient to support an action of trespass against the defendant.

The delegation of power by the Minister as competent authority was effected by a number of circulars addressed by him to local authorities or the clerks of local authorities (including the Blackpool Corporation), and there is no question raised in this case that the means chosen were an effective exercise of the power of delegation conferred by reg. 51 (5). It is, indeed, beyond all doubt that the justification of the plaintiff corporation, if challenged (apart from any alleged ratification), must rest and rest entirely on the terms of the circulars or one or more of them. That being so, nothing has, to my mind, been more shocking in the present case than the reluctance of the plaintiff corporation and of the regional officers of the Minister of Health—a reluctance successfully maintained for close on six months—to disclose to the owner of the property, the validity of the alleged requisition of which he set out to challenge, the circulars which were the sole foundation of the corporation's claim to confiscatory powers. This is, after all, a case where Parliament has thought fit not only to delegate the power of legislation by His Majesty in Council, but to give power to " competent authorities " mentioned in the Orders in Council to delegate in turn the widest possible functions (whether they be legislative or executive) to such specified persons or classes of persons as may be selected by them—a description which would comprehend any individuals responsible or irresponsible whom those authorities might choose. If Parliament has found it necessary in order to meet the severe conditions of the time to authorise by such indirect means the peremptory seizure of the private property of the ordinary citizen, plain justice at least requires that the citizen who is informed that, at the command of one of the selected specified persons or classes of persons, his property is to be taken out of his hands in order " to perform its social function," should be entitled to know what precisely is the authority which has been exercised and to see that the exercise is not in excess of the power which Parliament has directly or indirectly conferred. Those who seek to refuse him that elementary right cannot, in my judgment, escape the imputation of having sought to bludgeon him into submission or the charge of involving him as an alternative to submission in the costs of litigation which may turn out to be futile. Had the relevant circulars been at once disclosed to the defendant—as it is conceded by counsel for the plaintiffs they manifestly should have been as soon as he called on the corporation to justify their acts—at least a long period of wasted energy would have been saved. It may well be that A for practical reasons the circulars from time to time issued by the Minister of Health to local authorities should not be made generally available to the public, though I am not myself satisfied that, in so far as such circulars contain or constitute the delegation by the Minister of his requisitioning powers under reg. 51 as distinct from instruction and advice to the delegates, the terms, or, at least, the effect, of those circulars should not be made available to the public as proper matters of public interest and concern. If such a course were followed, B it would, at least, have the desirable result of making clear the terms and limitations of the delegated powers as distinct from instruction and advice as to their exercise—a matter to which I later return. In any event, the defendant, as the proprietor of the premises sought to be seized, could in no fair sense of the word be regarded as a mere member of the public when his solicitor raised the question of disclosure, and to the injustice done to the owners of the property C sought to be affected by the policy of secrecy must be added unfairness to the harassed officials on whom falls the burden of implementing the policy. No one —certainly not I—can fail to sympathise with those officials in the arduous performance of their difficult duties or doubt their conscientiousness in trying to perform those duties fairly and to the best of their ability, but those who, pursuant to the policy of secrecy—if such policy there be—lay on the officials the injunction against disclosure and require them, instead, to make brief D summaries in their correspondence of the complexities of the material documents, expose them inevitably to the charge of inadequate and unfair representation from which they are, in my judgment, entitled to be protected.

In the present case a considerable number of circulars was referred to. Two only seem to me material, namely, Circular 2845, dated Aug. 4, 1943, and Circular 138, dated July 30, 1945, for it was conceded by counsel for the plaintiffs that in the circumstances of the case he could not rely on the later E Circular 141, dated June 28, 1946. To the detail of the two circulars numbered 2845 and 138 I propose only to refer to determine the one question which is relevant for present purposes, namely, were the "conditions" expressed in those circulars as applicable to the exercise by the plaintiff corporation or its clerk of their powers of requisition limitations or restrictions on the delegated powers or merely conditions which the Minister imposed, as between himself and his delegates and by way of instructions to them by him, without limitation F on the delegated powers themselves? The county court judge concluded in favour of the former alternative, and, in my judgment, he was right so to do. Referring to what I have already said above, I state again here that, in justice to those whose property may be taken no less than in fairness to those persons on whom are cast the duties of executing the delegated powers, it seems to me incumbent on the delegants so to frame their delegations as to leave no doubt G where the line is intended to be drawn between limitations on the delegated powers, on the one hand, and mere instructions, on the other. Moreover, where real doubt arises whether any part of the instrument of delegation is to be regarded as one or the other, limitation or instruction, *prima facie*, I should have thought, the construction favourable to the private citizen should in these courts be adopted.

The first of the two suggested limitations is in regard to furniture. According H to the finding of the county court judge, there was, at the material date, on the premises in question a considerable amount of the defendant's own furniture. It is said that the amount of that furniture was not great. At least, it was so much in amount as to accord with the fact that the defendant (as the county court judge found) had immediately before the requisition frequently used the premises for his own occupation at week-ends. In the requisition notice no mention or exception is made of furniture, and in so far, therefore, as the plaintiff corporation or its clerk took possession by virtue of their notices of the defendant's premises, they must be taken to have taken possession also of his furniture thereon. I turn to Circular 2845, which is headed: "Requisitioning for families inadequately housed." The material paragraph is that numbered 5 which in in the following terms:

> Accordingly, the Minister in the exercise of his powers under the Defence (General) Regulations, 1939, has decided to extend and hereby extends the powers already delegated to you in Circular 1949, dated Jan. 18, 1940, to include the taking possession A of buildings required for the purpose of improving the conditions of families at present inadequately housed. The delegation is subject to the conditions set out in the appendix to this circular, which also indicates the procedure to be adopted in the exercise of these powers.

The appendix is divided into two parts. The first is entitled "Conditions to which requisitioning is subject," and the second "Procedure." The first part which is as follows:

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> 1. The requisitioning power is limited to the taking possession of: (a) unoccupied houses or other residential buildings whether furnished or not; (b) unoccupied non-residential buildings. 2. The prior consent of the senior regional officer of the Ministry of Health shall be obtained. 3. No chattels contained in any house of which possession is taken may be requisitioned, and the requisition notice shall contain a direction to the owner or tenant requiring him to remove the chattels or to store them in a designated part of the premises specifically excluded from the requisition, and informing him that, C if he fails to do so, the chattels will be removed and stored by the requisitioning authority. 4. No premises may be requisitioned if arrangements have been made for their use by, or on behalf of, any government department whether by way of requisition or otherwise, or if they are in the occupation of any local authority. 5. The requisition is subject to the right of the Minister at any time to direct the authority to hand over the premises to the person otherwise entitled to possession.

I need not read the second part. Paragraph 1, however, provides that, so far D as it is applicable, the procedure set out in para. 5 *et seq.* of the enclosure to the earlier Circular 1949 is to be followed. Reference to the earlier circular shows that a form of requisitioning notice, called Form C.S.4, had been devised for the use of the local authorities, and I observe that that form, was, in fact, used without modification in the present case.

In my judgment, and on a fair reading of Circular 2845 and its appendix, there is to be found a distinction between "conditions" subject to which power E was delegated (*i.e.*, restrictions or limitations on such power), on the one hand, and instructions or advice which, though intended to regulate, as between the Minister and his delegates, the way in which the latter exercised their power, did not limit or restrict the power itself. In my judgment, that distinction is made in the last sentence of para. 5 of the body of the circular and is preserved and emphasised in the division of the appendix into two parts. Counsel for F the plaintiffs conceded that the first paragraph of the first part of the appendix did operate as a limitation of the power, but claimed that the other paragraphs in the same part of the appendix, or, at any rate, para. 3, which is the material one for present purposes, have no such limiting effect. I cannot see, as a matter of interpretation of the document or otherwise, why this should be so. All the paragraphs in this part of the appendix are equally referred to in the heading and in para. 5 of the body of the circular as "conditions" to which the delega- G tion is made subject. All are in this respect *ejusdem generis*. Once it is conceded, as in my view it must be conceded, that the first paragraph of this part of the appendix was and is a limitation on the power, then the same quality must be attributed to all the other paragraphs of the same part of the appendix. It was said by counsel for the plaintiffs that such a conclusion would involve grave practical difficulties inasmuch as a local authority would not in very many cases know, and could not know (without making inquiries which would have H the effect of defeating their purpose), whether premises did or did not contain furniture, and that the requisitioning power ought to be exercisable by use of the Form C.S.4, at any rate, in all cases where the premises were not "visibly" (which I understand to mean "obviously") furnished. I cannot see any justification for importing these words into the language of the document. Nor do I think there is any such administrative difficulty as contended. Where the authority does not know, and it is not prudent or politic to find out, whether there is furniture on the premises, the Form of Notice C.S.4 can be modified (as it was suggested in the first paragraph of the second part of the appendix it ought, in appropriate circumstances, to be) in the way suggested by ASQUITH, L.J., during the argument, that is, it should contain a direction to the owner or tenant to remove the chattels (if any) on the premises and should inform him that in default of his so doing the authority will itself remove and store such chattels. The Notice C.S.4 in its pristine form will continue to apply where it is known that there are no chattels on the premises, or, at most, only chattels of a negligible amount. On the other hand, where it is known what the extent of the chattels on the premises is, the Notice C.S.4 may be further modified A by the direction to the owner or tenant to store them on some specified part of the premises which would be exempted from the requisition. In my judgment, therefore, the "requisition" of June 20 in this case was in excess of the corporation's delegated powers and was invalid by reason of its failure to provide for the exclusion therefrom of the defendant's chattels. As already stated, the purported effect of the requisition in the form it took was to take possession in law both of the premises and the chattels and to render it impossible for the B defendant lawfully to remove the chattels or otherwise dispose of them. It is, in my view, plainly impossible to contend—and it was not, indeed, contended—that the "requisition" was only invalid *quoad* the furniture. By requisitioning premises or parts of premises with the furniture thereon the authority did that which, by the express terms of para. 3 of the relevant part of the appendix to the circular, they were disentitled to do. It follows, there- C fore, that the requisitioning and seizure by the plaintiffs in June, 1946, was, in my judgment—as the county court judge held—invalid altogether.

Having regard to my conclusion on this part of the case it is not necessary for me to express any final view on the second ground on which the corporation's acts were impeached and on which SCOTT, L.J., has also reached a conclusion favourable to the defendant, namely, their failure to give effect to the result of the defendant's notification to them of his intention (found to be a *bona fide* D intention) to occupy the premises himself for his personal residence. On this point the material circular is that numbered 138, pt. II (requisitioning of unoccupied houses), the first sentence of sub-para. (3) of which provided that, in the event of such a notification on the part of the owner, "the authority shall not proceed further in the matter." As regards this part of the case there is, I think, a somewhat stronger ground for supporting the plaintiffs' argument, for, if the relevant part of the circular is examined, it will be seen that the modifications E to be effected by it were expressed to be occasioned by certain difficulties experienced in regard to two matters, namely: (1) the obtaining of the prior approval of the Minister's senior regional officer, and (2) the giving to the owner or tenant a reasonable opportunity to let or occupy the house. The first of these two matters is a reference to para. 2 of pt. I of the appendix to the earlier Circular 2845, namely, to something which was, for reasons which I have already given, a restriction on the delegated power. The same cannot, F however, so easily be said as regards the second matter. The giving of reasonable opportunity to the owner to let or occupy found no place among the conditions in the first part of the appendix to Circular 2845. The reference in this case is to para. 9 of the body of the earlier circular, which in form at least is, to my mind, more akin to a direction or instruction than to a limitation of powers. I must not be taken to be saying that this suggestion is correct. but, with due deference G to the firm conclusion which SCOTT, L.J., has reached, the corporation's argument on this point seems to me appreciably easier than their argument on the furniture point. For reasons which I have already given it is unnecessary to express any final conclusion, and I do not, therefore, do so.

If I am right so far, it follows that the corporation's action against the defendant must fail unless they can successfully establish one or other of the submissions made on their behalf and accepted by the county court judge, namely: H (1) independent or original requisitioning by the Minister himself, or (ii) ratification by the Minister of the acts done by the corporation in excess of the authority conferred upon them. For both these arguments one document and one document only has been relied on in this court and must do double duty, namely, the letter dated Aug. 20, 1946, addressed to the defendant's solicitor by the Minister's senior regional officer at Manchester, for counsel for the plaintiffs does not now seek to rely on an earlier letter of July 29, mentioned by the county court judge, or on the letter of Nov. 28 which was written after action brought. As the burden sought to be imposed on the letter of Aug. 20 is so remarkably onerous, the letter should be read in full, but as SCOTT, L.J., has already read it I shall not take up time by reading it. It is to be observed that the letter of Aug. 20 was written by way of answer to the letter of the defendant's solicitor dated eleven days earlier. In that letter the solicitor had put to the senior regional officer his case for saying that the purported "requisition" of June 20 had been in excess of the corporation's powers, and was, therefore, invalid. It is true that the case was founded on the circumstance that the defendant had notified his intention of occupying the premises himself and that no point is made in regard to the furniture, but the solicitor's letter was written many weeks before he had seen the circulars and the summarised effect of them (with which he had been supplied) had made no reference whatever to the condition as regards furniture, though it must have long since been apparent to the corporation that there was, and had been at all material times, furniture in the house. However that may be, the significance of the matter for present purposes is that the senior regional officer's letter of Aug. 20 was written in reply to the submission of invalidity made in the letter of Aug. 9 on the grounds therein alleged. Was the letter of Aug. 20 a requisitioning by the Minister himself in the exercise of his original powers under reg. 51 (1) ? If it is true, as counsel for the plaintiffs contended, that the previous delegations by the Minister in his several circulars involved no total abdication or "denudation" by the Minister of his own power and authority so that he could at any moment resume that power and authority and do so in reference to premises already the subject of a purported exercise of the power he had delegated : see *per* LORD COLERIDGE, C.J., *Huth* v. *Clarke* (2) (L.R. 25 Q.B.D. 394) ; is that what the letter of Aug. 20 did ? A simple and straightforward reading of its terms seems to me to provoke immediately a clear answer in the negative. Counsel has admitted the obvious fact that the Minister never intended or supposed that by the letter he was deliberately exercising a power of requisition. Counsel argues that, nevertheless, the language of the letter is such that, albeit by accident or, as it were, by a side wind, it has in law that effect. For my part, I gravely doubt whether any document can, because of an interpretation which may be put on its language, have the effect contended for, once it is conceded that there was no intention by the document to exercise the requisitioning power. In any case, it is, in my judgment, perfectly plain (and I say this with all respect to the county court judge) that on a fair reading of its language the letter cannot by any means, however accidental or oblique, be construed as an exercise of any power of requisition. Counsel strongly relied on the second paragraph of the letter, but, in my judgment, what the letter says, and all it says or purports to say is this : (i) that the contention of the defendant's solicitor in his letter of Aug. 9 is wrong and that the corporation's acts of June 20 and 21 amounted to a valid exercise of their powers within the scope of their delegated authority, the defendant having, accordingly, been a trespasser ever since ; (ii) that, as a consequence, steps would be taken by the corporation to evict the defendant on Aug. 31, unless he had on or before that date himself gone out of possession, the corporation being armed for the purpose with the powers to sue under para. 2 (*a*) of the regulation. Any other construction ignores, in my view, the essential word "accordingly" which is the clue to the meaning of the second part of the letter, the intimation or threat thereby conveyed being the consequence following from the rejection of the defendant's challenge to the validity of the corporation's acts. Finally, was the letter a ratification of the acts of the corporation on the footing (*a*) that they were done by the corporation as the Minister's agent and (*b*) that they were in excess of the authority previously conferred on the agent ? Be it observed that, unless they were so in excess, no ratification was required. In my judgment, the construction which I have put on the letter answers this question no less clearly than the previous question in regard to direct requisition by the Minister, for the assertion in its first paragraph negatives the need for ratification no less clearly than the terms of the document as a whole negative the suggestion that the Minister's officer was doing, or purporting to do, any such thing.

In the circumstances I do not propose to consider at any length the more general question raised by counsel for the plaintiffs whether a delegate of power under reg. 51 is anything more than an "agent" of the competent authority.

Counsel relied on the sentence (L.R. 25 Q.B.D. 395) in the judgment of Wills, J., in *Huth* v. *Clarke* (2) : " the word ' delegate ' means little more than an agent." His proposition was that the relationship between the Minister of Health and the Blackpool Corporation was at all material times that of principal and agent or so analogous thereto as to make ratification by the Minister possible where the corporation had, in fact, exceeded the scope of their authority. Without attempting any precise definition, I greatly doubt whether one to whom, under the regulation, the statutory power of requisition has been delegated by a competent authority can be said to exercise those powers as " agent " for the competent authority. If it be true, in accordance with the terms of the Emergency Powers (Defence) Act, 1939, that such a delegate (no less than the competent authority) acts " on behalf of His Majesty," it does not seem to me to follow that he acts on behalf, in the sense of being the agent, of the competent authority. I need not, however, further pursue the matter since, as already stated, I am satisfied that the effect of the letter of Aug. 20 is not that the Minister thereby affirmed and adopted as his own acts which the corporation had purported to do, independently of any delegated power and representing itself to be the mere agent of the Minister. In my judgment, therefore, there is no substance in the contentions of the plaintiffs based on alleged original requisition or ratification by the Minister of Health.

In the result there was, in my view, no foundation for the claims of the corporation for damages for trespass and for an injunction, and I think that their action ought to have been dismissed with costs. In my judgment, the appeal should be allowed with the usual consequences.

Appeal allowed with costs.

Solicitors : *J. H. Milner & Son,* agents for *Arnold Lever,* Blackpool (for the defendant) ; *Sharpe, Pritchard & Co.,* agents for *Trevor Jones,* town clerk, Blackpool (for the plaintiffs).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

COLNE VALLEY WATER CO. *v.* WATFORD AND ST. ALBANS GAS CO.

[Court of Appeal (Lord Goddard, C.J., Tucker, L.J., and Jenkins, J.), December 15, 1947.]

Practice—Discovery—Action—Penalties—Sums payable under statute—Penalties or compensation—Other remedies sought—Discovery of documents relating to other claims—Gasworks Clauses Act, 1847 (c. 15), *ss.* 21, 23—*Waterworks Clauses Act,* 1847 (c. 17), *ss.* 62, 63.

The sums payable under the Waterworks Clauses Act, 1847, ss. 62 and 63, and the Gasworks Clauses Act, 1847, ss. 21 and 23, are penalties in the true sense and not compensation, and, therefore, in an action to recover such penalties, the filing by the defendant of an affidavit of documents will not be ordered.

Furthermore, in an action in which the plaintiffs claimed penalties under those sections and also damages and an injunction in respect of the pollution of the water supply by the defendants :—

Held : the defendants would not be ordered to file an affidavit of documents relating to the claims for damages and an injunction because, although three different remedies were claimed, there was only one issue on which they all depended.

Mexborough (*Earl*) v. *Whitwood Urban District Council* ([1897] 2 Q.B. 111) *considered.*

[As to Grounds for resisting discovery of Documents, see HALSBURY, Hailsham Edn., Vol. 10, pp. 342-344, para. 411 ; and for Cases, see DIGEST, Vol. 18, p. 52, Nos. *90-94.*]

Cases referred to :

(1) *Adams* v. *Batley, Cole* v. *Francis,* (1887), 18 Q.B.D. 625 ; 56 L.J.Q.B. 393 ; 56 L.T. 770 ; 18 Digest 182, *1343.*

(2) *Saunders* v. *Wiel,* [1892] 2 Q.B. 321 ; 62 L.J.Q.B. 37 ; 67 L.T. 207 ; 18 Digest 183, *1345.*

(3) *Mexborough* (*Earl*) v. *Whitwood Urban District Council,* [1897] 2 Q.B. 111 ; 66 L.J.Q.B. 637 ; 76 L.T. 765 ; 18 Digest 55, *126.*

Appeal by the plaintiff water company from an order of Croom-Johnson, J., sitting in chambers, discharging an order of the master who had directed the defendant gas company to file an affidavit of documents.

The plaintiffs alleged that the defendants had polluted the water and sources of water from which their area drew its supplies, and claimed sums prescribed by the Waterworks Clauses Act, 1847, ss. 62 and 63, and the Gasworks Clauses Act, 1847, ss. 21 and 23, and also damages and an injunction. Croom-Johnson, J., held that the sums recoverable under the two Acts of 1847 were penalties, and that, therefore, discovery would not be ordered. Nor would discovery be ordered in connection with the claims for damages and an injunction, because there was only one issue upon which all three remedies claimed depended. The Court of Appeal now affirmed the decision of Croom-Johnson, J. The facts appear in the judgment of Lord Goddard, C.J.

Le Quesne, K.C., and *Rougier* for the plaintiffs.
Diplock for the defendants.

LORD GODDARD, C.J. : Three separate claims for relief are made in this case. The action is brought to recover (*a*) " penalties " under the Waterworks Clauses Act, 1847, and the Gasworks Clauses Act, 1847 ; (*b*) damages for wrongful pollution of the plaintiff company's wells by the defendant company ; and (*c*) an injunction to restrain the defendant company from causing or suffering to flow into the wells of the plaintiff company any substance that would pollute the said wells. The defendants object to filing an affidavit of documents, relying on the rule that a defendant cannot be ordered to file an affidavit of documents in an action for penalties. The argument of counsel for the plaintiffs is that the so-called penalties with which the two statutes deal are not in their true sense penalties at all, but are in the nature of compensation. Alternatively, he says that, even if they are penalties in the true sense, there is no reason why the defendants should not file an affidavit of documents, so far, at any rate, as relates to the claims for damages and an injunction.

With regard to the first point, the Waterworks Clauses Act, 1847, s. 62, provides :

> Every person making or supplying gas within the limits of the special Act who shall at any time cause or suffer to be brought or to flow into any stream, reservoir, aqueduct, or waterworks belonging to the undertakers, or into any drain communicating therewith, any washing or other substance which shall be produced in making or supplying gas, or who shall wilfully do any act connected with the making or supplying of gas whereby the water in any such stream, reservoir, aqueduct, or waterworks shall be fouled, shall forfeit to the undertakers for every such offence the sum of £200 ; and such penalty shall be recovered, with full costs of suit, in any of the superior courts ; but such penalty shall not be recoverable unless it be sued for during the continuance of the offence, or within six months after it has ceased.

Section 63 provides :

> In addition to the said penalty of £200, and whether such penalty have been recovered or not, the person making or supplying gas as aforesaid shall forfeit to the undertakers the sum of £20, to be recovered in like manner, for each day during which such washing or substance shall be brought or shall flow as aforesaid, or during which the act shall continue by which such water is fouled, after the expiration in either case of 24 hours from the time when notice of the offence has been served on such person by the undertakers.

Provisions in similar terms are to be found in the Gasworks Clauses Act, 1847, ss. 21, 22, and 23 of which are for all purposes identical with ss. 62 and 63 of the Waterworks Clauses Act, 1847. Those sections are put in the Acts for the protection of the undertakers. In the Gasworks Clauses Act, 1847, there is this very important additional section, s. 29, which provides :

> Nothing in this or the special Act contained shall prevent the undertakers from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable, in consequence of making or supplying gas.

We must assume for the purposes of this appeal that the statement of claim discloses the relief to which the plaintiffs are entitled, and on that footing they are entitled to penalties and to damages in addition. The question whether or not penalties of this description are to be regarded as pure penalties or as what is sometimes called compensation has been the subject of a number of cases. The leading case is *Adams* v. *Batley* (1) in which there was a claim for penalties under the Dramatic Copyright Act, 1833, which provided that for every infringement a sum of not less than 40*s.* might be recovered. The court held, on the construction of the Act, that that was a sum to be awarded by way of compensation and not by way of penalty in the sense of it being a fine. In that case the words were "an amount not less than 40*s.*," and, therefore, I think the court regarded that as meaning that in these matters it is very difficult to assess the damage which a person may sustain by an infringement of his copyright and, therefore, it should fix a sum which should, at any rate, A be not less than 40*s.*, although the plaintiff might be able to recover more. Conversely, in *Saunders* v. *Wiel* (2) (a case under the Patent and Trade Marks Act, 1883), the sum which had been fixed as a penalty was held to be a true penalty, and, indeed and in truth, it must depend on the construction as a whole of the enactment under consideration to decide whether the sums of moneys which are called "penalties" therein are to be regarded as penalties in the punitive sense or merely as a method of assessing the compensation to B which a person is entitled. It is material to observe that under the Gasworks Clauses Act, 1847, the liability of the gas company in any other legal proceedings to which they may become liable in making or supplying gas is expressly preserved, and, therefore, it is clear that under the Act there is imposed a liability to pay penalties and there is also preserved the liability to pay damages. That seems to me to be a sufficient reason for holding that the penalties in this case are penalties. Further, it is observable that in the C Waterworks Clauses Act, 1847, and the Gasworks Clauses Act, 1847, a special period of limitation is provided for the recovery of the penalties, namely, six months, whereas damages can be recovered at any time permitted by the appropriate statute of limitations. I cannot overlook the fact that six months has long been the limitation for summary proceedings in criminal courts. Taking all these circumstances into consideration, I have come to the conclusion that D the penalties in this case are penalties in the true sense of the word. Parliament has prescribed in the Waterworks Clauses Act, 1847, s. 62, for a fine of £200, whether the offence be serious or trivial, and by s. 63, in addition to a fine of £200, the sum of £20 for each day the offence is committed. We are bound to hold that those are penalties in the true sense of the word, and that this is an action for the recovery of penalties and not merely an action for the recovery of compensation. E

Counsel for the plaintiffs suggests secondly, that we should allow an affidavit of documents relating to the other issues, the claim for damages and the claim for an injunction. In my opinion, that is not a thing that the court ought to do. It is clear, although three different remedies are sought, that there is only one real issue, and that issue is whether or not the defendants have fouled the water supply of the plaintiffs. It seems to me that it would be impossible for an affidavit of documents to be made which would relate F to the claim for damages or the claim for an injunction and not to the cause of action for penalties. There seems to be authority on this point. In his judgment in *Mexborough* v. *Whitwood Urban District Council* (3) CHITTY, L.J., pointed out that in a case of this sort it was no use ordering an affidavit of documents when it could be seen at once that the defendant would claim exemption from disclosure on the ground that he was being sued for penalties. G If he has a clear objection to the discovery and inspection of documents on the ground that they relate to that for which he is being sued for penalties it would be absurd to make an order saying: "Make your affidavit so far as it relates to the injunction and the damages, although in that affidavit you can claim that you are not bound to disclose the documents because it would affect you in your defence to the action for penalties." The issue is the same. If he cannot be ordered to disclose any documents in the case on the ground H that it is an action for penalties, it seems to me that it would be futile to order disclosure on the other part of the case. Therefore, I think that the judge was right and that this appeal fails.

TUCKER, L.J.: I agree that on the true construction of ss. 62 and 63 of the Waterworks Clauses Act, 1847, and ss. 21 and 23 of the Gasworks Clauses Act, 1847, the sums claimed in this action under those sections are in the nature of penalties. It is true that they are penalties awarded to the person aggrieved, which is a matter to be taken into consideration, but, on the other hand, they are sums of money fixed irrespective of the nature and degree of the offence committed, and they have to be read in conjunction with the Gasworks Clauses Act, 1847, s. 29, which preserves the right to the person aggrieved to recover damages which would otherwise be payable. I think that that is the proper construction to be put on these Acts, and, in so deciding, I agree that the matter will remain entirely at large at the trial whether sums recovered by way of penalty should or should not be taken in reduction of A any damages which may be recovered. That part of the claim being a claim for penalties, it becomes necessary to consider whether in this particular case in the exercise of his discretion the judge should, or could, have made an order for discovery limited to those issues in the action which are not concerned with the claim for penalties. I agree that in this action it would be impossible to frame an order so limited, and, therefore, I think that this was not a case where the judge could be called on to exercise the discretion which he otherwise B would have had in circumstances similar to the present. I agree that the appeal fails.

JENKINS, J.: I agree.

Appeal dismissed.

Solicitors: *Claude Barker & Partners* (for the plaintiffs); *Simmons & Simmons* (for the defendants).

C [*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Re CRAWSHAY, HORE-RUTHVEN AND ANOTHER *v.* PUBLIC TRUSTEE AND OTHERS.

D [COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), November 25, 26, 27, 28, December 1, 19, 1947.]

Wills—Construction—Legacy settled on daughter and her issue—Gift over if no child of daughter should attain 21—Codicil excluding issue of daughter by W. from any benefit under will—Daughter having no issue other than children by W.—Death of daughter leaving children who had attained 21—Effect of gift over.

E *Powers—Fraudulent exercise—Special power of appointment among nephews and nieces—Power exercised in favour of a nephew—Agreement by appointee to benefit appointer's children.*

By his will a testator settled a legacy on trust for his daughter, R., for life with remainder to her issue, with a proviso that, " in case there should be no child " of R. who should attain 21, then on trust for such issue of F her brothers and sister as she might by will appoint, and, in default of appointment, to be divided equally between all the children of her brothers and sister as should be living at her death. By a codicil, after reciting that R. was engaged to be married to A.W. and that he disapproved of the marriage, the testator declared " that none of the children or issue " of R. by A.W. " shall in any way take any share or interest whatsoever in the . . . trust funds . . . or any part thereof respectively under any G of the trusts powers and provisions of my said will but my said will shall be read in all respects as if all and every the child children and issue " of the intended marriage of R. and A.W. " had been expressly excluded by my said will from all benefits interest or right or participation whatsoever in the said trust funds or any part thereof . . . but nothing herein contained shall in anywise affect the right title or interest in or to the said trust funds . . . of any . . . children or issue " of R. " by any other H husband than " A.W., and in all other respects he thereby confirmed his will. R. died in 1943, having been married once only, *i.e.*, to A.W. by whom she had two children who had attained 21. At the time of R.'s death, four of her nephews and nieces were alive, one of whom was J.C. By his will one of R.'s brothers, W.T.C., (who died in 1918) gave certain property to J.C. on condition that he assigned for the benefit of R.'s issue any interest to which he might become entitled in the settled legacy under the testator's will or the exercise of the power of appointment. This direction to assign was complied with by J.C. in 1919 to the knowledge of R., and by her will, made in 1934, R. appointed the whole legacy to J.C., with the object of benefiting her own children. The questions to be determined were (i) whether, in the events that had happened, the legacy fell into the testator's residue on R.'s death, and, if not, (ii) whether the power of appointment given to R. had been validly exercised by her by her will :—

HELD : (i) on the true construction of the will and codicil, the proviso to the gift in favour of R. and her issue operated if there were no child A of R. who fulfilled the conditions specified other than a child of R. by A.W., and, therefore, in the events that had happened, the trust funds did not fall into the testator's residue, but became subject to the trusts declared by the will to take effect on failure of the trust thereby declared in favour of R.'s issue not being issue of her marriage to A.W.

(ii) since R. had appointed the whole fund to J.C. in the knowledge that he had already purported to assign to non-objects anything to which he B might become entitled under an exercise of the power, the appointment was invalid as a fraud on the power.

Observations of P. O. LAWRENCE, J., in *Re Wright* ([1920] 1 Ch. 108, 117) *approved.*

Dictum of LORD PARKER OF WADDINGTON in *Vatcher* v. *Paull* ([1915] A.C. 372, 378) *applied.*

Decision of VAISEY, J. ([1947] 1 All E.R. 643) *affirmed.* C

[AS TO CONSTRUCTION WHERE WILL AMBIGUOUS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 209, 210, para. 265 ; and FOR CASES, see DIGEST, Vol. 44, pp. 558-560, Nos. *3747-3767*.

AS TO APPLICATION OF GIFT OVER TO OMITTED EVENTS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 382, 383, para. 428 ; and FOR CASES, see DIGEST, Vol. 44, pp. 1172-1174, Nos. *10148-10156*. D

AS TO FRAUDULENT APPOINTMENTS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 581-585, paras. 1033-1035 ; and FOR CASES, see DIGEST, Vol. 37, pp. 504-515, Nos. *972-1066*.]

Cases referred to :

(1) *Doe d. Hearle* v. *Hicks*, (1832), 8 Bing. 475 ; 6 Bli. N.S. 37 ; 1 Cl. & Fin. 20 ; 1 Moo. & S. 759 ; *affg. S.C. sub nom. Hicks* v. *Doe d. Hearle*, (1827), 1 Y. & J. 470 ; 44 Digest 337, *1671*.

(2) *Re Nicholson's Settlement, Molony* v. *Nicholson*, [1938] 3 All E.R. 532 ; [1939] E Ch. 11 ; 107 L.J.Ch. 338 ; 159 L.T. 314 ; Digest Supp.

(3) *Re Wright, Hegan* v. *Bloor*, [1920] 1 Ch. 108 ; 88 L.J.Ch. 452 ; 121 L.T. 549 ; 37 Digest 453, *555*.

(4) *Vatcher* v. *Paull*, [1915] A.C. 372 ; 84 L.J.P.C. 86 ; 112 L.T. 737 ; 37 Digest 492, *865*.

(5) *Re Marsden's Trust*, (1859), 4 Drew. 594 ; 28 L.J.Ch. 906 ; 33 L.T.O.S. 217 ; 37 Digest 513, *1048*. F

(6) *Roach* v. *Trood*, (1876), 3 Ch.D. 429 ; 34 L.T. 105 ; 37 Digest 491, *855*.

(7) *Re Crawshay, Crawshay* v. *Crawshay*, (1890), 43 Ch.D. 615 ; 59 L.J.Ch. 395 ; 62 L.T. 489 ; 37 Digest 514, *1056*.

(8) *Humphrey* v. *Olver*, (1859), 28 L.J.Ch. 406 ; 33 L.T.O.S. 83 ; 37 Digest 515, *1062*.

(9) *Re Brooks' Settlement Trusts, Lloyds Bank, Ltd.* v. *Tillard*, [1939] 3 All E.R. 920 ; [1939] Ch. 993 ; 109 L.J.Ch. 28 ; 161 L.T. 158 ; Digest Supp.

G

APPEAL by the defendant, J. W. L. Crawshay, from an order of VAISEY, J., reported [1947] 1 All E.R. 643.

By his will, made on June 24, 1877, the testator, Robert Thompson Crawshay, settled a legacy on trust for his daughter, Rose, with remainder to her issue, with a proviso that, in case there should be no child of Rose who should attain 21, then on trust for such issue of her brothers and sister as she should by will appoint, and, in default of appointment, to be divided between all the H children of her brothers and sister as should be living at her death. He gave his residuary estate to his three sons. By a codicil made on Nov. 14, 1877, the testator declared that none of the children or issue of Rose by one Williams (whom she was about to marry) should take any interest whatsoever under his will, but that the will should read in all respects as if all the children and issue of Rose and Mr. Williams had been expressly excluded by the will from all benefits or interest under the will, but the rights and interest of any child of Rose by any other husband than Mr. Williams were not to be affected, and in all other respects the testator thereby confirmed his will. He died in 1879. The daughter, Rose, who died on Sept. 16, 1943, was married once only, to Mr. Williams, by whom she had two children who had attained 21. Four of her nephews and nieces were living at her death, but, by her will, made on June 13, 1934, she appointed the whole legacy to her nephew, Jack Crawshay (the appellant), who had, in 1919, executed a deed whereby he assigned for the benefit of Mrs. Williams' issue any interest to which he might become entitled in the settled legacy under the testator's will or the power of appointment. On a summons to determine (*a*) whether, on Mrs. Williams' death, the legacy fell into the testator's residue, and, if not, (*b*) whether the power of appointment given to Mrs. Williams under the testator's will had been validly exercised by her by her will, VAISEY, J., held (*a*) that, on the true construction of the testator's will and codicil and in the events that had happened, on Mrs. Williams' death the legacy was held on the trusts declared by the will to take effect on failure of the trusts thereby declared in favour of her issue and did not fall into the testator's residue; and (*b*) that, since Mrs. Williams had exercised the power in order to benefit her own children, the appointment in favour of her nephew, Jack Crawshay, failed as being a fraud on the power. From this decision Jack Crawshay appealed to the Court of Appeal, but his appeal was dismissed, on both points. The facts appear in the judgment of LORD GREENE, M.R., on the first point and in the considered judgment of the court, delivered by COHEN, L.J., on the second point.

Montgomery White, K.C., and *G. A. Rink* for the appellant, J. W. L. Crawshay (the appointee).

Droop for the trustees.

C. D. Myles for Mrs. Greener (a niece of Mrs. Williams).

Geoffrey Cross for Mrs. Spiller (another niece).

Mumford for the Public Trustee, Eliot Crawshay Williams and George Bransby Williams.

Ungoed-Thomas, K.C., for the personal representatives of Leslie Crawshay Williams.

Cur. adv. vult.

Nov. 27. The following judgments were delivered on the first question.

LORD GREENE, M.R.: The first point that arises in this appeal has been conveniently argued first, and, as it is an isolated point the decision of which will affect the subsequent course of the argument, it is convenient if we dispose of it at once.

It arises under the will and codicil of the testator, Robert Thompson Crawshay, in relation to a settled legacy of £100,000 which he bequeathed in favour of his daughter, Rose Harriette Crawshay, as she was at the date of the will, and her issue. Shortly stated, the trusts in the will in relation to that legacy were for the daughter, Rose Harriette, for life and after her death for her issue as she might appoint by deed or will, and in default of appointment in trust for all her children who being sons or a son should attain 21 or being daughters or a daughter should attain that age or marry under that age with the consent of their or her parents or guardian. Then comes in the form of a proviso a gift of a power of appointment to Rose Harriette among her nephews and nieces in the event there stated. The testator made codicils to his will. The only one with which we are concerned is dated Nov. 14, 1877. Between that time and the date of the will, the daughter, Rose Harriette, had become engaged to be married to one Arthur Williams, and the testator in this codicil states his disapproval of that marriage and that he did not "wish any child or issue thereof to have any benefit or interest of or in either of the said trust fund[s] bequeathed by my will as aforesaid." There then follows a paragraph which, in effect, excludes the children of a marriage to Mr. Williams from any benefits in the legacies, but preserves the right of any children or issue of Rose by any other husband.

Under the will any child of Rose Harriette by any marriage could become a beneficiary. The word "child" in the will means any child in the order of nature. No class of child is excluded from the beneficial gift. The proviso to which I have referred is in these words:

> Provided always and I hereby declare that in case there should be no child of my

> said daughter Rose Harriette Crawshay who being a son shall live to attain the age of 21 years or being a daughter shall live to attain that age or be married my said trustees or trustee shall from and after the death of the said Rose Harriette Crawshay or such default or failure of her issue as aforesaid (whichever shall last happen) stand and be possessed of the said sum of £100,000 consolidated bank annuities or so much thereof as shall not have become vested in any child or issue of the said Rose Harriette Crawshay under the power of appointment in that behalf hereinbefore contained upon such trusts for the benefit of all or any of the children or issue who may be living at the time of her decease of her brothers and sister [as she might by will appoint].

I need not read the exact words of the power of appointment. The word "child" in that proviso appears in reference to Rose Harriette twice. In each case it covers the entire class of her children. No part of the class of her children is excluded in the use of the word "child" on either of the two occasions on which it is used. In the codicil, after reciting his objection to Mr. Williams and his desire that the issue of that marriage should not take an interest, the testator carries out his desire in these words:

> Now I hereby declare that none of the children or issue of my said daughter Rose Harriette Crawshay by the said Arthur Williams shall in any way take any share or interest whatsoever in the said trust funds or either of them or any part thereof respectively under any of the trusts powers and provisions of my said will but my said will shall be read in all respects as if all and every the child children and issue of the said intended marriage of my said daughter Rose Harriette Crawshay with the said Arthur Williams had been expressly excluded by my said will from all benefits interest or right or participation whatsoever in the said trust funds or any part thereof respectively thereby given or by the exercise of any of the powers or provisions therein contained empowered to be given to the child children or issue of my said daughter Rose Harriette Crawshay but nothing herein contained shall in anywise affect the right title or interest in or to the said trust funds or any part thereof respectively of any child or children or issue of my said daughter Rose Harriette Crawshay by any other husband than the said Arthur Williams and in all other respects I hereby confirm my said will.

The appellant, Jack Crawshay, to whose interest it is to displace Rose Harriette's power of appointment in favour of her nephews and nieces and to cause the legacy to fall into residue, argues as follows. The codicil must not be read so as to alter the will more than is necessary. The codicil only directs that the children of the Williams marriage shall be excluded from any beneficial interest. Therefore, he says that there is no need to alter the proviso in the will, "that in case there should be no child of my said daughter Rose Harriette Crawshay who being a son shall live to attain the age of 21 years . . ." There were children of the Williams marriage. They, in fact, attained 21. Therefore, the event contemplated in the proviso on which the power of appointment among nephews and nieces was to come into existence has never taken place. The argument on the other side is that the effect of the testator's testamentary disposition is to produce a result which would not have been produced on the will as it originally stood, namely, that the proviso is to take effect in default of children of Rose capable of taking—*i.e.*, non-Williams children.

VAISEY, J., rejected the argument now put forward by the appellant, and held, in effect, that the proviso must be read as referring to the event of a child capable of taking an interest (*i.e.*, a non-Williams child) failing to live to attain 21. He was assisted in placing that construction on the language by the fact that, although the only daughter who on marriage under 21 would be entitled to take a share in default of appointment would be a daughter who had married with the consent of her parents or guardians, that condition in the beneficial gift in default of appointment was not repeated in the proviso. In the opinion of VAISEY, J., it should be inserted in the proviso, which would then run, in its reference to a daughter of Rose Harriette, "being a daughter shall live to attain that age or be married with the consent of her parents or parent . . ." Finding that mistake which could be corrected, as he held, in the proviso, he found it easier to construe the provision in the opposite sense to that for which the appellant now argues.

I agree with the judgment of VAISEY, J., and with the reasons that he gives for it, but I would prefer to approach this question from rather a different angle, although with the same result. There are two documents to be considered, the will and the codicil. We must construe the will, we must then construe the codicil, and, in so far as the codicil directs certain modifications to be effected in the will, those modifications must be made to ascertain the final testamentary wishes of the testator on this subject. As I have said, the will was perfectly simple. Every child of Rose by any marriage was a potential beneficiary and constituted a class, the failure of which was to bring into existence the power of appointment among nephews and nieces. The nephews and nieces, therefore, could only be cut out of an interest under the will by the acquisition of a vested interest by a member of that class of beneficiaries. The argument put forward on behalf of the appellant produces the result that the nephews and nieces would be deprived of any possible interest in the will by the attainment of the age of 21 of a different class altogether, namely, not a class of beneficiaries, but a class of people who are strangers to the will, *i.e.*, the Williams children, who take no interest whatever under the will. Such a result would not square with the scheme of the will at all, and, although this is not by itself conclusive, the actual language of the codicil appears to me to put the matter beyond doubt. In the codicil the testator deprives the Williams children of any interest in his bounty and goes on to say:

> . . . but my said will shall be read in all respects as if all and every the child children and issue of the said intended marriage of my said daughter Rose Harriette Crawshay with the said Arthur Williams had been expressly excluded by my said will from all benefits interest or right or participation whatsoever . . .

This is an instruction to put on to the will a construction different from that which it originally bore. This direction can usefully be carried out by taking a pen and writing in the alterations which are required to be written in. The effect will be to divide the children of Rose Harriette Crawshay into two classes, those who can take and those who cannot take. According to the argument on behalf of the appellant, that is as far as the codicil goes, but it appears to me that the directions in the codicil are not limited to that purely mechanical operation, but that any consequential alterations in the will must also be made. The effect of the codicil is: "My will shall be read in all respects as though the children of Rose and Arthur Williams had been cut out." What draftsman instructed to draw up a new will with those instructions in front of him would ever read them as not instructing him to make the consequential alteration in the words which introduce the power of appointment in favour of nephews and nieces? If he did not do so, he would produce a will with a scheme in its nature fundamentally different from that of the original will. He would produce a will in which the word "child" was used in two senses, in one place in the sense of non-Williams children and in the other place, according to the argument for the appellant, as meaning any child—in other words, notwithstanding the direction in the codicil, the word "child" in the proviso is to retain the meaning which it clearly had in the unaltered will which was contemplating a totally different set of circumstances and class of beneficiaries.

Putting it shortly, the effect of the codicil, in my opinion, is not to be cut short at the point of the beneficial interests, but is to be carried to its logical and reasonable conclusion of making any consequential alterations in the will which are made necessary to preserve the logic of the will as it existed before the alteration, but altered to meet the new circumstances. To leave the will in a state in which the proviso does not dovetail conveniently into the beneficial interests would, it seems to me, be entirely to fail to carry out the instructions the testator has laid down in his codicil. In addition to excluding the children of the Williams marriage, he goes out of his way to include the children of any other marriage, and his will is to be construed as though that had been done. As a result of this, it seems to me, the proviso to the will, as altered by the codicil, should contain a reference to the fact that the testator has in his beneficial gift excluded children of the Williams marriage, but included and retained children of any other marriage. If that was inserted in the proviso, as I think it ought to be, I can have no doubt whatsoever that, as a matter of construction of the proviso, the word "child" must be construed as meaning a child who is one of the class of beneficiaries indicated. That, in my opinion, is the only reasonable way of reconciling the will and the codicil and carrying out the testator's wishes, the testator having, by the codicil, confirmed his will. In my view, that is a conclusive answer to the present appeal on this point.

COHEN, L.J.: I agree. Despite able arguments addressed to us, I feel no doubt that the decision of the judge on this point was right. I agree with the MASTER OF THE ROLLS that, reading the will and codicil together, as we are bound to do, we must construe the proviso to the gift in favour of the daughter Rose and her issue as operating in case there should be no child who fulfils the conditions specified other than a child of Rose by Mr. Williams. A True it is that the gift over in default of the issue of Rose is not expressly mentioned in the codicil, but the codicil directs that the will shall be read in all respects as if all and every the children and issue of the intended marriage of his daughter Rose with Mr. Williams had been expressly excluded by his will from all benefits, interest, etc. I do not think we should be construing the will in all respects as if the particular category of children had been excluded if we treated the word "child" in the proviso as including a child B by Mr. Williams. Counsel for the appellant said that, if we adopted our construction, we should be disregarding a principle which he described as the principle in *Doe d. Hearle* v. *Hicks* (1) and took from HAWKINS ON WILLS, 3rd ed., p. 9. That principle is this:

> It is a general principle to construe a codicil so as to interfere as little as may be with the dispositions of the will . . . C

The particular words he relied on were these (*ibid.*, 10):

> If such devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention to devise; for if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand.

D We are not here, of course, concerned with the question of revocation, but I will assume, without deciding, that the principle applies to the question of a modification of a gift over and that we must find an intention to modify that gift as clear and free from doubt as the original gift was. I think that in this case we have a perfectly plain expression of such an intention, and for that purpose I adopt the observations of the MASTER OF THE ROLLS. I think, in considering what the intention of the codicil was, it is not irrelevant E to note that any other construction implies a purely capricious intention on the part of the testator. Adopting the construction which the MASTER OF THE ROLLS has adopted, the will and codicil, read together, as they must be, are consistent throughout. Adopting the contention for which counsel for the appellant contended, it seems to me we have an intention which it is impossible to imagine that any sane testator could have adopted. Counsel for the appellant asked us to assume that the point was not present to the testator's mind, but F I see no reason to make any such assumption. It is true that he summarises the gift of Rose's share and does not set out the provisions which are to operate in default of her issue, but I do not think we should be justified in assuming that he was not perfectly familiar with these provisions and had them in mind.

These reasons are sufficient to dispose of the case. They are not exactly the grounds on which VAISEY, J., decided it, but I must not be taken to differ G from VAISEY, J. Had it been necessary, I should, I think, have been prepared to adopt his judgment as the basis of my decision. Counsel for the appellant admitted that the proviso in the original will must be construed as if the words "or marry with the consent of her parents or parent or guardians or guardian for the time being" had been included in the proviso in question. So read, the proviso would have been, I think, indistinguishable from the proviso included in the gift over relating to the £100,000 fund created for H the son, Robert. There are other provisions of a similar kind—at any rate two—to which our attention was called. The first was in relation to the £100,000 fund for Richard. There the language used was different. The direction was that:

> . . . in default or failure of such issue of the said Richard Frederick Crawshay as aforesaid my said son Richard Frederick Crawshay shall have a like power of appointment over the said legacy the trusts whereof are lastly hereinbefore declared.

There it is true that the phrase is "such issue," and counsel for the appellant said that when the testator intended to refer to "such issue" he knew how to do so, but I think the explanation of that is that which the MASTER OF THE ROLLS gave in the course of the argument, namely, that the altered phraseology was used because he was dealing with trusts by reference and not with original trusts. The second provision was that with regard to what was to happen to the legacies in favour of Robert and his issue and Richard and his issue in the event of the total failure of all the trusts relating to both A those legacies. There the phrase used was :

> . . . if my said sons Robert Thompson Crawshay and Richard Frederick Crawshay and my said daughter Henrietta Louise Ralston shall all die without having any child or issue who shall become absolutely entitled under or by virtue of the trusts and provisions aforesaid . . .

This language put the matter beyond any possible doubt, but I think the reason for the difference in the language of the two provisions is that in the B later one the testator was dealing with a situation in which there must have been a complete failure both under powers of appointment and under the trusts in default of appointment, whereas, when he is dealing with the gift in favour of Robert and his issue and the gift in favour of Rose and her issue, he is dealing only with what is to happen in the event of failure of issue taking under the trust in default of exercise of the power, because he goes on to C make it clear that he is there only dealing with what has not been validly appointed. I think it is fairly plain from the will as a whole that, as the judge said, although he has chosen to set it out in more full language, the proviso and declaration, according to the proper terms and meaning of the will alone, does and can mean in each case no more than failing the operation of the preceding trust. If that be the right view, as I agree with the judge in thinking it was, it seems to me that, so far as the question of construction is concerned, D on this ground also Jack Crawshay fails in the case he has sought to make before us.

ASQUITH, L.J.: I agree.

Nov. 28; Dec. 1. The court heard argument on the second question.

E *Cur. adv. vult.*

Dec. 19. The following judgment of the court was read.

COHEN, L.J.: We have already expressed our agreement with the decision of VAISEY, J., that the funds representing the legacy of £100,000 consols settled by the will and first codicil of Robert Thompson Crawshay F the elder (hereinafter called the first testator) on his daughter Rose (afterwards Mrs. Williams) for life did not at her death fall into the first testator's residue, but became subject to the trusts declared by such will to take effect on failure of the trust thereby declared in favour of her issue (not being issue of her marriage to Mr. Williams). The effect of this decision is that the fund in question was, in the event which happened, held on trust for the benefit of all or any of the children who might be living at the time of Mrs. Williams' G death of her brothers and sister and in such proportions and subject to such conditions and provisions as she, Mrs. Williams, should by will appoint, but that, in the event of her not exercising such power, the fund was divisible equally between all such children of her brothers and sister as should be living at her death. Mrs. Williams, by her will dated June 13, 1934, exercised or purported to exercise the before-mentioned power by appointing the whole of the fund to her nephew, the appellant, Jack Crawshay, a son of one of her H brothers, and the question which we have now to decide is whether VAISEY, J., was right in holding that that appointment was invalid as a fraud on the power and that the settled fund passed in default of appointment to the appellant, Jack Crawshay, the plaintiff, Richard Oakes Crawshay, the defendant, Mrs. Greener, and the defendant, Mrs. Spiller, in equal shares as the only nephews and nieces of the first testator living at the time of Mrs. Williams' death on Sept. 16, 1943.

This question is not an easy one to answer, but we have been much assisted by the able arguments of counsel for the various parties, and, in particular, by the fact that counsel for the appellant found himself able to accept six out of the seven propositions of law advanced by counsel for Mrs. Greener. These six propositions are directed to the second type of power referred to [in the judgment of the court delivered by Clauson, L.J. ([1938] 3 All E.R. 534)] in *Re Nicholson's Settlement, Molony* v. *Nicholson* (2), namely :

> . . . powers for an appointor to select and define the beneficial interests *inter se* of the several members of a class of beneficiaries or their issue in a fund which (subject to the exercise of the power . . .) is to pass in defined proportions to some or all of the members of the class.

The six propositions are as follows : (i) One case of a fraud on a power is where the donee of a special power of appointment makes an appointment intended to benefit some person not an object of the power. (ii) To establish a fraud on a power it is not necessary to prove a bargain between the donee of the power and the appointee. (iii) What the court looks to is the intention or purpose of the appointor in making the appointment. (iv) It is not necessary that (*a*) the appointee should be a party to or know of the corrupt intention or purpose, or (*b*) that the purpose should, in fact, take effect. (v) The relevant date as at which the intention of the appointor has to be ascertained is the date of the exercise of the power. (vi) Evidence is admissible as to the state of mind of the appointor, including statements by the appointor which go to show his or her state of mind at the material date. Such statements may be material though they are not contemporaneous with the date of exercise of the power.

These propositions are based on observations of P. O. Lawrence, J. ([1920] 1 Ch. 117) in *Re Wright, Hegan* v. *Bloor* (3). We respectfully agree with those observations. We would add that the second proposition is founded on the observations of Lord Parker of Waddington ([1915] A.C. 378) in the Privy Council in *Vatcher* v. *Paull* (4), which were cited by Vaisey, J. ([1947] 1 All E.R. 648) in the court below, namely :

> . . . a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power.

A difficulty, however, arises in determining what, short of a bargain, establishes such purpose and intention. On the one hand, if the appointor appoints to an object of the power, hoping that the appointee will so dispose of the appointed property as to benefit a non-object, but intending to benefit the object whatever disposition he may make of the appointed property, the appointment will be valid, but, if he makes the appointment to an object with the belief that the object will be subject to strong moral suasion to benefit a non-object, which suasion the object would, in the appointor's opinion, be unable to resist, the appointment would, we think, be invalid as a fraud on the power. *Re Marsden's Trust* (5), where the testatrix, desiring to benefit her husband who was not an object of the power, appointed to her daughter, believing that her husband could bring effective pressure on the daughter to give effect to her mother's desire, is a case on this side of the line. We would add that *Re Marsden's Trust* (5) was approved by this court in *Re Nicholson's Settlement* (2). *Roach* v. *Trood* (6) is a case on the other side of the line. The facts of that case are complicated and we need not set them out in full. It is sufficient to observe that the main point alleged against the validity of the exercise of the power was an intention to benefit the appointor himself and this intention was negatived on the facts. The effect of the transaction as carried out may have been to benefit other non-objects of the power, but their Lordships disposed of this objection by saying (3 Ch. D. 443) :

> . . . nor is there anything in the evidence, to indicate that it was made with the intention of benefiting [the appointor] or that it was other than part of a fair and reasonable division of a father's property amongst his children.

Re Crawshay, Crawshay v. *Crawshay* (7) is the strongest case in his favour to which counsel for the appellant was able to refer us. In that case a testator, having power to appoint among his children a sum of £35,000, appointed £10,000, part of that sum, to a daughter, not absolutely, but subject to a direction that the amount should be paid to the trustees of a legacy settled by his will on trust for the daughter for her life with remainder to her issue.

Being aware or suspecting that this appointment was open to question, he appointed that, if objection should be taken to it, the said sum of £10,000 should go and belong to his son Robert "but who will I am assured settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid so as thereby to carry out my wishes." The son executed a declaration of trust in accordance with his father's wishes. There was no evidence (other than the will itself) of any bargain between the son and the A testator that the son would settle the £10,000. NORTH, J., upheld the appointment in favour of the son. The gist of his decision is to be found in a passage from his judgment where he said (43 Ch.D. 624, 625):

> If the words mean "as he assures me," that is, if they show that there was a bargain between the two, that, though this fund was given to Robert absolutely with a statement that he might settle it voluntarily if he chose to do so, he had really bound himself to settle it according to the testator's wishes, then, in my opinion, B the appointment would be void. But if, on the other hand, the fund is really given, as it purports to be, to Robert absolutely, not subject to any trust, but that he might do what he liked with it, and if the word "voluntarily" is truly used, then, if he does settle it as the testator says he should like him to do, and as he endeavoured to do himself, that would be an entirely voluntary act on Robert's part, and the appointment to him would be valid. There is no evidence of any conversation, or arrangement, or bargain, or even of any understanding between the father and son, C or that the son had any knowledge that there was any such provision in the will, before the will was opened after the testator's death and the contents made known to the family; and, even if the son did know of the provisions in the will before the testator's death, yet, unless it was made known to him under circumstances which showed that he had accepted a trust, and had bound himself to carry out his father's wishes, I do not think his knowledge would make the gift invalid.

NORTH, J., referred to *Re Marsden's Trust* (5) and distinguished that decision D on the ground that in the case before him there was no "element even of suspicion, or, indeed, anything which is not to be found in the will itself." It may be that, had *Re Crawshay* (7) come before us for decision, we should have reached a different conclusion from that of the judge, but it is not necessary for us expressly to overrule *Re Crawshay* (7), since it is plainly distinguishable on fact from the present case.

Counsel for Mrs. Greener advanced a seventh proposition, which was as E follows: "If a corrupt intention is shown ever to have been entertained, the burden of proving that it was abandoned previously to the execution of the power lies upon those who support the appointment." Counsel for the appellant admitted that the pre-existing intention was evidence, and in some cases cogent evidence, of the intention at the date of the exercise of the power, but submitted that there was in this court no question of *onus*. The court must reach a decision on the evidence as a whole unbiassed by any consideration F of alleged *onus*. This seventh proposition of counsel for Mrs. Greener was also based on *Re Wright* (3), but on this point P. O. LAWRENCE, J., based himself ([1920] 1 Ch. 120) on a decision of this court in *Humphrey* v. *Olver* (8). It is to be observed, however, that in *Humphrey* v. *Olver* (8) only TURNER, L.J., based his decision on the question of *onus* (28 L.J.Ch. 410). KNIGHT BRUCE, L.J., reached his conclusion on the evidence as a whole. We prefer this method G of approach, recognising that the cogency of the inference drawn from the proof of intention must largely depend on the length of the period that elapses between the date as at which the intention is proved and the date on which the power is exercised and on what has happened in the meanwhile.

That being the state of the law, it becomes necessary to consider the history of the matter from the time of the first testator's death, in so far as that history throws light on the intention of Mrs. Williams when she exercised the power H of appointment in her 1934 will. As VAISEY, J., points out, the underlying fact has been the very natural resentment felt by Mrs. Williams against the provisions in the codicil to the will of the first testator, excluding her issue by Mr. Williams from taking any benefit under that will. Those provisions were disapproved equally by her three brothers and by a deed dated June 23, 1887, (hereinafter called the 1887 deed) they did their best to put the matter right by assigning to the then trustees of the first testator's will all the share or shares to which, as the residuary legatees under the first testator's will, they then were, or they or their representatives might thereafter become, entitled expectant on the death of their sister, Mrs. Williams, in the settled legacy or the funds representing the same, on certain trusts for the benefit of the issue of Mr. and Mrs. Williams. We pass now to 1907. In that year Mrs. Williams was minded to make a codicil to her will and her solicitors, Messrs. Lawrence, Graham & Co., took the opinion of eminent counsel as to her position in relation to the legacy settled on her and her issue by the will of the first testator. Among the questions put to counsel in those instructions were the following :

> (1) Whether or not, as Mr. and Mrs. Williams have children who have attained 21, the ultimate trusts in respect of the legacy after Mrs. Williams' death fail, so that the legacy then falls into residue and the assignment of June 23, 1887, is effectual. (2) If not, or if the point is at all doubtful, whether Mrs. Williams can properly make an appointment by codicil of the whole fund in favour of one of her nephews and nieces (say Mr. Richard Crawshay's eldest daughter), reciting the doubt (if possible as though it were only scarcely arguable and not as though there were anything in it), and either in such codicil or by a separate paper to be opened after Mrs. Williams' death and without any present communication express to the appointee her hope that she (the appointee) will in honour hand over the legacy to Mrs. Williams' two sons or the trustees of the assignment of June 23, 1887.

Counsel answered those questions as follows. First, he advised that the gift over in default of Mrs. Williams' issue contained in the provisions affecting the said settled legacy failed and after her death, unless she were to have further issue of a husband other than Mr. Williams, the said legacy would fall into residue and thus become subject to the deed of 1887. He advised, however, that it would be wise to regard the point as a doubtful one and he further advised as follows :

> I think that an appointment by Mrs. Williams in favour of one of her nephews and nieces would not be a fraud on the power provided there is not antecedent arrangement or bargain between Mrs. Williams and the appointee as to the manner in which the appointed fund is to be dealt with : *Re Crawshay* (7). The expression of Mrs. Williams' wishes might be contained in the codicil itself (see the last cited case) or in a separate paper. I think it would be better if it were contained in a separate paper to be opened after Mrs. Williams' death and no communication on the subject should be made to the appointee during Mrs. Williams' lifetime.

Counsel settled the draft codicil and a copy of that draft was before us. From this draft it appeared that the selection of the nephew or niece to receive the benefit of the appointment was a matter on which the testatrix changed her mind with some frequency. There also appeared on the draft the following marginal note :

> It would be better to select a nephew, as, if the appointee is a niece, the appointed fund might on her marriage be caught by a covenant in her settlement to settle after-acquired property. But, of course, if a female appointee marries, a new codicil could always be made.

On May 1, 1907, Mrs. Williams executed the codicil in the terms of the draft settled by counsel, the appointment being in favour of Jack Crawshay, who was then aged about 13 years. Having regard to the opinion of counsel and to the marginal note, there can be no doubt that the testatrix executed the codicil in the hope that Jack Crawshay would hand the said legacy over to her issue by Mr. Williams. Whether that hope was something more than a hope and amounted to the conviction that, having regard to the terms of the 1887 deed and to the known views of her brothers, the pressure on Jack Crawshay would be such that he would be unable to resist it and would hand over the legacy to her children by Mr. Williams, may be open to argument, though, if it were necessary, we should be prepared to hold that, had the matter rested on the 1907 codicil, the case fell within the principle of *Re Marsden's Trust* (5). The matter does not, however, rest there.

On Jan. 8, 1910, Mrs. Williams executed a new will containing a similar appointment to that which was contained in the 1907 codicil and two days later she wrote a letter addressed to the appellant, Jack Crawshay, in the following terms :

> My dear Jack, You will not, I am sure, misunderstand what I have done with regard to the disposition of money in my will. It is scarcely to be imagined that any question will arise that would possibly deprive your cousins Eliot and Leslie of their just

> inheritance, and I have only exercised my power of appointment under your grandfather's will in case by any possibility any difficulty should arise, and must in that event trust to your honour that reparation should be made. In case you may not know, it was decided by your father's and uncles' lawyers, that, in consequence of the codicil to your grandfather's will, the £100,000 he left to me came to them at my death, and they were honourable, kind, and just enough, to give up all right to it, so that there can hardly be any question of claim on the part of anyone, in the matter, except the rightful inheritors, Eliot and Leslie. I have not, dear Jack, as yet seen very much of you; before this letter reaches you we may be better acquainted. In any case I trust the transaction may not cause you any trouble or bother and that these few words from one then no longer here may not impose a very painful duty, and that you will not regard unkindly, Your affectionate aunt, Rose Williams.

This letter was not sent to the appellant, and it may be that the original intention that it should be handed to him after Mrs. Williams' death was abandoned, but the fact that it was written with that intention leads, in our view, to the conclusion that the appointee was intended to be subject to such strong moral suasion that, if the matter had to be tested in relation to the state of affairs prevailing in January, 1910, the appointment would be invalid as a fraud on the power.

One event of importance had taken place before Mrs. Williams made her 1910 will, but there is no evidence to show that Mrs. Williams was aware of that event. On July 11, 1907, her brother, William Thompson Crawshay (hereinafter referred to as the second testator), made his will. By cl. 10 thereof he devised certain real estates to the following uses (so far as material), that is to say, to the use of trustees for a term of 1,000 years to commence from his death, and, subject thereto and to certain intermediate uses, all of which have failed or determined, to the use of the appellant, Jack Crawshay, in fee simple. By cl. 13 of the said will the trusts of the said term of 1,000 years were declared. These included a trust that, if the 1887 deed should for any reason fail to take effect (as, in fact, having regard to our decision on the construction, it has) the trustees should immediately after the death of the survivor of the persons therein named, that is to say (in the events which happened) of Mrs. Williams herself, raise by mortgage of the said premises or any part thereof such a sum as should be equivalent to the value at such death of the investments representing the said settled legacy, less such share or interest therein as should have been previously assigned to the trustees of the 1887 deed by Jack Crawshay, pursuant to the provisions thereinafter contained, with interest from the death of Mrs. Williams as therein mentioned, and should stand possessed of the said sum and interest on the trusts which would have been subsisting under the 1887 deed with respect to the said funds if the 1887 deed had taken effect. By cl. 15 of his will the second testator, in effect and so far as material, declared that Jack Crawshay should within six calendar months from his coming of age or the second testator's subsequent death assign to the satisfaction of the trustees of such will any share or interest to which he might be or become entitled in the said settled legacy under the will of the first testator or the exercise of any power of appointment therein contained to the trustees of the 1887 deed on the trusts of the 1887 deed as though the same were effectual, with a further provision that, in case the appellant, Jack Crawshay, should refuse or neglect to execute such assignment, his estate in the devised premises should determine and become void. The second testator died on Sept. 25, 1918, and his will with certain codicils thereto was proved on Feb. 18, 1919. Jack Crawshay was born on Sept. 10, 1894, and, therefore, attained his majority on Sept. 9, 1915. By a deed dated Feb. 3, 1919 (*i.e.*, within the prescribed period of six months after the death of the second testator) and hereinafter referred to as the 1919 deed, and made between Jack Crawshay, of the first part, the trustees of the second testator's will, of the second part, and the trustees of the 1887 deed, of the third part, Jack Crawshay assigned to the parties thereto of the third part all the share or interest, whether vested or contingent, to which he then was, or might become, entitled of and in the said settled legacy and investments under the first testator's will, or the exercise of any power of appointment therein contained, on the trusts and subject to the powers and provisions which under the 1887 deed or any exercise of any powers therein contained would then be subsisting or capable of taking effect with respect to the same if the assignment made by the 1887 deed had been effectual. In so far as the 1919 deed purported to effect an assignment of any interest taken by the appellant under an appointment by Mrs. Williams, it may have been ineffective since it was an assignment of an expectancy: see *Re Brooks' Settlement Trusts, Lloyds Bank, Ltd.* v. *Tillard* (9). There can, we think, however, be no doubt that it was intended as an effective assignment of that interest.

The instructions to prepare the 1919 deed were given by Messrs. Lawrence, Graham & Co. as solicitors for the executors of the second testator and for the trustees of the 1887 deed. When the case was before Vaisey, J., he was left under the impression that Messrs. Lawrence, Graham & Co. were acting also for Jack Crawshay, but there was evidence before us negativing that impression and showing that he was independently represented. The importance of this fact was that (*a*) the instructions given to counsel to settle the 1919 deed contained the following passage:

> Mrs. Williams is still living and you are also requested to consider whether any alteration in her will dealing with this subject is desirable under the present circumstances.

(*b*) counsel's opinion indorsed on those instructions contained the following passage:

> In my opinion, no alteration in Mrs. Williams' will is necessary, but if she has, as suggested in my opinion of Mar. 18, 1907, expressed any wish as regards the fund applied by her to Mr. Jack Crawshay in a separate paper such paper should now be destroyed.

Acting on the basis that the instructions (which were accompanied by a copy of the instructions to settle the 1907 codicil) had been given on behalf of Jack Crawshay, Vaisey, J., drew the inference that his recollection was at fault when he said he was at no time aware that Mrs. Williams had made or would make an appointment in his favour. This inference is, of course, not justified on the further evidence before us. The instructions in question, however, make one thing plain. They must have been given on behalf of Mrs. Williams, or at least she must have been informed of their content and of the advice of counsel indorsed thereon, when she made any testamentary disposition later in date than 1919. This is supported by the affidavit of Mr. Henry Graham filed on Dec. 5, 1946. He was not a partner in the firm in 1919, but he says:

> I believe that his (counsel's) advice was communicated verbally to Mrs. Williams by my firm though I have no evidence of it.

More important confirmation is to be found in the letter written by the firm to Mrs. Williams on Apr. 10, 1919, which is in the following terms:

> I am preparing a draft of a new will for you in accordance with your recent letters, and will forward it to you to go through as soon as it is ready. You will remember that there has always been a question whether it was competent for your three brothers to secure the consols legacy under your father's will to your sons after your death, although they did all they could for the purpose by signing a settlement in 1887. Mr. William Crawshay in his will has arranged for the money being provided out of his estate after Mrs. Crawshay's death should the settlement of 1887 prove to be ineffectual, and his will further provides that Mr. Jack Crawshay, (who would be one of those to benefit if the deed of 1887 is not effectual) should as a condition of taking any interest under his will confirm the settlement of 1887 so far as he is concerned. This Mr. Jack Crawshay has done. It will, however, still be necessary to retain in your new will the provisions on the subject which were inserted in your present will.

We think that when, in 1920, Mrs. Williams executed a new will containing provisions in all material respects identical with those contained in the 1907 codicil, the inference is inevitable that she did so because she believed that under the 1919 deed anything she appointed to Jack Crawshay would go to her children by Mr. Williams under the deed of 1887. If this be so, it is immaterial that, in fact, in view of the decision in *Re Brooks Settlement Trusts* (9), the 1919 deed may have been ineffective to pass what the appellant took under an exercise of the power.

Counsel for the appellant, however, says that at that date, or, at any rate, when she made her next will in 1922, she knew that the trustees of the will of the second testator had retained sufficient of his estate to secure to the trustees of the 1887 deed, and, therefore, to her children, the value at her death of the investments represented by the settled legacy. This being so, he argues that she cannot possibly have made the appointment in her 1922 will or in any subsequent will, including the vital will of 1934, with a view to benefiting her children, but must have done so to benefit Jack Crawshay by relieving the estate devised to him by the will of the second testator from the burden of the 1,000 years term. We are unable to accede to this argument. Looking at the evidence as a whole, and, in particular, at the instructions to counsel to settle the 1919 deed, his opinion indorsed thereon, and the letter written by Messrs. Lawrence, Graham & Co. to Mrs. Williams on Apr. 16, 1919, we think that the inference is inevitable that the appointments thereafter made in favour of Jack Crawshay were made to make assurance doubly sure, that is, to ensure that the settled legacy passed to the trustees of the 1887 deed pursuant to the 1919 deed. If this be the true view, the case falls clearly within the principle laid down by LORD PARKER OF WADDINGTON in *Vatcher* v. *Paull* (4). Indeed, it might be said that the case was stronger than if it rested on a mere agreement between the appointor and appointee, since the appointee had already purported to assign to non-objects anything to which he might become entitled under an exercise of the power. For these reasons, we are of opinion that the decision of VAISEY, J., was right in every particular and ought to be affirmed.

Appeal dismissed. Appellant to pay the costs of all parties, the trustees to have costs as between solicitor and client out of the trust fund in so far as a party and party order for their costs against the appellant would not indemnify them in respect of their solicitor and client costs.

Solicitors: *Gilbert Samuel & Co.* (for the appellant); *Lawrence, Graham & Co.*; *Wellington Taylor & Sons*; *Farrer & Co.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BROWNSWORD *v.* LEY'S MALLEABLE CASTING CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., Bucknill and Asquith, L.JJ.), December 15, 16, 1947.]

Workmen's Compensation—Silicosis—Application of scheme—Matters for consideration—Authorisation by employers of process employed—Whether workman employed in the process—Various Industries (Silicosis) Scheme, 1931 (*S.R. & O.,* 1931, *No.* 342), *para.* 2 (viii) (*c*).

Before an employer can be made liable under the Various Industries (Silicosis) Scheme, 1931, it must be established that the process alleged to have caused the disease was installed or operated by him or by persons acting with his authority, express or implied.

The question whether a workman, whose work is connected with a process, is employed in that process so as to make the Scheme applicable to him by virtue of para. 2 thereof is one of degree for the county court judge to decide. Where the workman's work is of two types, one of which brings him into contract with the process, the judge should distinguish clearly between them and indicate which leads him to the conclusion which he reaches.

[AS TO SILICOSIS SCHEMES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 984-986, para. 1345; and FOR CASES, see DIGEST SUPP.]

APPEAL by the applicant, Annie Brownsword, the widow of the deceased workman, from an award of His Honour JUDGE WILLES, made at Derby and Long Eaton County Court on May 8, 1947.

The workman was employed to move castings after they had been cleaned in a sand and shot blasting chamber and inspected. He had no part in the blasting process itself, but he had to manhandle the larger castings into the door of the blasting chamber. He contracted silicosis and tuberculosis and died. The county court judge dismissed the application. The Court of Appeal now sent the case back for a rehearing. The facts appear in the judgment of LORD GREENE, M.R.

Beney, K.C., and *R. M. Everett* for the applicant.

Scott Cairns, K.C., and *Sunderland* for the employers.

LORD GREENE, M.R.: This appeal raises some novel and difficult points on the application of the Various Industries (Silicosis) Scheme, 1931, made by the Secretary of State under the Workmen's Compensation Act, 1925, and the Silicosis and Asbestosis Act, 1930. The deceased workman unquestionably died as the result of his having contracted silicosis combined with tuberculosis and so his case is covered by the Scheme. He was employed in the employers' foundry in one of the processes mentioned in cl. 2 (viii) (*c*) of the Scheme, namely, that of the sandblasting of metal or articles of metal by means of compressed air with the use of quartzose sand or crushed silica rock or flint.

The employers carry on a foundry business in which they manufacture castings of various kinds. Castings, when they have been made, normally require cleaning because black sand gets on the surface in the process of manufacture. One way of effecting that is to use shot blasting, a process by which shot is propelled at high speed by means of a nozzle from a blasting apparatus on the casting which requires to be cleaned. Another process is that of sandblasting in which the projectiles directed on to the casting are particles of sand. The use of silica sand in such an operation produces floating sand which, if inhaled into a man's lungs, sets up silicosis. The deceased man was employed as a labourer in the trimming shop in the employers' works, on, apparently, the same work, from 1936 to 1945, when he was taken ill, and he died on July 7, 1945. The trimming room is a large room containing benches on which castings are placed to be cleaned, trimmed and weighed. The actual cleaning is carried out in a little chamber, partitioned off from the trimming room, known as the sandblast chamber. The work which the workman had to perform consisted of moving the castings after they had been cleaned in the chamber and inspected. In the actual process of cleaning he had no part, except that on occasion during the period with which we are concerned large castings had to be subjected to the cleaning process and he had to manhandle them into the sandblast chamber and remove them when the cleaning process had been applied to them. In the case of the large castings, the door of the chamber had to be left open while the cleaning process was going on, and, accordingly, the operation of bringing the large castings up to the sandblast brought the workman closely into contact with the area in which the cleaning process took place. Inside the chamber was a machine placed there to discharge shot by means of a blast on to the castings requiring to be cleaned. If the matter had stood there, the Silicosis Scheme would not have applied, for the process would have been a process of shotblasting and not sandblasting, but the employee who was operating the machine found it effective to mix with the shot 50 per cent. of silica sand. He did this, it is said, to modify the force of the impact because at one time there was a complaint that delicate castings had been injured by shot being propelled against them. The evidence on the part of the employers was that they had never authorised this practice of mixing sand with the shot, that they knew nothing about it and would not have authorised it if they had. It was further said that the actual work which the deceased man was to do in the trimming room did not constitute him a person engaged in the process in question, even if the process in question ought to be regarded as one for the consequence of which the employers are responsible under the Scheme.

I am assuming that counsel for the employers is right in submitting that, before an employer can be made liable under this Scheme, it must be found that the process in question was installed or operated by him or by persons acting with his authority, express or implied. On that view the crucial question was whether there was authority, express or implied, to operate this sandblasting scheme. The county court judge, in his judgment, contrasted the intention in the case of shot and the intention in the case of sand. In the one case he said the intention is to clean by shot, and in the other case the intention is to clean by sand. I cannot help thinking that he was really paying exclusive attention to the intention of the employers when they installed the machine. I do not see that the intention of the employers or their description of the cleaning process conducted at their works has anything to do with the matter. The real question is: Was the sandblasting authorised, or was it not? The judge does not appear to me to have addressed his mind at all to the question whether he ought to find an implied authority on the part of the employers. It is true that he refers to the use of sand as being unauthorised, but it seems to me that there he is thinking of a direct authority which he seems to imagine is required to displace the intention of the employers in installing this particular machine. The result is not satisfactory because, in my opinion, reading the judgment, I hope, fairly in favour of the judge, it cannot be construed as showing that he applied his mind to that question.

There is another point on which I feel that the county court judge misdirected himself on the mixed question of law and fact whether the work which the deceased man had to do constituted him a person employed in the process of sandblasting. In considering that question I will assume that the employers would be responsible for the sandblasting operations that were going on provided the workman was employed in that process. Paragraph 2 of the Scheme provides: "This Scheme shall apply to all workmen employed at any time on or after the commencement of this Scheme in any of the following processes," and then comes a long list in which various processes which lead to the creation of silica dust are described and references are made in some of those cases to ancillary processes. Under the particular head with which we are concerned come the words:

> (viii) in the undermentioned trades, the processes specified and those processes only, namely:—foundries and metal works . . . (*c*) sandblasting of metal . . .

There is nothing there about ancillary processes. Counsel for the employers says that the deceased man's job was to move castings from one place to another. His job was to move into the cleaning chamber things which were intended to be treated by sandblasting and to move them away after the sandblasting and the inspection had been completed. He was not employed in sandblasting or in the sandblasting room, and the protection given by this head of the Scheme is limited to persons actually employed in the operation described, namely, sandblasting.

As I have said, although his principal work consisted of moving by hand castings which had been treated or were about to be treated, his duties did at times bring him into the position where he had to help move castings into the door of the sandblasting chamber, which was left open, and later move them away from that place. The county court judge does not distinguish clearly those two parts of the work, nor does he state his opinion which of them was conclusive in leading him to the conclusion that the workman was employed in the process, while feeling, as he states, that he was bound to decide that the process was not within the Order. He comes to his conclusion on the basis of the workman's normal work of moving the smaller castings and his occasional work of dealing with the larger castings in the doorway of the sandblasting room. It does not appear what conclusions he would have come to if, as I think is right, his work of moving the smaller castings about in the room did not constitute an employment in the process. I think it is clear that some limitation must be spelled out of those words "employed in the process of sandblasting." The question is what limitation. I cannot think that in this process the application of the Order is limited to the man who holds the nozzle of the blasting machine. In my opinion, the question is one of degree as to the point at which a man whose work is connected with the process can be said to be employed in the process. It may very well be that, in some works, the job of carrying out the process is entrusted to a team of men, all of whom are engaged in carrying out a different part or a different stage or a different element in the complex of operations which together constitute the process. The exact point at which a man comes within or stays without that limit is a question of degree in each case. In the present case I am not satisfied that the county court judge directed his mind to that aspect of the matter. It seems to me that, had the workman's sole task been that of dealing with the smaller castings, it could not be said of him that he was employed in a sandblasting process. On the other hand, it would seem that the fact that he did on occasion deal with larger castings in the way I have described would be sufficient to enable a judge of fact to come to the conclusion that he was employed in a sandblasting process. As a question of degree, it was for the county court judge to decide. My difficulty is that he came to a conclusion on a composite ground, a combination of the man's regular work of moving the smaller castings and the occasional work of dealing with the larger ones. It seems to me, therefore, that the matter ought to go back to him to reconsider and decide it on the basis whether or not, on the first point, there was authority, and, on the second point, whether or not the deceased man's work was work in the process. On those two grounds the matter, in my opinion, ought to be reconsidered by the county court judge and decided accordingly.

BUCKNILL, L.J.: I agree. It seems to me there are important issues of fact which have not been determined by the judge and really make it impossible to say whether his judgment is right or not. On the point whether the deceased man was employed in the process, it seems to me that one does not know from the judgment of the judge whether he came to the conclusion that the disease from which the man died was due to his going into the chamber from time to time or whether it was due to the fact that he worked in the trimming room moving the castings after they had been cleaned and inspected. The burden is on the representatives of the deceased man to prove that the disease was due to the conditions to which he was subjected, although it is true that there is a presumption in his favour if he was employed in the process over a period of not less than five years. Thus, if the disease was due to the fact that the trimming room was full of silica dust and that he got the disease because he was there doing work which really had nothing to do with the process of sandblasting, he could not say he was employed in the process. On the other hand, if it was due to the fact that he assisted in pushing the pieces of metal into the chamber to be cleaned or in taking them out of the chamber after they had been cleaned, then I think he was employed in the process. That matter is left at the moment in obscurity as far as I am concerned and I think that also ought to be cleared up before one can say that justice is done in the case. For these reasons, as well as the reasons my Lord has given, in my view, the case should be sent back either to this judge or to another judge for a decision to be given on those points.

ASQUITH, L.J: I also agree. The county court judge dealt with this case on the footing that there were two questions. First, was the deceased man engaged in the process of sandblasting in the sense of being *de facto* engaged in it ?, *i.e.*, though he seldom entered the sandblasting chamber, was his work so intimately connected with the process of sandblasting and so interlocked with its conduct and its dangers that he can be said to have been engaged in the sandblasting process itself. The judge answered the first question in the affirmative. On what precise evidence did he base that finding ? His judgment leaves it doubtful. The deceased's work seems to have been of two kinds. First, having to be near the door of the sandblasting chamber after castings had been sandblasted, trimmed and inspected, and carrying them to the weighing machine, and the annealing room. If that had been the only branch of his work, it seems to me very doubtful whether it could have constituted his an employment in the process of sandblasting. Apart from work of this character he did, at comparatively infrequent intervals, enter the sandblasting room itself to manoeuvre heavy objects into and out of it. I agree that, on the judgment as it stands, it is impossible to see to what extent the county court judge based his finding on the first type of work and to what extent on the second, and that the case ought to go back to him for elucidation of those matters. The other question which the judge considered only arises if the first question is rightly answered in the affirmative. It was whether the deceased was employed in the process of sandblasting within the second meaning which "employed in the process" is capable of bearing, that is to say, did his employers authorise the process of sandblasting and consciously employ him or not ? The judge has arrived at no clear finding on the extent of the employers' knowledge whether this process was being carried on or not, and this omission might also with advantage be repaired if the case goes back to him. For these reasons, with the others mentioned by my Lords, I think the case should be sent back.

Case remitted.

Solicitors: *W. H. Thompson* (for the applicant); *Berrymans*, agents for *T. Haynes, Duffell & Son*, Birmingham (for the employers).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BRITISH CELANESE, LTD. *v.* MONCRIEFF.

[CHANCERY DIVISION (Romer, J.), December 16, 17, 19, 1947.]

Master and Servant—Invention—Invention of servant—Agreement for inventions made during employment to become exclusive property of master—Servant trustee for master—Obligation of servant, after termination of employment, to procure patent protection for master in other countries.

A M. was employed by a company as a research chemist from Mar. 26, 1928, to June 30, 1945, and by a series of service agreements (of which the last was dated Dec. 24, 1942) he agreed (by cl. 5 of the agreement of 1942) that, so long as he was bound by the agreement, any improvements or inventions made or discovered by him should without payment become the sole exclusive property of the company, which would give him in respect of them such remuneration as it thought reasonable, and that B he would, if required by the company, but at its cost, apply to obtain letters patent or other equivalent protection for such inventions or improvements in all such countries as the company might require and would vest such letters patent or other protection in the company or as it should direct, and would do all he could to help the company to obtain and maintain them. In 1943, M. made certain inventions for C which he applied for letters patent in Great Britain at the cost of the company, and by agreements dated Dec. 28, 1943, and July 4, 1945, he assigned to the company all his interest in the patents when they should be granted. By an agreement made between the company and M., and contained in a letter dated June 29, 1945, (which provided for the protection of the company's interests), M.'s employment by the company came to an end on June 30, 1945. In 1947, the company asked M. to D assist it to obtain patent protection for the inventions in foreign countries, but he refused to do so :—

HELD : on the true construction of cl. 5 of the service agreement, although the clause was on its face purely contractual, M. became a trustee for the company of any inventions that he made from the time he made them, and the word "inventions" in the clause was intended to include not only the physical product or formula which M. might E invent, but also all the rights and benefits attaching thereto, in so far as M. might be able to secure their enjoyment by the company ; and, therefore, although the service agreement was determined by the letter of June 29, 1945, M. was in no way released thereby from the obligations which he had already incurred as a trustee but had not fully discharged, and he was bound to execute (but at the company's expense) the documents F necessary to enable the company to secure patent protection in foreign countries.

Triplex Safety Glass Co. v. *Scorah* ([1937] 4 All E.R. 693) *applied.*

[AS TO AGREEMENTS BETWEEN MASTER AND SERVANT IN REGARD TO INVENTIONS, see HALSBURY, Hailsham Edn., Vol. 24, p. 537, para. 1028 ; and FOR CASES, see DIGEST, Vol. 36, pp. 538-540, Nos. *40-58,* and Supplement.]

G Case referred to :—

(1) *Triplex Safety Glass Co.* v. *Scorah,* [1937] 4 All E.R. 693 ; [1938] Ch. 211 ; 107 L.J.Ch. 91 ; 157 L.T. 576 ; Digest Supp.

ACTION for a declaration that the defendant was a trustee for the plaintiff company of certain inventions and for orders on the defendant to assign to the company his interest in applications for letters patent for the inventions in some of the Dominions and in certain foreign countries. ROMER, J., held H that, on the true construction of a service agreement between the company and the defendant, the defendant was the trustee for the company of the inventions, notwithstanding that the service agreement had been determined and the defendant had left the company's employment, and, accordingly, he was bound to execute the documents in question. The facts and the relevant clauses of the agreement appear in the judgment.

Salt, K.C., and *Teague* for the plaintiff company.
Shelley, K.C., and *M. J. Albery* for the defendant.

ROMER, J.: This is an action brought by British Celanese, Ltd., against Robert Wighton Moncrieff who was at one time in the service of the plaintiff company but left it during 1945. The relief which the company seeks is a declaration that the defendant is a trustee for the company of certain inventions and for orders on the defendant to assign to the company, at the cost of the company, his interest in applications for letters patent for the inventions in some of the Dominions and in certain foreign countries. The defendant claims no beneficial interest whatsoever in the inventions in question and never has claimed any beneficial interest for himself whatsoever, but he says that he is not a trustee for the company in respect of the inventions and is under no obligation to do what they want him to do, namely, to procure for the company patent protection in respect of the inventions in these various countries.

The plaintiff company are manufacturers of artificial silk plastics and chemicals. The defendant was employed by the company as a research chemist from Mar. 26, 1928, until June 30, 1945, the conditions of his employment being regulated by a series of service agreements, the last of which was dated Dec. 24, 1942, and was expressed to continue in force for three years from June 1, 1943. The defendant's employment was determined by a letter of agreement signed by both parties and dated June 29, 1945. During 1943 the defendant and another employee of the plaintiff company, William Pool, made two inventions relating to improvements in the spinning of artificial silk, and these inventions (which have been referred to as "the spinning inventions"), it is alleged by the statement of claim, were made by the defendant and Pool in the course of their employment by the company and during working hours and with the company's equipment and material. In November, 1943, the defendant and Pool, under the instructions and at the cost of the company, applied for letters patent in Great Britain for the spinning inventions, and by an agreement dated Dec. 28, 1943, and made between the defendant and Pool, of the one part, and the company, of the other part, which contains a recital that the company were solely entitled to the spinning inventions, the defendant and the said Pool jointly and severally agreed to assign all their joint and several interest in the letters patent for the spinning inventions when the same should be granted. The said applications were accepted by the Patent Office on Nov. 15, 1945, under the numbers 573,325 and 573,327 respectively and are still pending. Also during 1943 the defendant invented a product to be spun into artificial silk, and this invention (which has been referred to as "the polymer invention"), it is alleged by the statement of claim, was made by the defendant in the course of his employment by the plaintiff company and during working hours and with the company's equipment and materials. In May, 1945, the defendant, on the instructions and at the cost of the company applied for letters patent in Great Britain for the polymer invention, and by an agreement dated July 4, 1945, and made between the defendant, of the one part, and the company, of the other part, after reciting that the company was solely entitled to the polymer invention, the defendant agreed to assign to the company all his interest in the letters patent for the polymer invention when the same should be granted, and the said application is still pending. In November, 1944, the defendant and Mr. Pool, by the direction and at the cost of the plaintiff company, applied in Canada for letters patent for the spinning inventions. The applications are still pending. The company requested the defendant to assign to a nominee of the company his interest in the Canadian applications and has offered to pay the defendant's costs of that assignment, but the defendant refused to execute the assignment. It is alleged, as is the fact, that the plaintiff company is desirous that applications for letters patent should be made in Australia, Belgium, France, Germany, Italy, Switzerland and Japan for the spinning inventions, and in Australia, Belgium, France, Germany, Italy and Japan for the polymer invention and have requested the defendant to assign to the company or to a nominee of the company the right to apply for such letters patent in the said respective countries and have offered to pay the defendant's costs of such assignments, but he refuses to execute the assignments. The defendant, in his defence, puts in issue the allegation of fact that these spinning inventions and the polymer invention were made by him in the course of his employment by the company and during working hours and with the company's equipment and material. That was the only issue of fact which was still unagreed at the commencement of this hearing. Shortly before the action was heard, the defendant, in fact, agreed to do what the plaintiff company wished him to do in relation to the Canadian applications, and they, accordingly, disappeared from the picture very shortly before this action came on for trial.

[With regard to the question whether the defendant made the inventions in the course of his employment with the plaintiff company and during working hours and with the company's equipment and material, His Lordship reviewed the evidence and continued :—]. The defendant, although he put in issue this question, did not seriously challenge it from the outset of the hearing, and did not ask me to act except on the footing that he did, in fact, make the inventions in the course of his employment and with the company's equipment and material. The defendant did not himself give evidence.

The position is that some applications for British patents have gone forward, and there is no difficulty now about them or the Canadian applications or the applications in the United States, but, for some reason I need not consider the plaintiff company was not minded to apply for foreign patent protection until the early summer of 1947. By that time, of course, the defendant was out of the plaintiff company's employment. It is in regard to those foreign applications alone that the trouble arose, and the defendant is not prepared to collaborate with the plaintiff company in securing them.

The matter largely depends on the terms of the service agreement which the defendant entered into with the plaintiff company. The one to which I shall refer is the one of 1942. The earlier one was dated 1938 and so far as the present question is concerned was couched in identical, or, at all events, substantially similar, terms. The 1938 agreement continued operative until it was superseded by this agreement of 1942, which was made between the plaintiff company, of the one part, and the defendant, of the other part. It was agreed as follows. First :

> The company shall engage the employed as from June 1, 1943, but subject to the proviso contained in cl. 14 hereof and he shall perform such duties as may be allocated to him by the managing directors or either of them or their representatives.

Clause 2 made provision for the question of salary, and it was recognised that the defendant, who had up to that time been working in the company's premises at Spondon and was coming to London for the purpose of entering on a new phase of his activities, should have remuneration suitable to compensate him for such a change of locality. By cl. 3 :

> The employed shall devote his whole time to such work as the managing directors or their representatives may from time to time require of him and well and faithfully serve the company.

Clause 4 provided :

> The employed shall treat as confidential the whole affairs of the company their business or processes machinery or apparatus used or the experiments or trials made by them and except in so far as he may be authorised by the company so to do he will not during the period of his employment or for 5 years thereafter communicate disclose divulge or describe in writing or otherwise to any person or persons not being a managing director or other responsible officer of the company the nature of the said processes . . .

Clause 5 is the most important clause of this contract :

> The employed agrees so long as he is bound by any of the provisions of this agreement to at once communicate to the company all inventions or improvements of every nature which he may make or discover or may control or be in a position to communicate. Such inventions and improvements shall without payment become the sole exclusive property of the company if they desire to have them and the company shall give to the employed in respect of any such discovery invention improvement whether patented or not such remuneration as they in their absolute discretion shall think reasonable. And the employed will if required by the company so to do but at the cost of the company apply for through patent agents or others nominated by the company and do all acts necessary to obtain letters patent or other equivalent protection for the said inventions or improvements in all such countries as the company may require and will vest such letters patent or other equivalent protection in the company or as they shall direct and it shall be lawful for the company for the purpose aforesaid to make use of the name of the employed or where permissible to obtain the patent in their own name or that of their nominees and

> the employed will not knowingly do anything to imperil the validity of any such applications or grants but on the contrary will

in effect, do all he can to help the company to obtain and maintain them. The company agreed to pay all costs and charges incurred in protecting the said discoveries inventions and improvements if they desired to protect them. Then cl. 6 is a covenant against competition for the period of employment and for five years thereafter. I do not think there is anything more to which I need refer.

Until June, 1943, the defendant worked at the company's laboratory at Spondon, and it was at Spondon that these inventions were made. On June 1, 1943, the defendant came to the company's London laboratory, and in or about November, 1943, while he was there, the joint applications by the defendant and Mr. Pool went forward to the British Patent Office, under the supervision of the company's patent agents. On Dec. 28, 1943, there was signed or executed by the inventors, Mr. Moncrieff and Mr. Pool, as I have already said, an agreement of assignment to which reference was made in the statement of claim. It recited that the assignors had filed an application for letters patent on Nov. 24, 1943, for an invention which in effect was the spinning invention, and it contained this recital :

> And whereas the assignors made the said inventions whilst in the service of the assignee and the assignee is solely entitled to the benefit of said letters patent and inventions as the assignors hereby admit And whereas the parties hereto desire that the assignee shall become the sole patentee of said letters patent as the original grantee under the provisions of the Patents and Designs Act, 1907-1942, it is mutually agreed by and between the parties hereto that the assignors and each of them will assign to the assignee all that their joint and several interest in said letters patent when granted in order that the grant of said letters patent shall be made to the assignee.

In 1944 and 1945, relations became, apparently, somewhat strained between the company and the defendant, and negotiations were opened up with a view to bringing the defendant's employment to an end. On June 29, 1945, a letter was signed by a director, on behalf of the plaintiff company, and by the defendant. The letter is addressed to the defendant and is in the following terms : " Dear Sir, With reference to our recent discussion, it is hereby mutually agreed as follows : 1. That your service agreement dated Dec. 24, 1942, be and it is hereby terminated as from June 30, 1945." Clause 2 provides for compensation for loss of office. " 3. In consideration of the termination of the agreement and the release by the company from your duties thereunder, you hereby agree and undertake with the company as follows." There follow three sub-clauses, the first of which is, in effect, a repetition of cl. 4 of the agreement of 1942 binding the defendant to treat as confidential the affairs of the company and their business and processes and so on, and not, for a period of five years from July 1, 1945, to communicate or disclose them to anybody else. Sub-clause 3 provided for what was to happen if the defendant desired to enter some other service, and provided for compensation in the event of the plaintiff company taking the view that any employment contemplated by the defendant might be prejudicial to their interests, and, therefore, of a kind to which the company could not consent. It also provided that, so long as this arrangement remained in force, the defendant would keep them apprised of any change in his address. At the foot of the letter appear the words : " I agree with the above arrangement," and it is signed by the defendant. On July 4, 1945, a further assignment, as already mentioned, was executed by the defendant. It bears date July 4, but it may possibly, as I understand, have been signed on the same day as the letter which I have read, namely, June 29, 1945. It contains a recital in precisely the same form as the earlier assignment of Dec. 28, 1943, namely, a recital by the defendant in relation to an application for letters patent which he had filed on May 10, 1945, for the polymer invention that he had " made the said invention whilst in the service of the assignee and the assignee is solely entitled to the benefit of said letters patent and invention as the assignor hereby admits " and that " the parties hereto desire that the assignee shall become the sole patentee of said letters patent as the original grantee under the provisions of the Patents and Designs Acts, 1907-1942." The agreement carried that desire into effect by the assignor assigning to the assignee all his interest in the said letters patent. Other documents were signed by the defendant at about the same time, assigning to a nominee of the plaintiff company his interest in a Canadian application for the polymer invention and an application in respect of the invention in the United States.

It was not until the summer of 1947 that the matter of the other foreign patents was taken up. It started with a letter of May 13, 1947, written by the plaintiff company's patent agents to the defendant asking him if he would execute some formal assignments of his share of the patent rights in Canada to a nominee of Dr. Dreyfus. That letter did not receive an answer, and it was followed by further letters from the company's patent agents asking the defendant, in effect, to secure to the company patent protection in Canada and certain foreign countries. Nothing came of it, and, eventually, a gentleman called on the defendant and produced a bundle of documents for his signature, but the defendant said that he would like a little time to think it over and to have legal advice. He did take time to think it over, and received legal advice, and as a result he refused to sign the documents or any of them, and eventually on Nov. 7, 1947, the writ in this action was issued. The matter is of some urgency because, if the plaintiffs are right and they are entitled to call on the defendant to assist them to obtain patent protection in foreign countries, then under the terms of the Neuchatel Agreement, 1947, such applications have to be in by Dec. 31, 1947.

The question is not one of fact, but one of construction and of law. It seems to me that the question depends very largely on the construction and effect of cl. 5 of the 1942 agreement. It seems to me that, although that clause is on its face purely contractual, nevertheless the defendant did become a trustee of any inventions that he made if, and as from the time when, he made them. I think that an agreement for value between A and B, that an item of property, if made by B, shall be and become the absolute property of A, constitutes B a trustee of the property if he makes it, and the fact that the matter is dealt with by contract does not prevent that juridical conception from arising. The items of property in the present case are "inventions," and the question is what that word means in this document. It presumably means the fruits of the defendant's inventive capacity, and those fruits were to become the sole exclusive property of the company. It is difficult to see how they could become that unless (i) the inventions and the right to make use of them were vested in the company, and (ii) they were so vested in such a way that no one else could lawfully make use of them. Those rights are not alien to the nature of an invention, *i.e.*, they are not alien to the product of an inventive act. The right to obtain a monopoly is incident to an invention and is a benefit which arises out of it. The applicant for a monopoly must be the inventor, but he may, of course, agree to assign the patent when granted. This contract was one made between a large commercial company, on the one hand, and an employee who was to undertake research work, on the other. I take the view, with little doubt, that the word "invention" in cl. 5 was intended as between these two parties to include not only the physical product or formula which the defendant might invent, but also all rights and benefits attaching to it in so far as the defendant might be able reasonably to secure their enjoyment by the plaintiff company. It is said that such rights and benefits cannot be the subject of a trust. I am unable to see why they should not be the subject of a trust in the same way as other choses in action can be subject to a trust.

In *Triplex Safety Glass Co.* v. *Scorah* (1) FARWELL, J., apparently, found no difficulty in visualising a trust affecting an invention in that wide sense which I have indicated, and, in my judgment, it is of the inventions in that sense that the defendant became a trustee for the plaintiff company, and, if he became a trustee of them for the company then he is bound to vest them in the company in so far as he can reasonably do so. In *Triplex Safety Glass Co.* v. *Scorah* (1) the headnote is ([1938] Ch. 211):

> Where an employee makes an invention or discovery in the course of his employment and in doing that which he was engaged and instructed to do, during the time of his employment, and during working hours, and using the materials of his employers, there is an implied term in his contract of service that such invention or discovery becomes the property of his employers, and such an implied term is not

excluded by the fact that the express terms of the contract relating to inventions and other matters are unreasonable and unenforceable. In such circumstances, where the employee has made an invention or discovery in the course of his work, the employee becomes a trustee of that discovery or invention for his employers, and he remains such a trustee after he has left their employment, and he is bound to give the benefit of any such discovery or invention to his employers.

In the course of his judgment FARWELL, J., dealt first with the express service agreement into which the parties had entered and came to the conclusion that it was too wide to be enforced by the courts. Having arrived at that conclusion, he expressed himself as follows (*ibid.*, 216, 217):

> That leaves me to deal with the question how far there may be an obligation on the defendant to do that which the plaintiffs asked him to do, apart from the express contract altogether. As far as that is concerned, the first ground on which the defendant seeks to avoid that conclusion is by saying that where there is an express contract containing terms which are not enforceable for any reason, the court will not imply terms, because the court will assume that all the terms were in the written document, and that, therefore, there is no room for any implication as to other terms; and it is said that, this provision in the contract not being enforceable, there cannot be any implied term in the contract arising from the employment under which the defendant is under any obligation to do that which he is asked to do here. No doubt to some extent the contention that an express contract excludes any implication is well founded, but I do not think it can be taken to the lengths to which [counsel for the defendant] has invited me to go. As I suggested in argument, it cannot be that merely because a servant covenants in his contract of service to behave properly and honestly towards his employer, and that contract of service happens to be too wide to be enforceable, that he is thereby entitled to be as dishonest and to act as unfairly as he pleases towards his employer. That obviously could not be so. In a case of this sort it is a term of all such employment, apart altogether from any express covenant, that any invention or discovery made in the course of the employment of the employee in doing that which he was engaged and instructed to do during the time of his employment, and during working hours, and using the materials of his employers, is the property of the employers and not of the employee, and that, having made a discovery or invention in course of such work, the employee becomes a trustee for the employer of that invention or discovery, and he is therefore as a trustee bound to give the benefit of any such discovery or invention to his employer, and in my judgment that applies in this case notwithstanding the express contract is not enforceable.

Pausing there, it seems, as I have said, that in the view of FARWELL, J., there is no difficulty about attaching terms of trusteeship to an "invention" in its wide sense. FARWELL, J., then dealt with the fact that the employee had, in fact, left the employment of the company before the action was brought and disposed of that argument by saying (*ibid.*, 218):

> . . . it is plainly settled that, once a person is put into the position of a trustee, he cannot avoid the obligations attached thereto, unless the beneficiaries release him either expressly or impliedly. It may be, of course, that in certain cases the court might be able to imply a release from some special circumstances, but, in my judgment, the mere fact that nothing was done in this matter for some two years is wholly insufficient to enable the court to imply any such release in this case; and in those circumstances, as in my judgment the defendant became a trustee of this discovery or invention by reason of the fact that he made it while in the employ of the company and during the company's working hours, and in pursuance of the orders of the company's servants, he became a trustee of it for the company, and he has never ceased and cannot have ceased to be a trustee. If that be so, the result must follow that, when the beneficiary calls upon him to assign the property of which he is a trustee to the beneficiary, he is bound to do so, subject only to this; the trustee is entitled to be indemnified against any proper cost to which he has been put in connection with the property of the beneficiary. The trustee is not bound to spend money on the property of another, and he is entitled to be protected against any expenses which he has incurred in protecting that property, but, subject to that, the beneficiary is entitled to call upon the trustee to transfer the property to him, and in this case it seems to me that on that ground the plaintiffs are right in this action . . .

He thereupon ordered the defendant, who had already taken out a grant of letters patent, to assign the patent to the plaintiff.

All that the defendant is asked to do in the present case is to sign a certain number of documents, and it is not suggested that there is any difficulty about doing it. He has already procured patent protection for the plaintiff company in this country and in the United States, and, very recently and belatedly, in Canada. In the various assignments which the defendant signed, as I have pointed out, he admitted that the plaintiff company was solely entitled to the benefit of the letters patent and inventions therein mentioned. In my judgment, the defendant was in no way released from the obligations, which, in my view, he had already incurred as a trustee, but not fully discharged, by the letter of June 29, 1945, which determined his service agreement. The agreement itself was determined and he was released from his duties thereunder, but it appears to me that the language of the letter falls far short of a release of the trust obligations to which I have referred, and such obligations, if they had arisen, as, in my judgment, they had, were in no way affected by the execution of that letter of agreement but remained on foot and still remain on foot, notwithstanding the release of the defendant under the terms of the letter from the duties imposed on him by the contract of service. I do not propose to deliver a disquisition today on the general question of the relations between master and servant with regard to inventions made by a servant, nor do I intend to refer to the many cases which were cited to me on that question. I think that, on the construction of this agreement and in the events which have happened, the defendant was and is a trustee for the plaintiff company of the inventions in question and of all benefits attaching thereto which he can reasonably secure to the plaintiff company, and that he is bound, accordingly, to execute such documents as are necessary to vest in the plaintiff company the benefits in the Dominions and foreign countries which he has not already assigned to it. This, of course, he is only bound to do at the cost of the company and he is entitled to be protected against himself being put to any expense. Subject thereto, I can see no reason why he should not finally give effect to the obligations in relation to these inventions which remain to be performed.

Order accordingly.

Solicitors: *Linklaters & Paines* (for the plaintiff company); *Robbins, Olivey & Lake*, agents for *Longbothams, Horsfield & Fielding*, Halifax (for the defendant).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

ffirmed. H.L. [1949] 1 All E.R.
88.

HOGAN *v.* BENTINCK WEST HARTLEY COLLIERIES (OWNERS), LTD.

[Court of Appeal (Lord Greene, M.R., Bucknill and Asquith, L.JJ.), December 17, 18, 1947.]

Workmen's Compensation—Incapacity resulting from accident—Novus actus interveniens—Inefficient medical treatment—Operation for congenital deformity on injured thumb.

The workman, who was employed in a coal mine, suffered from a congenital defect, *viz.*, a growth in the top joint of his thumb which formed a superfluous thumb beside and in addition to his normal thumb. On June 16, 1946, a stone flew off a shovel he was using and fractured the superfluous thumb. The bone was put in a splint and he was paid compensation on the basis of total disability until Aug. 19, 1946, when he was certified fit for light work in the colliery which he performed. The thumb, however, remained painful and interfered with his work, and his own doctor, whom he consulted, sent him to hospital where it was discovered that the fracture had not joined up, and an operation was advised and performed for the removal, not merely of the superfluous bone, but also of the normal bone of the thumb at the top joint. On an application by the workman for compensation on the ground of pain in the stump, the county court judge accepted the view of medical witnesses that the operation was a proper one to cure the congenital deformity but not to cure the pain consequential on the accident, and held that the incapacity was due, not to the accident, but to the operation for the deformity which "appeared to have been ill-advised":—

Held: there was evidence on which the county court judge could find that the incapacity was due, not to the injury, but to inefficient treatment of it, and, as this amounted to a *novus actus interveniens* which broke the chain of causation between the original accident and the present disability, the workman was not entitled to compensation.

Rothwell v. *Caverswall Stone Co., Ltd.* ([1944] 2 All E.R. 350) *criticised, but followed.*

[**EDITORIAL NOTE.** It should be observed that the decision in *Rothwell* v. *Caverswall Stone Co., Ltd.* (4) is strongly criticised in this case and the authority of that decision will perhaps be challenged in the House of Lords, leave to appeal to which tribunal was granted to the workman. Lord Greene, M.R., expressed as follows his view of what the law should be : " An incapacity caused immediately by unskilful treatment may, in truth, be due to the accident, and, on any proper theory of causation, it ought to be attributed to the accident and not to the unskilful treatment, when recourse to treatment was the natural and reasonable consequence of the accident."

As to Improper or Unskilful Medical Treatment, see HALSBURY, Hailsham Edn., Vol. 34, p. 864, para. 1183 ; and for Cases, see DIGEST, Vol. 34, p. 351, Nos. *2824-2828.*]

Cases referred to :

(1) *Lakey* v. *Blair & Co., Ltd.*, (1916), 10 B.W.C.C. 58 ; 34 Digest 351, *2828.*
(2) *Humber Towing Co., Ltd.* v. *Barclay*, (1911), 5 B.W.C.C. 142 ; 34 Digest 351, *2824.*
(3) *Rocca* v. *Stanley Jones & Co., Ltd.*, (1914), 7 B.W.C.C. 101 ; 34 Digest 351, *2825.*
(4) *Rothwell* v. *Caverswall Stone Co., Ltd.*, [1944] 2 All E.R. 350 ; 113 L.J.K.B. 520 ; 171 L.T. 289 ; 37 B.W.C.C. 72 ; Digest Supp.
(5) *Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293 ; [1944] K.B. 718 ; 113 L.J.K.B. 513 ; 171 L.T. 113 ; 37 B.W.C.C. 51 ; *affd.*, [1946] 1 All E.R. 98 ; [1946] A.C. 163 ; 115 L.J.K.B. 63 ; 174 L.T. 39 ; 38 B.W.C.C. 50 ; Digest Supp.

Appeal by the workman from an award of His Honour Judge Richardson, made at Morpeth County Court and dated July 21, 1947, refusing compensation on the ground that the workman's incapacity was due, not to the original injury, but to an ill-advised operation for a deformity on the injured thumb. The appeal was dismissed, the court holding, reluctantly, that it was bound by authority to find against the workman.

Fenwick, K.C., and *W. Temple* for the workman.
Beney, K.C., and *N. Harper* for the employers.

LORD GREENE, M.R. : This appears to be a hard case, but, in my opinion, we cannot, in the existing state of the law, interfere with the judgment of the county court judge. The workman is alleging a disability consisting of a painful stump of his thumb, the top joint of the thumb having been removed by amputation. The stump was not caused or produced directly by the accident, but it arose in this way. The workman, who was employed in a coal mine, suffered from a curious congenital defect, *viz.*, a growth in the top joint of his thumb which formed a small superfluous thumb beside and in addition to his normal thumb. On June 16, 1946, a stone flew off the shovel that he was using and fractured the superfluous bone. He went into hospital where he was X-rayed, the bone was put in a splint, and he was paid compensation as for total disability until Aug. 19, 1946. He was then certified fit for light work and returned to odd jobs about the colliery. Unfortunately, the thumb remained painful and interfered with his work with the result that he consulted his own doctor who sent him to the emergency hospital. In the emergency hospital the surgeon, Dr. Jones, had another X-ray taken which showed that the fracture had not joined up. Dr. Jones advised that, to cure the pain from the injured bone, not merely the superfluous bone, but also the normal bone of the thumb should be removed at the top joint, and this operation was duly performed. The consequence of the operation is the soreness of the stump of which the workman now complains. It is common ground that the soreness of the stump does amount to a disability. What is said is that the soreness of the stump is a consequence of the amputation and not a consequence of the injury.

It has been laid down in decisions in this court more than once that in cases where the disability of which a workman complains can be found on proper evidence to be due to some unskilful treatment of an original injury and not to the injury itself, that amounts to a *novus actus interveniens* which breaks the chain of causation between the original accident and the disability. That doctrine has, I cannot help thinking, been viewed on occasions with some distaste by members of this court. I confess that I myself view it with some distaste and I should be glad to see the whole matter dealt with by the House of Lords. There are two schools of thought about this problem. One is that, if a workman reasonably submits to medical advice and treatment to rid himself of the effects of an injury, he is not to be penalised if that advice or treatment turns out to be unskilful or wrong. In other words, if, for instance, his action is reasonable in consulting a doctor and following that doctor's advice, there can be no break in the chain of causation, but the consequences of his following that advice to get rid of his injury are to be attributed to the original accident and not to the intervention of the disconnected element, *viz.*, the doctor's lack of skill. I cannot do better than read this short passage in the judgment of SCRUTTON, L.J. (who, I think, viewed the doctrine with distaste) in *Lakey* v. *Blair & Co., Ltd.* (1) (10 B.W.C.C. 66):

> I can quite understand its having been said, when an accident happens, it is reasonable for a man to go to a doctor, and there is nothing unreasonable in saying that the consequences of the accident are the consequences which happened to him from taking the reasonable course of going to a doctor, which may include that the doctor himself has made a mistake. I can quite understand that having been said. But that contention has been put forward and has been negatived in two decisions of the Court of Appeal. In the *Humber Towing Co.* v. *Barclay* (2) the Court of Appeal say, the question is whether or not the man's present condition is due to the original accident, or to the negligence of the bone-setter against whom the man brought an action.

There the workman, instead of going to a doctor, consulted a bone-setter who made a very bad job of setting the broken bone. I should have thought the case would have been decided against the workman on the simple ground that his action in going to a bone-setter instead of to a proper medical man was in itself unreasonable. SCRUTTON, L.J., goes on:

> In *Rocca* v. *Stanley Jones & Co.* (3) it was argued, the question is, is the incapacity due to any unreasonable conduct on the part of the man. It was said that it was perfectly reasonable for him to go to the hospital. What happened was that when he went to the hospital somebody treated him negligently, for which he was not responsible; and the court say that is not the question. The question is, was the incapacity due not to the accident, but to the want of skilful treatment.

I should have thought, with respect, that that way of looking at it—which is, undoubtedly, the way the courts have looked at it—was open to the criticism that an incapacity caused immediately by unskilful treatment may, in truth, be due to the accident, and, on any proper theory of causation, ought to be attributed to the accident and not to the unskilful treatment, provided that recourse to the treatment was the natural and reasonable consequence of the accident. I think we are bound by the law as it now stands, but I would call attention to the fact that this doctrine comes from early in the history of workmen's compensation, and, in connection with this class of case, it first appears in the *Humber Towing Co.* v. *Barclay* (2), referred to by SCRUTTON, L.J. That was a case of gross negligence. COZENS-HARDY, M.R., agrees that an employer is liable under the Acts for personal injury by accident arising out of and in the course of the workmen's employment, but he demurs to the proposition (5 B.W.C.C. 143, 144)

> . . . that he is an insurer of the medical man, the chemist, and the nurse who attended the man, and is liable in the event of any of them being guilty of gross negligence, which gross negligence might be found as a fact to be the real cause of the disability at the time the matter came before the county court judge.

There the MASTER OF THE ROLLS denied that the employer should be regarded as the insurer, and there seems to flow from the conclusion to which he came the converse proposition that the workman is to be regarded as the insurer since it is the workman who is to lose his compensation if an apparently skilful and competent doctor has not the skill which other doctors think he ought to possess. However, that is all by the way. We must loyally accept the law and act on it.

[HIS LORDSHIP reviewed the evidence, said that the county court judge had found as a fact that the pain of which the workman complained and which constituted his present disability was due to an operation which was a good operation to cure something which was not the result of the accident, *viz.*, the existence of the superfluous thumb, but was a bad operation to cure the pain caused by the accident in the superfluous thumb, and continued :—] If that be right, what is the application of the principle which has been laid down ? It was last considered in this court in *Rothwell* v. *Caverswall Stone Co., Ltd.* (4). The court, by a majority, applied that principle, but SCOTT, L.J., took the view that the cases which had laid down the principle were inconsistent with certain other cases. The majority of the court, however, did not think the decisions were inconsistent and so came to the conclusion that they were not put into the position contemplated by *Young* v. *Bristol Aeroplane Co., Ltd.* (5) of having A to choose between inconsistent authorities. We are, of course, bound under the principles of *Young* v. *Bristol Aeroplane Co., Ltd.* (5) to accept that decision. The rule was carefully gone into and DU PARCQ, L.J. (37 B.W.C.C. 100) lays down certain propositions which I will not take up time by reading save one where he says (*ibid.*, 101) :

> . . . negligent or inefficient treatment by a doctor or other person may amount B to a new cause and the circumstances may justify a finding of fact that the existing incapacity results from the new cause, and does not result from the original injury.

Applying that principle in the present case, the judgment of the county court judge appears to amount to a finding of inefficient treatment by the hospital surgeon as a cure for the consequences of the accident. Was there evidence on which he could so find ? In my opinion, there was, and, so long as the C decision to which I have referred stands, it seems to me we are constrained to decide the appeal in the way I think it must be decided.

There are two further observations that I ought to make. One is this, and it may be a criticism of the principle by which we are bound. That principle was first laid down in reference to a case where the negligence was very serious, and now, in course of time, it has reached the point that something much less than gross negligence, *viz.*, mere inefficiency, is required. Therefore, the un- D fortunate workman is put in the position that he may call his doctor who says : " I gave this man the treatment I considered right." The other side may then call doctors, perhaps more eminent or more persuasive, who may say : " I think it was the wrong treatment." And the judge can then find on the facts that the treatment was the cause of the disability and that the accident was not the cause of the disability. I find difficulty myself in seeing the reasonableness E of that sequence, but that it is the sequence I am afraid is beyond doubt. The other point relates to the question of onus. The judge starts off his note by saying : " Onus on workman : not satisfied incapacity due to accident." It was contended that that was a misdirection in law. The workman, it was said, had proved his case up to a point. If it had stopped there he would have been entitled to an award, and thereafter the onus fell on the employer to displace that presumption. In my view, however, the learned judge is saying, not F that the onus of disproving a *novus actus interveniens* is on the workman, but that on the case as a whole the onus is on him, because it is for him to prove that his disability is to be ascribed to the accident, and, as a result of the evidence as a whole, he comes to the conclusion that the incapacity was due to the " operation for congenital deformity which appears to have been ill-advised." In the result, in my opinion, though with some regret, I feel myself bound by the law as already laid down to say that this appeal ought to be dismissed. G

BUCKNILL, L.J. : I agree with regret. I find it rather difficult to know what the learned judge meant in the latter of the two sentences of which the judgment is composed, but one has to remember that this court cannot interfere with the decision of the judge on any issue of fact. We can only interfere if he has gone wrong in law. The point in the case as I see it is this : Was the H pain which was left in the stump after the operation due to the original accident or to a misconceived operation which ought not to have been performed ? There was evidence both ways. I think that the judge accepted the evidence of two of the medical witnesses and came to the conclusion that the pain was not the natural consequence of the accident, but was the result of an ill-advised operation. I do not see how this court can interfere with that decision. I also regret very much that the opportunity of going to the House of Lords which was given to the parties in the *Rothwell* case (4) was not taken.

ASQUITH, L.J. : I also concur, both in the results reached and in the regret expressed by my Lords.

Appeal dismissed.

Solicitors : *Hyde, Mahon & Pascall*, agents for *Watson, Burton, Booth & Robinson*, Newcastle-upon-Tyne (for the workman) ; *Gregory, Rowcliffe & Co.*, agents for *Cooper & Johnson*, Newcastle-upon-Tyne (for the employers).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

SLOMAN *v.* HARRIS LEBUS (a Firm).

[COURT OF APPEAL (Lord Greene, M.R., Bucknill and Asquith, L.JJ.), December 16, 17, 1947.]

Workmen's Compensation—Industrial disease—Dermatitis—Disease contracted after 2 months' exposure to liquids capable of producing dermatitis—Workman disabled only for employment in particular process in which disease contracted—" Long continued exposure "—Right to declaration of liability—Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929 (*S.R. & O.*, 1929, *No.* 2), *para.* (2).

By the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929, para. (2), a workman suffering from dermatitis produced by dust or liquids is not entitled to compensation under the Workmen's Compensation Act, 1925, s. 43, on account of the disease " if he is thereby disabled only for employment in the particular process in which the disease has been contracted, or other processes involving risk of the said disease, unless the judge . . . is satisfied that the disease has been contracted through long continued exposure to dust or liquids in the industry in which he was engaged at the time of his disablement."

In April, 1946, a workman was engaged as a furniture-stainer and 2 months later he was certified as suffering from dermatitis. He received compensation for total incapacity until Sept. 23, 1946, when he resumed work with his employers as a furniture porter, but he continued to receive compensation on the basis of partial incapacity until May 10, 1947. He claimed that he was entitled to continue to receive compensation from May 10, 1947, onwards on the basis of partial incapacity, or, alternatively that he was entitled to a declaration of liability :—

HELD : (i) the mere payment and acceptance of money at a rate appropriate to compensation was not conclusive evidence of the existence of an agreement that the workman's condition was such that he was entitled to payment on the basis of long continued exposure, and the workman was not entitled to continue to receive compensation on the basis of partial incapacity.

(ii) the workman was not entitled to a declaration of liability, there being no evidence of a reasonable probability of a recurrence of the disease even if he remained in work not exposing him to dust or liquids which had caused his dermatitis.

Lewis v. *Cammell, Laird & Co., Ltd.*, (1929) (22 B.W.C.C. 410), *distinguished.*

[AS TO DERMATITIS AS A SCHEDULED DISEASE, see HALSBURY, Hailsham Edn., Vol. 34, p. 971, para. 1329, and p. 972, note 2 ; and FOR CASES, see DIGEST, Vol. 34, p. 470, Nos. *3842*, *3844*, and Supplement.

FOR THE WORKMEN'S COMPENSATION (INDUSTRIAL DISEASES) CONSOLIDATION ORDER, 1929, AS AMENDED BY THE WORKMEN'S COMPENSATION (CATARACT) ORDER, 1932, see WILLIS'S WORKMEN'S COMPENSATION, 37th Edn., p. 720, and see also pp. 725, 726.]

Case referred to :

(1) *Lewis* v. *Cammell, Laird & Co., Ltd.*, (1929), 22 B.W.C.C. 410 ; Digest Supp.

APPEAL by the workman from an award of His Honour JUDGE WHITMEE, at Edmonton County Court, dated July 15, 1947.

The workman contracted dermatitis after having been employed for 2 months as a furniture-stainer. He received compensation for 3 months and then resumed work with his former employers as a furniture porter, but continued to receive compensation on the basis of partial incapacity for another 8 months. He claimed that he was entitled to continue to receive payment on the basis of partial incapacity, but the county court judge dismissed his claim and the Court of Appeal upheld the judge's award. The facts appear in the judgment of ASQUITH, L.J.

Edgedale, K.C., and *C. J. A. Doughty* for the workman.
Beney, K.C., and *Tyrie* for the employers.

LORD GREENE, M.R. : I will ask ASQUITH, L.J., to deliver the leading judgment.

ASQUITH, L.J. : This is an appeal by a workman from an award dismissing his claim for £2 15*s.* a week as from May 10, 1947, and deciding in favour of the employers. Before 1939 the workman was employed by the employers as a furniture porter. He went to the war, returned in April, 1946, and was re-engaged as a furniture-stainer. That is an occupation which brings the workman into contact with fluids capable of producing dermatitis. On June 20, 1946, he was certified by a medical board as suffering from dermatitis. He was completely disabled until Sept. 23, 1946, and in respect of that period he received compensation on the basis of complete incapacity, but on Sept. 23, 1946, he returned to light duty as a furniture porter, and between that date and the end of April or the early part of May, 1947, he continued to be paid on the basis of partial incapacity. He now claims for continued payments on that basis in respect of the period from May 10, 1947, onwards.

It is pertinent to consider para. 2 of the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929. The schedule to that Order (which is an extension of sched. III to the Workmen's Compensation Act, 1925) covers, among other things, "dermatitis produced by dust or liquids," and para. 2 provides :

> A person suffering from any of the diseases described in the schedule annexed to this Order as dermatitis produced by dust or liquids . . . shall not be entitled to compensation under the provisions of the said section [s. 43 of the Act of 1925] on account of the said disease if he is thereby disabled only for employment in the particular process in which the disease has been contracted or other processes involving risk of the said disease, unless the judge, committee or arbitrator is satisfied that the disease has been contracted through long continued exposure to dust or liquids in the industry in which he was engaged at the time of his disablement.

Subject to another point which was raised by counsel for the workman, the application of that provision to the facts of this case would, I should have thought, have been fatal to the workman, because, undoubtedly, he fulfilled both of the conditions which disentitle a man to compensation under that paragraph. It was common ground in the county court that he was disabled only for employment in the particular process in which the disease had been contracted or other processes involving risk of dermatitis, and the county court judge was not satisfied—and, I should have thought, he had good reason not to be satisfied—that the disease was contracted through long continued exposure to liquids.

Counsel for the workman, however, argues that the position is altered by an agreement which he claims was entered into in September, 1946, or is to be inferred from what occurred then and later. He says that the position in April or May, 1947, was no different from what it was on Sept. 23, 1946, that during the period between those dates the workman was paid as for partial incapacity, and that an agreement should be inferred from these payments to the effect that the workman's condition was such that he was entitled to payment on the basis of long continued exposure. The facts on which it is said that the county court judge not only could, but was compelled to, infer such an agreement were the acceptance and payment of the sums appropriate to compensation between September, 1946, and May, 1947. In support of his argument counsel for the workman cited *Lewis* v. *Cammell, Laird & Co., Ltd.* (1). There the county court judge had found that an agreement had been entered into and the only issue before the Court of Appeal was whether there was any evidence on which he could arrive at that finding. As I read it, the case does not decide that the mere payment and acceptance of money at a particular rate is conclusive evidence in every case of the existence of an agreement of the kind suggested. After all, such things as *ex gratia* payments do sometimes occur. I should have thought the proper conclusion in the present case was that there was evidence on which the county court judge could find that no such agreement was entered into and that there was certainly no evidence compelling him to A find that an agreement was entered into. If that is right, it disposes of the main point in the case.

It was also contended that, at all events, the workman was entitled to a declaration of liability to pay compensation, but it would seem that such a declaration could only be had in respect of the possible or probable recurrence of dermatitis which under para. 2 of the Order would entitle the sufferer to compensation. For these reasons, I think the appeal should be dismissed.

B

BUCKNILL, L.J.: I agree.

LORD GREENE, M.R.: I agree. I wish only to add a word on two points, the first being on the argument that, in para. 2 of the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929, the words "long continued exposure" ought to be read in a very special sense by implying C into them the negative qualification that it must not be through some personal idiosyncrasy. The words "long continued exposure"—three simple words in the English language—mean exactly what they say, no more and no less. It is found, as a fact, that those words are not complied with in the present case, and there can be no appeal. On the question of a declaration of liability, the judge, in a very clear and helpful note, gives himself what admittedly is a perfectly proper direction in law. Having held that, by reason of para. 2 of D the Order, there was no liability so long as the workman was able to work away from dust or liquids, he said:

> I held that if the [Order] prevented liability for further compensation there was no room for a declaration of liability unless there was evidence of a reasonable probability of a further breakdown even if the applicant remained in work not exposing him to dust or liquids which had caused his dermatitis.

E That was a perfectly proper direction. A declaration of liability is a means by which the workman, in view of the reasonable probability of a recurrence of the effects of his accident or disease (as the case may be), keeps open his rights to compensation in the future. In the present case para. 2 of the Order puts a limit on his right to compensation, and, in effect, disentitles him in the circumstances stated to claim compensation even if the disease does recur. Therefore, F any declaration of liability would have to be on the basis that it was a liability to compensation which might arise within the four corners of the limits laid down in para. 2. The judge, having directed himself properly, gives his conclusion as follows: "But the whole effect of the medical evidence was that he could safely work if he kept away from such dust or liquids," therefore, clearly finding (and there was ample evidence on which he could find) that there was no reasonable probability of the workman ever becoming entitled G to compensation, having regard to para. 2 of the Order. This court cannot possibly interfere, even if it would wish to do so, with such a finding. In the result, the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Shaen, Roscoe & Co.* (for the workman); *Goldingham, Wellington & Co.* (for the employers).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Affirmed. C.A. [1948] 2 All E.R. 871.

SHARP *v.* COATES.

[KING'S BENCH DIVISION (Humphreys, J.), December 18, 19, 1947.]

Real Property—Land charge—Registration—Estate contract—Yearly tenancy under written agreement—Undertaking to grant ten-years lease—Validity of undertaking against purchaser of land—Land Charges Act, 1925 (c. 22), *s.* 10 (1), *Class C* (iv).

By an agreement in writing R., the tenant from year to year of certain land, sublet the land to the defendant "for the term of one year from Oct. 11, 1943, and so on from year to year." The agreement further provided: "In the event at any time during the continuance of this agreement of the reversion expectant upon this agreement becoming absolutely vested in R., R. will grant to the [defendant] a lease for a term of 10 years as from Oct. 11, 1943 . . ." This provision was not registered as a land charge under the Land Charges Act, 1925. On the death of his mother, R. became the freeholder of the land which he sold to the plaintiff in December, 1945. The plaintiff gave the defendant notice to quit expiring on Oct. 11, 1947, but the defendant refused to give up possession, claiming that he was entitled to the grant of a lease for ten years under his tenancy agreement. In an action by the plaintiff for the possession of the land,

HELD: R. was an "estate owner" within the meaning of s. 10 (1), Class C (iv), of the Land Charges Act, 1925; to bind a purchaser his undertaking to grant a lease to the defendant required registration as a land charge, under s. 13 (2) of the Act; and, therefore, the plaintiff was entitled to possession.

[AS TO ESTATE CONTRACTS REGISTRABLE AS LAND CHARGES, see HALSBURY, Hailsham Edn., Vol. 19, p. 358. FOR THE LAND CHARGES ACT, 1925, ss. 10, 13 (2) and 20 (4), and FOR THE LAW OF PROPERTY ACT, 1925, ss. 1 (1) and 205 (i) (xxvii), see HALSBURY'S STATUTES, Vol. 15, pp. 531-7, 537, and 542-4; and pp. 177-8 and 389.]

ACTION for possession of land.

Under a written agreement for a yearly tenancy, the tenant (the defendant) was entitled to the grant of a lease for ten years in the event of the freehold of the property becoming vested, during the currency of the agreement, in the landlord, who himself held under a yearly tenancy agreement from his mother. The mother died, and the landlord, on becoming the freeholder, sold the land to the plaintiff, who brought this action to recover possession from the tenant. The tenant set up the term of his tenancy agreement. HUMPHREYS, J., held that as the term was not registered as a land charge, it was void as against the plaintiff, who was, therefore, entitled to possession.

Hanbury Aggs for the plaintiff.

Jopling for the defendant.

HUMPHREYS, J.: This is an action for the possession of certain land of about three acres in Norfolk. The material facts are agreed. The freeholder of the property was a Mrs. Racey, who died on Sept. 7, 1944. She had a son, Walter Henry Racey, and at some time she orally granted a yearly tenancy of the land to him. By a written agreement dated Apr. 13, 1944, the son in turn granted a yearly tenancy of the property to the defendant. The agreement provided: "The landlord agrees to let and the tenant agrees to take" the land in question "for the term of one year from Oct. 11, 1943, and so on from year to year," at a certain rent, and it contained a very unusual term in a yearly tenancy, that is, a proviso that: "In the event at any time during the continuance of this agreement of the reversion expectant upon this agreement becoming absolutely vested in the landlord"—meaning Mr. Racey who for some reason or other described himself as the landlord—"the landlord will grant to the tenant a lease for a term of 10 years as from Oct. 11, 1943, upon the terms of this agreement so far as the same are applicable to a lease."

It appears that, Mrs. Racey having died, Mr. Racey, her son, became the freeholder of this property. As the freeholder of the property he put up the land in question, together with the house and farm land of which it formed part, to be sold by auction on Mar. 24, 1945. The plaintiff attended the auction and was made acquainted with the conditions of sale, which showed, among other things, that the house was in the possession of the vendor who was prepared to give immediate vacant possession thereof and also of the farm and the farm land, but that the three acres in question were "in the occupation of Mr. C. Coates [the defendant] under an agreement dated Apr. 13, 1944, at a gross rental of £22 2*s.* 3*d.* p.a." The special conditions of sale included a paragraph which provided: "The three acres (more or less) being part of Lot 1 is in the occupation of Mr. Claude Coates upon the terms of an agreement dated Apr. 13, 1944, which agreement can be inspected by intending purchasers at the office of the vendor's solicitors at any time before the sale." On the day of the auction at which the property was to be sold, the plaintiff made certain offers, and negotiations followed as a result of which, in November, 1945, the plaintiff entered into a contract of sale and purchase for the property. Completion took place in December, 1945, and as from that date there is no question that the plaintiff was himself the freeholder of the property concerned. It was as such freeholder that he gave a notice to quit to the defendant, which is admittedly a good notice, and which expired on Oct. 11, 1947. The defendant refused to quit, and this writ was issued asking the court to make an order that he should give up possession. The answer made by the defendant to this action is this: "It is true that on Sept. 13, 1946, I was given a good notice to quit and that notice expired on Oct. 11, 1947, and, therefore, on Nov. 10, 1947, when the writ in this action was issued, the tenancy had expired, but I rely on the proviso in my agreement with Mr. Racey that I was entitled to have a lease for 10 years of this property as from Oct. 11, 1943. I demand my right from the present plaintiff." The reply to that answer is: "You have omitted to obey the terms of an Act of Parliament as to registration of your right with regard to this land and, therefore, by statute that right, whatever it is, is void as against myself who am a purchaser for value."

The plaintiff contends that the defendant's right under the proviso in his tenancy agreement is a charge on the land within the Land Charges Act, 1925, s. 10, which provides:

> (1) The following classes of charges on, or obligations affecting, land may be registered as land charges in the register of land charges, namely:— . . . Class C . . . (iv) Any contract by an estate owner or by a person entitled at the date of the contract to have any legal estate conveyed to him to convey or create a legal estate . . .

Counsel for the plaintiff says that Mr. W. H. Racey was an estate owner within the language of that clause. The Land Charges Act, s. 20, provides: "(4) 'Estate owner,' 'legal estate' . . . have the same meanings as in the Law of Property Act, 1925," and the Law of Property Act, 1925, s. 205 (v) defines "estate owner" as "the owner of a legal estate . . ." Section 1 of the Law of Property Act provides:

> (1) The only estates in land which are capable of subsisting or of being conveyed or created at law are—(*a*) an estate in fee simple absolute in possession; (*b*) a term of years absolute . . .

To see what is the meaning of a "a term of years absolute" one has to turn to s. 205 (xxvii) where "term of years absolute" is defined as meaning "a term of years," and, towards the end of a very long sub-section, there appears: "in this definition the expression 'term of years' includes a term for less than a year, or for a year or years and a fraction of a year or from year to year."

It seems to me that the chain is complete, and that those definitions show clearly that Mr. W. H. Racey was an "estate owner" within the Land Charges Act, 1925, s. 10 (1) Class C (iv), and, therefore, that this proviso constitutes a charge on the land which could be registered by him. The Land Charges Act, 1925, s. 13, provides:

> (2) A land charge of . . . Class C . . . created or arising after the commencement of this Act, shall . . . be void as against a purchaser of the land charged therewith, or of any interest in such land, unless the land charge is registered in the appropriate register before the completion of the purchase.

It follows that, in my judgment, the proviso to the clause in the agreement as a land charge is void as against the plaintiff, who is entitled to the possession for which he asks. *Judgment for the plaintiff.*

Solicitors: *Merrimans*, agents for *Fraser, Woodgate and Beall*, of Wisbech, Cambridgeshire (for the plaintiff); *Metcalf, Copeman and Pettefar* (for the defendant). [*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

MANN v. PHILLIPS.

[CHANCERY DIVISION (Roxburgh, J.), December 16, 1947.]

Practice—Judgment—Default of appearance—Discrepancy between writ and statement of claim—Discretion of court—Amendment of writ—R.S.C., Ord. 28, *r.* 1.

By his writ the plaintiff claimed against the defendant an order for the specific performance of an agreement in writing dated Apr. 2, 1946, A for the sale of certain land. The defendant made default in entering appearance and the plaintiff filed a statement of claim in which he pleaded only an oral agreement dated Apr. 2, 1946, On a motion for judgment in default of appearance :

HELD : whether or not a claim should be enforced which was not strictly in accordance with the writ was a matter for the discretion of the court ; the difference between the writ and the statement of claim B in the present case was a matter of substance ; and the motion must be dismissed.

THE COURT gave leave under R.S.C., Ord. 28, r. 1, to amend the writ by pleading an oral agreement.

[AS TO JUDGMENTS BY DEFAULT OF APPEARANCE, see HALSBURY, Hailsham Edn., Vol. 19, p. 218, para. 515 ; and FOR CASES, see DIGEST, Practice, pp. 384 *et seq.*, C Nos. *918 et seq.*]

MOTION for judgment in default of appearance.

The facts appear in the headnote and judgment. ROXBURGH, J., refused the motion.

Albery for the plaintiff.

The defendant did not appear. D

ROXBURGH, J. : By the writ in this action the plaintiff, Thomas Mann, seeks against the defendant, Ellis Phillips, an order for the specific performance of an agreement in writing dated Apr. 2, 1946, whereby the defendant agreed to sell to the plaintiff certain land and premises known as Northwood Farm, Frampton Cotterell, in the county of Gloucester, for the sum of £3,200. The defendant made default in entering an appearance, and E the plaintiff filed the following statement of claim in default of appearance : "By an oral agreement made on Apr. 2, 1946, the defendant agreed to sell to the plaintiff certain premises known as Northwood Farm, Frampton Cotterell, in the county of Gloucester, for an estate in fee simple free from incumbrances for the sum of £3,200. In breach of the said agreement the defendant neglected to deliver to the plaintiff any abstract of title in respect of the said premises despite the repeated requests of the plaintiff, and on F Dec. 18, 1946, the plaintiff issued his writ in this action. On Jan. 23, 1947, the defendant delivered an abstract of title, and on Feb. 25, 1947, the plaintiff delivered to the defendant requisitions on title to the said premises and a draft conveyance thereof for his approval. Despite the further repeated requests of the plaintiff, the defendant has failed to reply to the said requisitions or deal with the said draft conveyance by way of amendment G or approval. The plaintiff has at all material times been ready and willing to perform his part of the said agreement. The plaintiff claims specific performance of the said agreement and damages in lieu of or in addition thereto and costs." On the strength of that statement of claim, the plaintiff asks me to make an order in default of appearance and defence in this form : "Declare that the agreement mentioned in para. 1 of the statement of claim in this action ought to be specifically performed and order and adjudge the H same accordingly and order that the following inquiries be made : (1) An enquiry whether a good title can be made to the premises comprised in the said agreement and when such title was first shown ; (2) An enquiry what damages have been sustained by the plaintiff by reason of the defendant not having performed the said agreement according to the terms thereof, and, further, that the defendant do pay to the plaintiff the amount of such damages as the master shall certify to be due in respect of the second enquiry aforesaid and the amount of the plaintiff's taxed costs. Liberty to apply."

I have not heard counsel for the plaintiff on the form of the relief claimed, and, in the view which I take of this case, it is unnecessary to do so. I only say in passing that it must not be assumed that, if I had felt able to grant the plaintiff any relief, I should have granted relief in that form. It appears to me plain that the action commenced by the writ was based on an alleged agreement in writing. It seems to me, therefore, that the only thing which I could enforce in the absence of the defendant is that agreement in writing A and no other agreement. There is no reference in the statement of claim to any agreement in writing, and the minutes proposed ask me to enforce, not the agreement referred to in the writ, but the agreement mentioned in para. 1 of the statement of claim, which is in terms stated to be an oral agreement. Counsel has suggested that this is a point of no substance. I doubt it. I do not think it is necessary to determine that matter because he is asking me to do something which is not strictly in accordance with his writ, and this is B a matter for my discretion. He asks whether, if it were stated in the writ that the date of the contract was Apr. 2 and it proved to be Apr. 3, I should have refused the order ? Probably, in the exercise of my discretion, I should have said that the *de minimis* principle applied and made the order, but that is not this case at all.

It will be observed that the statement of claim sets up an oral agreement and contains nothing whatever to suggest that there exists any note or C memorandum thereof. It is true that the usual course is to plead an oral agreement and leave the defendant to set up the statute. It may well be that, if this writ had asked for specific performance of an oral agreement and an oral agreement had been set up in the statement of claim, I should have felt it right and proper to grant the relief asked, notwithstanding s. 40 of the Law of Property Act, 1925, and the absence of any reference to a memorandum D or note in writing, but it seems to me that it is a totally different proposition when the writ refers specifically to an agreement in writing and there is no mention of such an agreement in the statement of claim. If a plaintiff changes the basis of his claim from an agreement in writing to an oral agreement, I ought, in my opinion, to treat that as a change of substance unless I am satisfied that it is not. I am not at all satisfied that it is not a matter of substance in the present case by reason of the absence of all reference to a E memorandum or note in writing of the contract. Accordingly, this motion must be dismissed.

Albery: Would your Lordship grant me leave to amend the writ by pleading an oral agreement ? [He referred to R.S.C., Ord. 28, r. 1, which provides :

> The court or a judge may, at any stage of the proceedings, allow either party to F alter or amend his indorsement or pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy . . .]

An amendment can be allowed whether or not the defendant has entered an appearance : see ANNUAL PRACTICE, p. 484*n*.

G **ROXBURGH, J.**: I believe I can do that. I will give you leave to amend the writ. You will then have to re-serve the statement of claim, and if the defendant makes default in appearance, you will have to re-file it.

Motion dismissed.

Solicitors: *Haslewood, Hare & Co.* (for the plaintiff).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

REYNOLDS *v.* LLANELLY ASSOCIATED TINPLATE CO., LTD.

[Court of Appeal (Lord Greene, M.R., Cohen and Asquith, L.JJ.), December 10, 1947.]

Workmen's Compensation—Wage-earning capacity—Use of knowledge of local conditions by arbitrator.

In May, 1925, a shearer in a tinplate factory was injured in the right eye by a flying steel splinter and was totally incapacitated until August, 1926, when, in spite of the development of a traumatic cataract, he was able to return to and continue with his normal work until October, 1942, since which date, as a result of an accident at his home not connected with the eye injury, he had done no work. In November, 1944, an operation was performed on the injured eye and an award of compensation was made on the basis of total incapacity for four months. At the time of the eye injury the workman was earning £6 19*s.* 4*d.* a week which, with statutory increases, would, at current rates, amount to 10 guineas. On an application to vary the award, the arbitrator held, *inter alia*, that, so far as his right eye was concerned, the workman, who was then aged 66, though not able to work as a shearer, was able to do work other than that of a shearer and earn wages equal to his pre-accident earnings, including the statutory increases. There was no evidence of what other work he could do, and no trade evidence as to the availability of work, nor was there an offer of work by the employers. It was, therefore, assumed that the arbitrator had based his decision on his own local knowledge :—

Held : (i) although the arbitrator was entitled to use his knowledge, properly applied and within reasonable limits, of matters which were within the common knowledge of persons in the district, the present was a special and individual case, and the arbitrator must, wrongly, have based his decision on some particular knowledge which he had relating to the possibility of a workman of such skill and age obtaining work at so high a rate of wages.

(ii) the question of the workman's wage-earning capacity should have been determined by reference to his age, to the high wages as a skilled man he was once able to earn, and to the fact that the partial incapacity affected his ability to do precision work, and not by some general estimate of the position of the labour market, rates of wages in general, or the rate of wages for workmen of specified capacity of a normal age.

Observation of Lord Buckmaster in *Keane* v. *Mount Vernon Colliery Co., Ltd.* (26 B.W.C.C. 245, 252 ; [1933] A.C. 309, 317), *applied.*

[As to Use of Arbitrator's Local Knowledge, see HALSBURY, Hailsham Edn., Vol. 34, pp. 893, 926, paras. 1227-1270 ; and for Cases, see DIGEST, Vol. 34, p. 457, No. *3749* and Supp.]

Cases referred to :

(1) *Owens* v. *Llay Main Collieries, Ltd.*, (1932), 25 B.W.C.C. 573 ; Digest Supp.
(2) *Keane* v. *Mount Vernon Colliery Co., Ltd.*, [1933] A.C. 309 ; 102 L.J.P.C. 97 ; 149 L.T. 73 ; 26 B.W.C.C. 245 ; Digest Supp.
(3) *Roberts & Ruthven, Ltd.* v. *Hall*, (1912), 106 L.T. 769 ; 5 B.W.C.C. 331 ; 34 Digest 457, *3749.*
(4) *Viney* v. *New Tredegar, Treharris & Troedyrhiw Co-operative Society*, (1939), 32 B.W.C.C. 264 ; Digest Supp.
(5) *Blades* v. *Wool Exchange & General Investments, Ltd.*, (1937), 30 B.W.C.C. 395 ; Digest Supp.
(6) *Mothersdale* v. *Cleveland Bridge & Engineering Co.*, (1930), 99 L.J.K.B. 261 ; 142 L.T. 541 ; 23 B.W.C.C. 47 ; Digest Supp.
(7) *Tannock* v. *Brownieside Coal Co.*, [1929] A.C. 642 ; 98 L.J.P.C. 156 ; 141 L.T. 599 ; 22 B.W.C.C. 383 ; Digest Supp.

Appeal by the workman from an award of His Honour Judge Morris, K.C., made at Llanelly County Court on Jan. 21, 1947. The appeal was allowed.

Dare and *Wallis-Jones* for the workman.
Scholefield Allen, K.C., and *Ithel Davies* for the employers.

LORD GREENE, M.R. : The workman, who is aged 66, seeks to have the arbitrator's award varied in two respects. He was a shearer in a tinplate factory and the accident took place as long ago as May 26, 1925, when a steel splinter flew into his eye, as a result of which he was totally incapacitated until August, 1926. The injury started a traumatic cataract in the eye which, however, did not prevent him from returning to his normal work shortly after August, 1926. He worked until October, 1942, when he had an accident in his home, not connected with the injury to the eye, which kept him away from work for a substantial period. He has not worked since October, 1942, for, while he was still away from work, the cataract in the injured eye reached a stage at which an operation became desirable and on Nov. 21, 1944, he went into hospital and was operated on the next day. There is no dispute that for four months after that operation he was totally incapacitated, and the county court judge has awarded him compensation on that basis for that period and no more. The proceedings which have given rise to the appeal were proceedings by way of review. Shortly after the original accident the employers signed an agreement admitting liability, which was approved in the usual way, and as soon as the workman was able to return to work the compensation ceased. He is now seeking to have the compensation re-instated. The wages he had been earning before the accident in 1925 were £6 19*s.* 4*d.* That, it is agreed, when the relevant statutory increases are added, must be taken to be £10 10*s.* 0*d.* at present rates.

The first point on which the appeal is made can be dealt with shortly. It is said that the county court judge was wrong in the date which he took for the commencement of compensation, *viz.*, the date of the operation, and it is argued that the workman's incapacity due to the accident began in January, 1944, when, it is said, the incapacity due to the accident in his home had come to an end and the incapacity due to the deterioration in the right eye had begun to operate and was keeping him from work. The short answer to that proposition is that there was a conflict of evidence on the matter, the judge formed his conclusion on sufficient evidence that the proper date for the commencement of compensation was Oct. 21, 1944, and we cannot attack it.

The other, and main, point in the case is not too easy to decide. In his judgment the judge found the following facts. (1) The workman is not able to work as a shearer because of the condition of his right eye, due to the accident; (2) so far as his right eye is concerned, he is able to work at other work and earn his pre-accident rates of weekly wages, including the figure under the Act of 1943; (3) any incapacity to do work other than a shearer and earn wages equal to his pre-accident earnings is not as the result of any injury to his right eye. The finding that is challenged is No. (2). It is said that there was no evidence on which the judge could find that the workman could earn his pre-accident rates of weekly wages including the 1943 Act figure of 10 guineas a week.

The evidence with regard to his earning capacity subsequent to the operation is very meagre. He said himself: "I could not do shearer's work because of eyes." That is, of course, now common ground. "I believe labourer gets £4 a week." That suggests that he is putting forward a labourer's wage as the highest wage that he could expect to earn. The next item of evidence is to be found in that of Dr. Healey, the ophthalmic surgeon who operated for the cataract. He said: "No hope of further improvement to right eye; left eye will get worse." It appears that there is also a cataract in the left eye, but not due to this accident, and at present, at any rate, it does not prevent him seeing altogether. What he said with regard to the workman's capacity for work was: "Not fit to-day to do work as shearer. He can do various kinds of other work." He said in cross-examination he wanted four months to settle down after the operation, and that is the four months for which the judge gave compensation. On behalf of the employers Dr. Thomas said: "I see no reason why he could not do the work of shearer after Jan. 26, 1944, with glasses. Probably will find difficulty now as a shearer. Not recommend him as a shearer but he can do other work." On that evidence it is to be noted that there is no trade evidence as to the availability of jobs. There is not, as is very often found in these cases, an offer by the employers to find a job, and there is no evidence as to what other kinds of jobs might be open. The effect of the judge's award is that as from the expiration of the four months, when the total incapacity came to an end, the workman remained partially incapacitated by reason of the fact that it is common ground, as the judge found, that he is not fit for his previous work as a shearer. What other work he can do is not referred to in the evidence as recorded, nor is there any finding in the judgment as to what that other work might be. It is, I think, right to bear in mind that the partial incapacity obviously affects his ability to do anything in the nature of precision work. It is also obvious that he was a man whose skill at the job on which he had spent his life was such that he was able to earn the very high rate of wages of ten guineas a week. He was a man of 66. It appears to me that the question what he would be able to earn in some suitable employment must be answered with reference to those three factors and not to some general estimate of the position of the labour market, rates of wages in general, or the rate of wages for workmen of specified capacity of a normal sort of age. The workman has a type of injury which must close to him the doors of many of the more highly paid types of work and he is a man of 66.

In those circumstances, what is the position ? If the evidence as recorded in the judge's note alone is considered, I feel myself in no doubt that the right conclusion for this court would be that there was no evidence on which the judge could find that the workman was able to work at other work and earn his pre-accident weekly rate of wages, including the 1943 figure. It would appear on the face of the evidence alone that the figure which was impliedly arrived at by the judge cannot have been an estimate founded on the evidence. It may be that the judge put too high an estimate on the workman's earning capacity after hearing the doctors and seeing the workman in the box and that he really did found on the evidence before him. If that was what he did, I would say the evidence was not sufficient to justify him in law in coming to his finding. Two suggestions are made to meet that difficulty. One is that the evidence of the doctors that the workman can do various other kinds of work is really only a compendious statement in the judge's note of much more elaborate and detailed evidence given before him. I do not find it possible myself to take that view, because I cannot help thinking that the judge would have realised the importance of recording any evidence of that kind if it was given, and, indeed, of referring to it in his judgment, because it obviously was of great importance. The other explanation offered is that the judge must have drawn on his own knowledge of the state of the local labour market and the sort of wage that can be earned, and reference is made to several well-known authorities which state that the county court judge is entitled to have recourse, as a matter of judicial knowledge, to local information which he possesses. On the assumption that he has done that (and I am assuming that he did do that), it is said that we ought not to interfere. That raises what, to my mind, is a question not very satisfactorily dealt with by the courts in the past. The practice of county court judges of supplementing evidence by having recourse to their own local knowledge and experience has been criticised, praised as most beneficial, objected to, and encouraged in different decisions. I think it is impossible to suggest at this time of day that the county court judge is not entitled, within limits to which I shall refer in a moment, to take into account his own knowledge of general conditions in the neighbourhood.

I do not desire to express any opinion, and it is not necessary to do so, whether or not the rather stringent limits suggested for the operation of that rule by ROMER, L.J., ought to be observed. I need not quote them, but he does criticise and suggest limits for its operation in *Owens* v. *Llay Main Collieries, Ltd.* (1) (25 B.W.C.C. 593). I am content myself to refer to this statement by LORD BUCKMASTER in *Keane* v. *Mount Vernon Colliery Co., Ltd.* (2) (26 B.W.C.C. 252) :

> In order to get rid of the question that the arbitrator has raised as to the admissibility of . . . knowledge [of local conditions of the varying wages of miners employed in the district] I may say that I think that, properly applied, and within reasonable limits, he was entitled to use it. To hold otherwise would involve that a number of witnesses would have to be called in order to bring under judicial notice by local proof facts within the common knowledge of everyone in the district. I see no objection to his having made his judicial experience in this respect available.

It is worth noticing that the type of case to which Lord Buckmaster is referring is that where the judge uses his knowledge of matters which are within the common knowledge of everyone in the district, and he limits his right to call his own knowledge into play by the words "properly applied and within reasonable limits." The question, therefore, I apprehend for this court, whenever a judge is said improperly to have used his local knowledge, is whether he has used that knowledge properly and within reasonable limits. That leaves the function of this court rather vague. It would mean that in every individual case where the point is raised we should have to decide whether or not we thought that the judge had acted in relation to the facts of the case in a reasonable manner. When one looks at the type of case where this practice has been adopted and approved one finds that they are cases of a quite general nature. Take the case last referred to, *Keane* v. *Mount Vernon Colliery Co., Ltd.* (2). The question there was what was necessary to give the family of a deceased man sufficient provision for the ordinary necessaries of life. In arriving at his finding, the judge said he had taken into consideration the evidence and also his own judicial knowledge of local conditions and the average wage of miners employed in the district. That type of knowledge is of quite a general character and is not liable to be varied by specific individual characteristics of the individual case. Among the other cases which have been cited to us, I take *Roberts & Ruthven, Ltd.* v. *Hall* (3), an early case which was much relied on. In that case Cozens-Hardy, M.R., said this (5 B.W.C.C. 333): "The arbitrator was entitled to act on his general knowledge of the labour market and the conditions of the trade and so on"—as I have said, matters of quite a general kind which the judge can safely be trusted to refer to of his own knowledge. The matter in dispute there was the amount of wages the workman could earn at light work. He was a member of the crew of a steam trawler and had injured his arm, and light work in relation to such a man in the local place (Grimsby) must have had a very clear meaning to the county court judge. He used his local knowledge of the rate of wages which a man of that class, capable of doing that type of work, could earn in Grimsby, and it was said he could properly do that. The last case I need refer to is *Viney* v. *New Tredegar, Treharris and Troedyrhiw Co-operative Society* (4) where a butcher earning £3 2*s.* 6*d.* a week was certified to be suffering from occupational dermatitis. He obtained work as a canvasser and earned £3 a week, and asked for a declaration of liability. The county court judge found as a fact on the evidence that there was no such physical incapacity as to prevent the workman earning his pre-accident wage and he dismissed the application. It was held that "the county court judge was entitled to find that the workman was able to earn his pre-accident wage in some suitable employment and it was a question of fact for him." Slesser, L.J., says this (32 B.W.C.C. 268):

> As has often been pointed out in these cases, *prima facie* the fact that the particular work upon which a man is engaged has by reason of his infirmity due to his accident been excluded from his future employment narrows the sphere of his employment; but it does not necessarily follow that, because his employment is narrowed in the sense that he is no longer able to do that which he had been doing, he has thereby suffered any incapacity and it is a fact for the learned county court judge to decide whether that is so or not. If there were any doubt about it, that is made perfectly clear by the recent case which was cited to us of *Blades* v. *Wool Exchange and General Investments, Ltd.* (5).

Blade's case (5) was one in which I had delivered a judgment which Slesser, L.J., cites in his judgment in *Viney's* case (4). It was a case of an office cleaner earning 18*s.* a week. The finding had been that she was still able to earn 18*s.* a week although the class of work that she could do was limited to work which would not expose her to the possibility of an industrial disease. She was suffering actually from dermatitis. Slesser, L.J., says (32 B.W.C.C. 269):

> "The judge finds"—I am quoting from the learned Master of the Rolls' judgment (30 B.W.C.C. 401)—"that she could earn 18*s.* in any other job which she could obtain," and he points out earlier that in the work which she had been doing in the past she had been earning 18*s.* a week so that there was, as a result, no incapacity. The question arose whether there was some evidence upon which the learned county court judge could so find, and the learned Master of the Rolls says (30 B.W.C.C. 402): "It is also to be observed that 18*s.*

> a week is a very small amount and represents earnings of a very low degree in the scale of the labour market. If the case were concerned with a person earning a much higher wage in some skilled trade, it would be possible to understand the view that local knowledge or a general knowledge of affairs might not be sufficient to enable the judge to come to a finding of fact as to what wages could be earned." I do not read those words to lay down a principle of law, but merely to be a guide to county court judges that of course as the wages rise in scale, the more they must take care to have regard to the particular circumstances of the particular employment and to the effect of its limitation.

I agree with what SLESSER, L.J., said there, but it still leaves it to be decided in any individual case whether the county court judge has gone beyond the permissible limits in drawing on his local knowledge. One more example was a judgment of SCRUTTON, L.J., in *Mothersdale* v. *Cleveland Bridge & Engineering Co.* (6) which is quoted in *Owens* v. *Llay Main Collieries, Ltd.* (1) (25 B.W.C.C. 587). SCRUTTON, L.J., said (23 B.W.C.C. 51):

> If the learned county court judge had properly directed himself, and was referred to *Tannock* v. *Brownieside Coal Co.* (7), and had read it, and using his local knowledge, and his knowledge as a man, as he is entitled to do, of the condition of things in Durham, he has found that the failure to obtain employment is largely due to the state of the labour market in Durham, and not wholly or mainly due to the consequences of the injury, I cannot possibly say that he is wrong in coming to that view when it is a matter of fact for him whether in the evidence, plus his local knowledge, there is evidence on which he could find that it was the state of the labour market in Durham which causes the man to be unemployed.

There the question was whether the workman's failure to obtain employment was a consequence of the injury and the judge, knowing the conditions of employment in Durham, found that it was not.

That is the sort of general knowledge which is quite unobjectionable if the judge makes use of it, but, in my opinion, in the present case it is not general knowledge, which has been drawn on. It must be some particular knowledge that the judge drew on relating to the possibility of a man of this high degree of skill at his age obtaining a job at as high a rate of wages as 10 guineas a week. There are factors in the case of such an individual of a particular nature, and the judge ought not to have drawn on knowledge which could only be helpful if it was of a highly specialised nature. The knowledge required to answer the question here was not, in my opinion, the sort of knowledge to which LORD BUCKMASTER was referring when he spoke of knowledge which everybody in the district would have. Even treating those words as of rather too limiting a character, this seems to me to be quite a different class of case from that where what was implied was some general knowledge relating to employment in general and the cases of men in all categories of that sort. This is a very special and individual case, and, in my view, the county court judge ought not to have answered the crucial question on his own knowledge of the locality. In the result, the award must go back to have question No. 2 dealt with, with liberty to either party to call further evidence.

COHEN, L.J.: I agree. So far as the date at which compensation should start is concerned, I entirely agree with my Lord that there was evidence on which the learned judge could reach his conclusion, and that we ought not to disturb it. With regard to the second point I must admit that my mind has fluctuated considerably during the hearing of the argument, but, on the whole, I have come to the conclusion that the order which my Lord proposes is right. Accepting to the full that it would be most undesirable that a judge should be precluded in proper cases from acting on his local knowledge of matters which are not covered expressly, or, indeed, possibly at all, by the evidence, none the less, as my Lord has pointed out, I think there must be some limit to that practice and I think that we have, as my Lord has said, following the injunctions laid down by LORD BUCKMASTER to consider whether in the particular case the learned judge has properly applied it within reasonable limits. Before we can be satisfied that he has so applied his local knowledge we must, I think, be satisfied that he had present to his mind the requisite data to which to apply the local knowledge. In considering in any case whether or not such data were present we must give a benevolent construction to what must inevitably be a short note of the proceedings before him, but in this case I am not satisfied that the county court judge had before him

the requisite evidence to which he could apply his knowledge of the conditions and rates of pay in the district to determine the second and vital question, *viz.*, whether the workman had so far recovered that he could earn his pre-accident rate of weekly wages in other work. It might be said, that in those circumstances, instead of remitting the case for a further hearing, the better course would be to ask the learned judge to amplify his note, but, having regard to the considerations urged by my Lord, I think it would be
A preferable to take the course which my Lord has indicated.

ASQUITH, L.J.: I agree with the course proposed. The authorities have not attempted, nor, perhaps, is it possible, to lay down a formula defining with precision the limits within which the county court judge may in such cases as the present rely on his personal knowledge of local conditions in supplement of or in substitution for regular evidence. As my Lord has pointed out, LORD BUCKMASTER in the House of Lords in *Keane* v.
B *Mount Vernon Colliery Co., Ltd.* (2), goes no further than to lay down that the judge is entitled to use his personal knowledge within reasonable limits. This means in practice that, in deciding whether such limits have been exceeded or not, the court must have regard to the facts of each individual case. On the facts of the present case, for the reasons given by my Lords, those limits have been exceeded, and I agree that the award should be sent back.

C *Appeal dismissed with costs.*

Solicitors: *Russell Jones & Walker*, agents for *Randell, Saunders & Randell*, Llanelly (for the workman); *T. D. Jones & Co.*, agents for *Edward Harris & Son*, Swansea (for the employers).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

D

R. *v.* SHARROCK AND OTHERS.

[CORNWALL (BODMIN) AUTUMN ASSIZES (Lewis, J.), October 31, 1947.]

Criminal Law—Evidence—Accused person as witness—Competence—Indictment—Quashing—Committal—Defect—Irregularity before justices.

E In proceedings before justices with a view to committal S. was charged with stealing and four others, including K., with receiving from S. or each other. To prove the case for the prosecution S. and K. were put into the witness box and sworn, but, on being warned that they need not say anything that might tend to incriminate them, S. declined to give any evidence, while K. said he stood by a statement he had made to the police and declined to say more. On a motion to quash the indictment,

F HELD: S. and K. could not properly be called to give evidence for the prosecution; they "gave evidence" although they were only called into the witness box and were sworn and made the answers stated above; and, therefore, the indictment must be quashed.

R. v. *Grant* ([1944] 2 All E.R. 311), *considered.*

[AS TO EVIDENCE OF DEFENDANT IN CRIMINAL PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 213, 214, paras. 299, 301; and FOR CASES, see DIGEST, Vol. 14, pp. 444, 445, Nos. *4694-4704.*]

G Case referred to:

(1) *R.* v. *Grant*, [1944] 2 All E.R. 311; 30 Cr. App. Rep. 99; Digest Supp.

APPLICATION to quash an indictment on the ground of bad committal.

In the proceedings before the justices the defendant, Sharrock, was charged with stealing, the defendants, Keast and Rundle, with receiving from Sharrock, and the defendants, Lakeman and Jacobs, with receiving from
H Keast. To prove the case for the prosecution Sharrock and Keast were put into the witness box and sworn, but, on being warned that they need not say anything which tended to incriminate them, Sharrock declined to give evidence, while Keast merely said he stood by a statement he had made to the police. There was no evidence that either Sharrock or Keast was called on his own application. The indictment was quashed.

J. C. Perks, for the defendant, Sharrock: I move to quash the indictment on the ground that it is based on a bad committal and is, therefore, a nullity. At the resumed hearing before the justices on Oct. 9, Sharrock was called as a witness. He was sworn, apparently against both himself and his fellow accused, and then, having been given a warning, he said: "I decline to say anything, having been told I need not do so." Later, the accused man, Keast, was also called and sworn, and he said: "I do not wish to give evidence against Jacobs. I have made a statement to the police and I wish to stand by it. I have nothing to say, having been warned that I need not do so." I submit that to call a man as a witness before the justices when he himself is being charged is contrary to natural justice and invalidates the whole A committal: *R.* v. *Grant* (1), the headnote of which states:

> In proceedings before magistrates in which 5 persons were charged jointly and severally with various offences, 3 of them were called to give evidence for the prosecution on the charge in which they themseves were concerned. It was contended that, in these circumstances, the committal by the justices was unlawful and that the indictment based on that committal should be quashed. In a second indictment there was no joint charge, but 3 persons were charged with stealing and 1 person with receiving, B and in the court below the persons who had been charged with stealing were called to give evidence in respect of the charge of receiving:—HELD: (i) it was not competent for the prosecution to call as witnesses persons who were themselves concerned in the charge. The committal of all the persons charged was, therefore, unlawful and the first indictment must be quashed. (ii) it was not in accordance with the fair administration of the criminal law that men who had been charged with an offence but not yet tried should be called as against another man to give evidence of that offence. The second indictment must, therefore, also be quashed. C

In his judgment, BIRKETT, J., said ([1944] 2 All E.R. 313):

> In the circumstances of this case Ley, Pearce and Trueman were called as witnesses for the prosecution although they themselves were then upon that charge. The view which I take is that it was not competent for the prosecution to do that in any event. I take the view, further, that it was quite contrary to the spirit in which the criminal law of this country is administered, and, so far as the men who were called are con- D cerned, counsel for the prosecution says that he could not contend that the committal was otherwise than unlawful, and, consequently, he was not prepared to contend the committal was good as against Grant.

H. E. Park, for the defendants, Keast and Lakeman: Section 3 of the Evidence Act, 1851, provides: "Nothing hereinafter contained shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, E competent or compellable to give evidence for or against himself or herself." It has been held that that enactment did not alter the ancient law of England which prohibited any attempt to examine or cross-examine any prisoner on his trial. Whenever, therefore, it is desired to obtain the testimony of a defendant in a criminal trial as against his co-defendants, an end must be put to the proceedings against him, either by his pleading guilty on arraignment, or by the prosecution entering a *nolle prosequi*, or by an application for a verdict F of acquittal being made before the case is opened, though the court, in its discretion, will in ordinary course direct an acquittal either during the progress or at the termination of the inquiry if no evidence has been given inculpating the party who is sought to be made a witness. Nothing short of a formal judgment or a plea of Guilty can, however, be considered, as, for this purpose an end of the matter: TAYLOR ON EVIDENCE (12th ed., p. 855); ARCHBOLD'S G CRIMINAL PRACTICE, 30th ed., p. 468. There is no evidence whatever that Sharrock and Keast were called as witnesses for the prosecution on their own application within the Criminal Evidence Act, 1898, s. 1 (*a*).

Besley, for the defendant, Rundle: I associate myself entirely with what my learned friend has said. In my submission once it is shown that the prosecution have acted improperly in any way whatsoever in the conduct of the proceedings before the justices and the justices have admitted evidence H which ought not to have been admitted, those proceedings should be declared to be invalid.

Laskey, for the defendant, Jacobs.

H. Collins, for the prosecution: This motion ought to fail. It is impossible to read the case of *R.* v. *Grant* (1) without seeing that what BIRKETT, J., says is objectionable is the giving of evidence by one co-defendant against another. The mere fact that a co-defendant goes into the witness box and takes the oath, which is all that occurred in the present case, does not constitute such "giving of evidence" as to justify the court in quashing the indictment.

LEWIS, J.: In this case a preliminary objection is taken by counsel for the five accused to quash the indictment on the grounds of bad committal, and my attention has been drawn to *R.* v. *Grant* (1) which was a decision of Birkett, J., at the Warwick Assizes.

In the present case it is said with truth that when there were before the justices the five accused men who are now standing in the dock—Sharrock on a charge of stealing and the other four on charges of receiving either from Sharrock or from each other the goods alleged to have been stolen by Sharrock—the prosecution thought it right to call Sharrock and Keast into the witness box to prove the case for the prosecution. In the witness box, Sharrock, having been duly sworn, was given the proper warning that he need not answer any question which tended to incriminate him, he being the principal person charged, and he said: "I decline to say anything, having been told I need not do so." When Keast was called, having taken the oath and having also been warned, he said: "I do not wish to give evidence against Jacobs. I have made a statement to the police and I wish to stand by it. I have nothing to say, having been warned that I need not do so." With regard to Keast's evidence, it is said that, unlike Sharrock, he did say something which was against his fellow accused in that he stated that he adhered to a statement he had made to the police. If he had then had read out to him his statement and had said: "Yes, I agree with that," that would have been evidence, not only against himself, but also against the other accused, and they would have had the right to cross-examine him about it.

It was clearly wrong on the authority of *R.* v. *Grant* (1) for either Sharrock or Keast to be called to give evidence, and the question I have to decide is whether the mere fact that both of them were called into the witness box and took the oath as witnesses can be said to be "giving evidence." In my view, it is. In *R.* v. *Grant* (1) there is nothing to indicate whether or not in the court below the men who there were called as witnesses for the prosecution gave any evidence. Although in this case counsel for the prosecution suggests that inferentially they must have done so, I do not think it follows. The point is that, in my opinion, these witnesses, Sharrock and Keast, having been put into the witness box and sworn, were called to give evidence. As I read the judgment of Birkett, J., in *R.* v. *Grant* (1), that was wrong, and, therefore, this committal was bad, and the indictment must be quashed.

Indictment quashed.

Solicitors: *Graham Couch & Co.*, St. Austell; *Rosen & Co.*, Bodmin; *Stephens & Scown*, St. Austell; *S. Townsend*, Camelford.

[*Reported by* Conrad Oldham, Esq., *Barrister-at-Law.*]

Re DEWHIRST, FLOWERS AND ANOTHER *v.* DEWHIRST AND OTHERS.

[Chancery Division (Harman, J.), January 12, 13, 1948.]

Wills—Construction—Gift of income of residue to wife during widowhood—Remarriage of wife—Second "marriage" annulled—Wife's right to income, as testator's widow, since date of annulment.

By his will the testator gave his residuary estate to his trustees on trust to pay the income thereof to his wife, E.D., "during her lifetime provided she shall so long continue my widow," and he directed that on her remarriage she was to receive only one half of the income and that the other half was to fall into the residue. The testator died in 1937. In 1942 E.D. remarried, but on Jan. 30, 1947, the second marriage was annulled on the ground of the "husband's" incapacity. By the decree absolute, dated Mar. 31, 1947, E.D.'s second marriage was declared "to be and to have been absolutely null and void" and it was further declared that E.D. "was and is free from all bond of marriage" with her second "husband." E.D. claimed that from the date of the annulment she was entitled, as the testator's widow, to the whole income of the residuary estate:—

Held: having regard to the form of the decree, E.D.'s second marriage must be treated as never having happened, and, consequently, since the date of the annulment she was entitled as the testator's widow, to the whole income of the residuary estate.

Re Garnett, Richardson v. *Greenep* (1905) (74 L.J.Ch. 570) and *Re Wombwell's Settlement, Clerke* v. *Menzies* ([1922] 2 Ch. 298) *applied.*

Re Eaves, Eaves v. *Eaves* ([1939] 4 All E.R. 260) *distinguished.*

[**EDITORIAL NOTE.** The form of a decree of nullity was discussed recently in the A
Court of Appeal in *De Reneville* v. *De Reneville* ([1948] 1 All E.R. 56), as well as in the cases mentioned in the judgment. There Lord Greene, M.R., (at p. 60) expressed the view that " A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place . . . a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction." Bucknill, L.J., while agreeing, said (p. 64) that " the decree of nullity is retrospective in some respects, and the decided cases are not easy to reconcile B
on the point as to how far the decree makes invalid past acts." In that case it was held that, as the marriage, which had been celebrated in Paris, was voidable and not void, the wife's domicil remained French until the marriage was annulled, and that for that reason the English courts had no jurisdiction to entertain a suit for nullity which must be brought in France.

As to Effect of Nullity Decree, see HALSBURY, Hailsham Edn., Vol. 10, pp. 640, 641, para. 937; and for Cases, see DIGEST, Vol. 27, pp. 265, 266, Nos. C
2326-2345, and Supplement.]

Cases referred to:

(1) *Re Eaves, Eaves* v. *Eaves*, [1939] 4 All E.R. 260; [1940] Ch. 109; 109 L.J.Ch. 97; 162 L.T. 8; Digest Supp.; *affg.*, [1939] 3 All E.R. 500; [1939] Ch. 1000; 161 L.T. 136.

(2) *Re Ames' Settlement, Dinwiddy* v. *Ames*, [1946] 1 All E.R. 689; [1946] Ch. 217; 175 L.T. 222; Digest Supp.

(3) *Chapman* v. *Bradley*, (1863), 4 De G.J. & Sm. 71; 3 New Rep. 182; 9 L.T. 495; D
40 Digest 529, *736*.

(4) *Re Garnett, Richardson* v. *Greenep*, (1905), 74 L.J.Ch. 570; 93 L.T. 117; 40 Digest 530, *744*.

(5) *Re Wombwell's Settlement, Clerke* v. *Menzies*, [1922] 2 Ch. 298; 92 L.J.Ch. 18; 127 L.T. 295; 40 Digest 530, *740*.

(6) *Dormer* (*otherwise Ward*) v. *Ward*, [1901] P. 20; 69 L.J.P. 144; 83 L.T. 556; 27 Digest 521, *5629*. E

(7) *Dredge* v. *Dredge* (*otherwise Harrison*), [1947] 1 All E.R. 29.

Adjourned Summons to determine whether, on the true construction of the testator's will, a gift of the whole income of his residuary estate to his wife during her widowhood was restored as from the date of the annulment of the wife's second marriage. Harman, J., held that it was. The facts appear in the judgment. F

J. A. Wolfe for the trustees.

Maurice Berkeley for the first defendant (the widow).

D. A. Ziegler for the testator's infant children.

HARMAN, J.: This is a point of some nicety arising out of the curious form of the decree pronounced by the Divorce Court in a suit for the annulment of a marriage. The historical reasons for the form of this order G
were pointed out by Goddard, L.J., in *Re Eaves, Eaves* v. *Eaves* (1), and it has been recently observed on by my brother Vaisey, J., in *Re Ames' Settlement, Dinwiddy* v. *Ames* (2).

The facts behind the question are simple enough. The first defendant is, or alleges she is in law, the widow of the testator, Alexander Dewhirst, in the matter of the trusts of whose will the summons is entitled. The other two defendants are the infant children of that marriage. The testator, H
by his will made in 1937 left an interest in the income of his estate to his wife *dum vidua* and an interest in half that income on her remarriage, with remainders over in favour of his children. He died in March, 1937. His will was duly proved, and on June 8, 1942, his widow, who until then, I assume, had received the income of the estate, remarried. From that time she did not either claim to receive, or, in fact, receive, the whole income in her beneficial capacity. She received half of it as beneficiary, but, as she had the care of the two infant children, the trustees paid to her the balance of the income as the guardian

of the children, as they were entitled to do, and she thus in one capacity or another did, in fact, receive the whole income. No question arises before me, therefore, on any part of the income paid to her during this period. Her second marriage was annulled on Jan. 30, 1947, and she now claims to be entitled as from that date to the whole of the income of the residuary estate. This claim is disputed on behalf of her infant children, who say that within the meaning of the will she is not the widow of the testator, and, therefore, she is not entitled to the A whole income as she claims to be.

According to a copy before me of the order by which the second marriage was annulled and which appears to have been made on Mar. 31, 1947, it is in these terms:

> Referring to the decree made in this cause on Jan. 31, 1947, whereby it was decreed that the marriage had and solemnised on June 8, 1942, at the parish church in the parish of St. George's, Doncaster, in the county of York, between Eileen Kidd otherwise B Dewhirst, . . . the petitioner and Arnell Hardwick Kidd, the respondent, be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever by reason of the incapacity of the respondent to consummate the marriage and the said petitioner Eileen Kidd otherwise Dewhirst be pronounced to have been and to be free from all bond of marriage with the said respondent Arnell Hardwick Kidd unless sufficient cause be shown to the court why the said decree should not be made absolute within 6 weeks from the making thereof, C and no such cause having been shown, the court on application of the said petitioner by final decree pronounced and declared the said marriage to be and to have been absolutely null and void, and that the said petitioner was and is free from all bond of marriage with the said respondent.

It is to be observed that the form of the decree absolute differs in some respects from the form of the decree *nisi*, but I do not think I ought to allow anything to turn on that consideration. By the final decree the marriage is D declared "to be and to have been absolutely null and void, and that the said petitioner was and is"—I suppose that must mean "has always been"—"free from all bond of marriage with the said respondent." That being the position of the first defendant, it depends (as counsel for the infants pressed on me, and, I think, rightly) on the true construction of the will of the testator whether she comes within the benefits of it. So I proceed to consider the E language of the will.

By his will the testator, after appointing executors and trustees and giving his wife a legacy, gave the residue of his real and personal estate to his trustees on trust for sale and conversion in the ordinary way, and they were to invest the net proceeds and hold them:

> . . . upon trust to pay the income interest and annual proceeds thereof unto my said dear wife [*i.e.*, the first defendant] during her lifetime provided she shall so long F continue my widow And I direct that upon the remarriage of my said dear wife the trustees shall continue to pay to her during the remainder of her life one half only of the income interest and annual proceeds as aforesaid And I direct that upon the remarriage or death of my said wife the remaining one half of my said estate or the whole thereof as the case may be shall fall into and form part of my residuary estate and be dealt with accordingly.

The question, therefore, is whether the first defendant can say that she still G continues to be the widow of the testator. If she cannot, she is not entitled to the whole income; if she can, she succeeds.

The results of a decree of annulment have been considered on several occasions by the courts, and, as the point here for decision was recently deliberately left undecided and open, I think I must advert to one or two of them. The tale begins with a decision of the Court of Appeal in *Chapman* v. *Bradley* (3) where H the problem was whether a marriage had been "solemnised." The court came to the conclusion that it had not, on the ground that the marriage was void.

KNIGHT BRUCE, L.J., said (4 De G.J. & S. 76):

> The first question is, what is the meaning to be ascribed to the word "solemnised" as used in that instrument. As used in that instrument it must, in my judgment, mean validly and effectually solemnised. The ceremony of marriage was indeed gone through afterwards, but the lady and gentleman were domiciled in England, and their domicil had not been changed; and the lady was the gentleman's deceased wife's niece. Therefore, the marriage ceremony, although it took place at Neufchatel, was as ineffectual as if there had never been any such ceremony at all.

TURNER, L.J., said (*ibid.*, 77):

> The word marriage must be taken to mean a valid and effectual marriage.

In *Re Garnett, Richardson* v. *Greenep* (4) KEKEWICH, J., after citing these passages, applied them to a case of a voidable marriage which had been annulled, and founded himself on the form of the nullity decree. He said (*ibid.*, 573, 574):

> Therefore there never was a marriage, although the ceremony was gone through, and the parties lived together as man and wife after that date. The marriage is pronounced null and void *ab initio*. Not only are they not now married, but they never were. A

In *Re Wombwell's Settlement, Clerke* v. *Menzies* (5), RUSSELL, J., avowedly followed *Re Garnett* (4), but he, too, made certain observations about the nature of a decree of nullity. He said ([1922] 2 Ch. 305):

> The result of a decree of nullity is that not only are the parties not now married but they never were. There never was any valid marriage. B

He referred to *Dormer* (*otherwise Ward*) v. *Ward* (6) from which he cited various passages. He went on to say (*ibid.*, 306):

> Those expressions show that, in the opinion of the judges of the Court of Appeal, a marriage which has been annulled on the ground of impotence was never a marriage at all, although, no doubt, it is recognised as valid until one of the parties to it takes proceedings to annul it. C

Those observations sufficed to decide the cases to which they referred.

The matter was carried a step further in *Re Eaves* (1), where the plaintiff sought to convince the court on the strength of the observations already cited that, if there never had been a marriage at all, the result might be that one could upset a transaction which had taken effect on the faith of the existence of the marriage before it was annulled. FARWELL, J., before whom D the case came, was impressed by that view, but he dismissed the action on the ground that the plaintiff was by her conduct estopped from obtaining any relief. In his judgment he said ([1939] Ch. 1003, 1004):

> Having regard to these considerations [*i.e.*, the position in certain cases which he cited] the question here is: Did the lady cease to be the widow of the testator by reason of the ceremony of marriage which was solemnised ? If she did, then there E is no doubt that this money ceased to be payable to her, because it was only payable during her widowhood. It is said on behalf of the defendant that her widowhood came to an end when this ceremony was performed, although the marriage has since been declared null and void. I am not able to accept that view. It seems to me that, if the so-called marriage is treated by the Divorce Court as having been null and void, that means null and void *ab initio*, and therefore, although these two people, the so-called husband and wife, for many years lived together and had all the status of married people, in truth and in fact the widowhood never determined, because the F lady never became in law the wife of the second husband.

It appears in that case that, but for his decision on the ground of estoppel, the judge would have come to the conclusion that the plaintiff was right on the footing that she had never ceased to be the widow of the testator. If that stands, it obviously has a very strong and important bearing on the present case, but the matter went to the Court of Appeal and there, as it seems to me, G rather different views were taken. The estoppel point, on which FARWELL, J., relied, was also relied on by CLAUSON, L.J., as the main ground of his decision, but SIR WILFRID GREENE, M.R., and GOODARD, L.J., did not rest their decision on that ground. SIR WILFRID GREENE, M.R., in delivering a considered judgment, said ([1939] 4 All E.R. 262):

> When the appellant [the plaintiff in the case] went through the ceremony of marriage with Mr. Powell in 1925, the respondent would have been entitled to call for the transfer H of the trust fund to himself, upon the ground that, as the result of the ceremony, the appellant's widowhood stood determined.

SIR WILFRID GREENE, M.R., came to the conclusion that, at any rate at that time, it could be said that the widowhood had determined. Later he said (*ibid.*, 263):

> The transfer took place [the handing over of a trust fund] upon the footing that a marriage was about to take place which would give to the appellant the status of a married woman, which it in fact did.

By those two observations, SIR WILFRID GREENE, M.R., gives a good deal of reason for saying that it would appear to be his view that the widowhood was determined by the remarriage notwithstanding the subsequent decree of nullity. GODDARD, L.J., made observations to the same effect. He said (*ibid.*, 265):

> On Mrs. Eaves' marriage to Mr. Powell, she thus became his wife *de jure* unless and until she elected to have the tie annulled. Consequently, she ceased to be the widow of her late husband . . . It is said, however, that, as soon as the plaintiff had obtained A her decree absolute, she reverted to the status of widowhood, and thereby once again became entitled to the benefit conferred upon her while she was the widow of Mr. Eaves.

At the end of his judgment, GODDARD, L.J., raised the present point by these words (*ibid.*, 268):

> I desire to add that I am not satisfied that it necessarily follows that, if a man leaves money to his wife during widowhood, or "while she remains my widow," she can, B after contracting a marriage which she subsequently avoids, say that she has reverted to the status of widow of her former husband, at any rate, for the purpose of retaking benefits under his will. I think that most testators would be surprised to learn that this result would follow, more especially when it is remembered that the plaintiff can now apply, under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, for maintenance against the man whom I may call the second husband. It is unnecessary to decide this in the present case, and I desire to reserve my opinion C upon it.

The point had been somewhat canvassed in the course of the hearing and certain views about it had been pronounced by GODDARD, L.J., and, I think, by the other members of the court, but there he deliberately left it open. That is the point that I have now to decide. I think, lastly, I ought to mention *Re Ames' Settlement* (2) where VAISEY, J., after discussing the cases, came to the conclusion that there had been a failure of consideration and that the question really was D who had the better equity to the fund there in question, the executors of the settlor or the persons entitled in remainder under the settlement. He said that, there having been a failure of consideration, the executors had the better right.

It seems to me that there is an apparent difference of judicial views on this subject, but I think that can be explained in this way. It is one thing to say that a person is entitled to property or rights after the annulment of the marriage, E but it is quite another thing to upset transactions, concrete and permanent, entered into while the marriage was current: *c.f. Dredge* v. *Dredge* (*otherwise Harrison*) (7). There is no doubt that during that time the whole world is bound to accept the fact that the "spouses" have the status of married people, and all the results which flow from that necessarily follow. I need not decide today whether, if the first defendant had claimed the income during the time between the celebration of her second "marriage" and F its annulment, she could have succeeded. At any rate, the decision in *Re Eaves* (1) is only that a transaction which was completed in reliance on the coming into effect of the new status of the plaintiff and within the period before the dissolution of her second marriage should not be upset. It may very well lead to different results according to whether the transaction in question is before or after the decree. I do not propose to decide anything that I am not bound to decide. In my judgment, having regard to the form of the decree G *nisi* and to the judicial views to which I have referred, this "marriage" must now be treated for all purposes as never having happened, and, however the first defendant might have been described during the time before it was annulled, she can now say that she is the widow of the testator. Consequently, in my opinion, since the date of the annulment, which is the only period with which we are now concerned, she has been, and she now is, entitled as being a widow, H to her interest *dum vidua*, in the testator's residuary estate, and I so decide.

Declaration accordingly.

Solicitors: *Collyer-Bristow & Co.* (for all parties).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

BATTAN SINGH AND OTHERS *v.* AMIRCHAND AND OTHERS.

[PRIVY COUNCIL (Lord Roche, Lord Normand and Mr. James Stratford, June 12, 16, July 30, December 8, 1947.]

Wills—Testamentary capacity—Soundness of mind—Testator enfeebled by disease—Delusion concerning relatives.

The principle enunciated in *Parker* v. *Felgate* (1883) (8 P.D. 171) and in *Perera* v. *Perera* ([1901] A.C. 354) that, if a testator has given instructions to a solicitor at a time when he was able to appreciate what he was doing in all its relevant bearings and if the solicitor prepares the will in accordance with these instructions, the will will stand good although at the time of execution the testator is capable only of understanding that he is executing the will which he has instructed, but is no longer capable of understanding the instructions themselves or the clauses in the will which give effect to them, should be applied with the greatest caution and reserve when the testator does not himself give instructions to the solicitor who draws the will, but to a lay intermediary who repeats them to the solicitor. The opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious, and the court ought to be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor, before making any presumption in favour of validity.

A testator may have a clear apprehension of the meaning of a draft will submitted to him and may approve of it, and yet, if he was at the time through infirmity or disease so deficient in memory that he was oblivious of the claims of his relations and if that forgetfulness was an inducing cause of his choosing strangers to be his legatees, the will is invalid.

Harwood v. *Baker*, (1840) (3 Moo. P.C.C. 282) and statement of COCKBURN, C.J., in *Banks* v. *Goodfellow*, (1870) (L.R. 5 Q.B. 549, 565; 22 L.T. 813, 817), *applied.*

[AS TO SOUNDNESS OF MIND, see HALSBURY, Hailsham Edn., Vol. 34, pp. 37-40, paras. 31-36; and FOR CASES, see DIGEST, Vol. 33, pp. 141-156, Nos. *188-381.*]

Cases referred to:

(1) *Parker* v. *Felgate*, (1883), 8 P.D. 171; 52 L.J.P. 95; 47 J.P. 808; 44 Digest 251, *779*.

(2) *Perera* v. *Perera*, [1901] A.C. 354; 70 L.J.P.C. 46; 84 L.T. 371; Digest Supp.

(3) *Banks* v. *Goodfellow*, (1870), L.R. 5 Q.B. 549; 39 L.J.Q.B. 237; 22 L.T. 813; *subsequent proceedings*, (1871), L.R. 11 Eq. 472; 33 Digest 143, *204*.

(4) *Harwood* v. *Baker*, (1840), 3 Moo. P.C.C. 282; 33 Digest 152, *339*.

(5) *Sivewright* v. *Sivewright's Trustees*, 1919, S.L.T. 261; 1920, S.C. (H.L.) 63; 33 Digest 144, *216i*.

APPEAL from a judgment and decree of the Supreme Court of Fiji granting probate of a will, dated Apr. 3, 1944. The facts appear in the judgment. The appeal was allowed.

Sir Herbert Cunliffe, K.C., and *Jopling* for the appellants, who propounded a will of Feb. 25, 1944, in favour of the testator's nephews.

Khambatta, K.C., and *Umrigar* for the respondents, beneficiaries under the will of Apr. 3, 1944.

Dec. 8. **LORD NORMAND** delivered the judgment of the Board. This is an appeal from a judgment and decree of the Supreme Court of Fiji in its probate jurisdiction which decreed probate of a will, dated Apr. 3, 1944, of an Indian named Jaimal who died on the day after the execution of the will. The issue to be decided is whether that will, which was in favour of the respondents, Amirchand and Mehar, as the sole beneficiaries, is valid or whether a will dated Feb. 25, 1944, in favour of the testator's nephews ought to be admitted to probate.

The testator was a Sikh who had come to Fiji about 38 years before his death. He had made a considerable fortune as a money-lender and his estate amounts to more than £20,000. He was illiterate and ill-educated, but he could write his name in English. Amirchand and Mehar were in no way related to him, but they were both indebted to him at his death, Amirchand for about £400 and Mehar for £6,500. The testator had no wife or child, but he had had a brother who lived in India and who died about 1940 or 1941. This brother had four sons, the beneficiaries under a will of Nov. 26, 1941, which was confirmed by a codicil of July 1, 1942, and they and their father had been the beneficiaries under a still earlier will of Jan. 21, 1938. It is proved that the testator had been on affectionate terms with his brother to whom he paid a prolonged visit in India in 1938 to 1940, and that he was also on good terms with his nephews, to two of whom he had at one time given a power of attorney to enable them to deal on his behalf with certain property belonging to him in India. He employed a firm of solicitors in Fiji, Messrs. Ellis, Munro, Warren & Leys, to attend to his affairs and this firm had been instructed by him to draw up the testamentary writings above referred to except the final and disputed writing of Apr. 3, 1944. Jaimal became gravely ill with pulmonary tuberculosis, and in the early part of 1944 he was in the Suva government hospital. He left that hospital in February and went to the Sikh temple at Samabula. It was while he was at this temple that he executed the will of Feb. 25, 1944, appointing the president, secretary and treasurer of the Sikh Gurdwara Committee at Samabula, Suva, to be his executors and trustees and leaving all his property to his four nephews equally. Amirchand was present at the making of this will. Shortly afterwards, as Jaimal wanted to enter the Lautoka hospital at Ba, Amirchand brought him to a stable near Mehar's house at Ba in which he stayed for a few days before entering the hospital. He removed from there to the Sikh Gurdwara at Lautoka, and was next taken to a house hired by Mehar at Yalaleva, where he arrived about two or three weeks before his death. On Friday, March 31, he received a visit from a young man named Hari Charan, who, as a boy about twelve years earlier, had had some acquaintanceship with him. Hari Charan gave evidence that this was the third visit that he had paid to Jaimal in as many weeks and that it was a casual visit. Jaimal, however, on this occasion is said to have lost no time in taking Hari Charan into his confidence about his testamentary intentions. According to Hari Charan, whose evidence the learned Chief Justice appears to have accepted only because it was uncontradicted, Jaimal told him that he wished to make a will in favour of Mehar and Amirchand because they had looked after him so well and he asked Hari Charan to get a lawyer to draw up a will for him. Hari Charan asked whether he had ever made a will before and Jaimal said he had made two, but that he was not worrying about them and that he wished to make his last will in favour of these men. He also said that he had neither wife nor children, but that he had relatives "regarded as brothers" in India to whom he had given sufficient property in the way of money and assets. It does not appear from Hari Charan's examination-in-chief that Jaimal asked him to do more than to get a lawyer for him, but in his cross-examination he says that Jaimal asked him to get a will drawn up in favour of Amirchand and Mehar. Hari Charan went on the same day to Mr. Davidson, a lawyer in Fiji, and gave him instructions which enabled Mr. Davidson to draw up the will. Amirchand accompanied Hari Charan to Mr. Davidson's office, but remained outside, and Mr. Davidson is said to have had no direct communication with him that day. The will is in the following terms:

> This is the last will and testament of me Jaimal (father's name Nehala) formerly of Suva but now of Yala Levu in the district of Ba in the colony of Fiji "Financier" I revoke all former wills and testamentary dispositions made by me and declare this to be my last and only will After payment of all my just debts funeral testamentary and medical expenses I give devise and bequeath unto my dear friends Amirchand (father's name Utham) and Mehar (father's name Saudi) both of Yala Levu aforesaid farmers as tenants in common in equal shares absolutely all my estate and property whatsoever and wheresoever situate and whether in possession reversion or remainder and I appoint them the said Amirchand and Mehar to be the trustees and executors of this my said will. I declare that I have no next of kin nor blood relations in Fiji or elsewhere who are known to me. I desire to express by this my said will my deep gratitude to the said Amirchand and Mehar for their devotion to me during my present illness.

Mr. Davidson deponed that the expressions of affection for and gratitude to Amirchand and Mehar were inserted by Jaimal of his own volition and without instructions from Hari Charan, and that for the statement that Jaimal had no next of kin nor blood relations in Fiji or elsewhere his only warrant was Hari Charan's statement that Jaimal had no wife or children and that he inferred the rest. Mr. Davidson typed out this draft will either on the afternoon of Friday, March 31, or the next morning. According to their evidence, Amirchand and Hari Charan had expected Mr. Davidson to deal with the will as a matter of urgency, and as no progress had been made by the Monday morning they went in a taxi cab to his office and took him to see Jaimal. Mr. Davidson said that he put questions to Jaimal and read over the will in Hindu and then in English which was again translated into Hindu by his clerk, that Jaimal listened carefully and at the end gave his assent to the will and said he wanted nothing in it changed, and that, among other questions put to Jaimal before he gave his final assent, Mr. Davidson asked who Amirchand and Mehar were and Jaimal put a hand on each of these two men and spoke with affection of them and said he wanted to give them all his property. In answer to other questions he said they were the only persons who had helped him in his illness, that he had no relations in Fiji, and that he did not know if he had any relations elsewhere than in Fiji. Mr. Davidson also said he was told by Jaimal that he had made a previous will, but Mr. Davidson asked no questions about its contents. Jaimal tried to sign the will, but his hand was too shaky. He then tried to affix his thumb mark, but he was too weak to do so unaided and Mr. Davidson had to help him. Mr. Davidson considered that Jaimal was a very sick man though his mind was perfectly logical. He also formed the opinion that Jaimal was not receiving adequate medical treatment and he said so to Amirchand. Amirchand and Mehar were present in the room with Mr. Davidson and Jaimal during the whole interview between them, and it is significant that Amirchand, who must have heard the questions and answers about Jaimal's relations and who must also have known from being present when the earlier will was made that Jaimal had nephews in India, did not intervene to correct Jaimal's memory. Amirchand, in his own evidence, which was disbelieved by the learned Chief Justice, falsely depones that he did intervene to say that Jaimal had nephews in India. It was, no doubt, in consequence of Mr. Davidson's advice that Amirchand took Jaimal to a hospital in the afternoon. Jaimal was by that time unable to speak. The doctor found that he was in a very weak condition, but gave him some medicine and told Amirchand to take him home. Jaimal died next day.

The objections to the validity of the will of April 3, 1944, urged in the court below were: (1) that it was not duly executed according to the provisions of the Wills Act, 1837; (2) that Jaimal was not, when he executed it, of sound mind, memory or understanding; (3) that the execution was obtained by the undue influence of Amirchand and Mehar; and (4) that Jaimal did not know or approve the contents. The learned Chief Justice summarily rejected the first, third and fourth of these objections. In the appeal to their Lordships' Board nothing was said in support of the first objection, which was merely a technical objection to the authentication of the will. Nor was it maintained that Jaimal did not know the contents of the will in the sense that he did not understand the meaning and effect of the words read to him. It was no longer denied that he gave his assent. The charge of undue influence was not abandoned at the hearing of this appeal, but it was not pressed because, as counsel for the appellants explained, the evidence on which he relied for proof of undue influence was in part the evidence relied on for proof that Jaimal was not of sound mind, memory or understanding, and if it was not sufficient to establish that ground of objection it would not suffice to prove the undue influence. The issue of undue influence is in this case purely one of fact, and, as the learned Chief Justice has found in favour of the respondents, their Lordships would not be disposed to reverse his finding though the evidence gives reason for the gravest suspicion.

The issue whether Jaimal was of sound mind, memory and understanding was decided by the learned Chief Justice on what seems to their Lordships a misunderstanding of *Parker* v. *Felgate* (1). That case decided that, if a testator has given instructions to a solicitor at a time when he was able to appreciate what he was doing in all its relevant bearings and if the solicitor prepares the will in accordance with these instructions, the will will stand good though at the time of execution the testator is capable only of understanding that he is executing the will which he has instructed, but is no longer capable of understanding the instructions themselves or the clauses in the will which give effect to them. The learned Chief Justice applied this case by holding that Jaimal gave instructions to Hari Charan at a time when his memory was not proved to be defective; that these instructions were properly embodied in the draft will by Mr. Davidson; that Jaimal was able to understand the will and to give his assent to it on the day of execution; and, therefore, that Jaimal was of sound disposing mind at that date. The principle illustrated in *Parker* v. *Felgate* (1) and in the similar case of *Perera* v. *Perera* (2) has, in their Lordships' opinion, no application to the present case. Apart from the single answer already noticed in cross-examination the tenor of Hari Charan's evidence is that Jaimal merely asked him to obtain a lawyer to draw his will. The words spoken to by Hari Charan in the examination-in-chief are: "Will you procure a lawyer for me to draw up the will," and in another place he was asked: "And he asked you to get a lawyer for him and you promised to do so?" and answered "That's right." Their Lordships would be reluctant on this evidence to take it as proved that Jaimal asked Hari Charan to give specific instructions to a solicitor on his behalf. Nor is it apparent from Hari Charan's account of the conversation that Jaimal intended to leave the whole of his property, wherever situated, to Amirchand and Mehar to the exclusion of his relations, and Hari Charan does not speak of any express direction that the previous will should be destroyed or cancelled. The learned Chief Justice has made no specific finding, but has tacitly assumed that Hari Charan received specific instructions which he was to transmit to a solicitor to draw a will cancelling all previous wills and leaving all that Jaimal possessed to Amirchand and Mehar equally between them. Their Lordships are further of opinion that the principle enunciated in *Parker* v. *Felgate* (1) should be applied with the greatest caution and reserve when the testator does not himself give instructions to the solicitor who draws the will, but to a lay intermediary who repeats them to the solicitor. The opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious, and the court ought to be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor, before making any presumption in favour of validity.

The learned Chief Justice was, accordingly, not entitled to conclude, as he did, that it was unnecessary to determine what was the condition of Jaimal's memory on the day when the will was executed. That was, indeed, the only day on which Jaimal was seen by Mr. Davidson, and it is plain from Mr. Davidson's evidence that, though he had drafted a will on information supplied to him by Hari Charan with, as he supposed, the authority of Jaimal, he was not satisfied until he had obtained instructions from Jaimal himself. There were, moreover, in the draft will, as has been seen, statements which Mr. Davidson had inserted of his own volition and he said he was at pains to put these statements to Jaimal. One of these was the statement that Jaimal had no next of kin nor blood relations in Fiji or elsewhere. It was on this statement that the appellants chiefly founded the argument that the testator was not of sound mind, memory and understanding when he executed the will. The respondents' counsel maintained that the finding that Jaimal knew and understood the contents of the will was a conclusive answer to this argument, but that is a misunderstanding of the judgment of the learned Chief Justice who expressly says that he found it unnecessary to enquire into the state of Jaimal's memory on the day when the will was executed. A testator may have a clear apprehension of the meaning of a draft will submitted to him and may approve of it, and yet, if he was at the time through infirmity or disease so deficient in memory that he was oblivious of the claims of his relations and if that forgetfulness was an inducing cause of his choosing strangers to be his legatees, the will is invalid. In *Banks* v. *Goodfellow* (3) COCKBURN, C.J., delivering the judgment of the court said (L.R. 5 Q.B. 565):

> It is essential to the exercise of such a power [*scilicet*, testamentary power] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of

right, and prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

In *Harwood* v. *Baker* (4) the same principle had been stated and it was observed that, when a testator suffering from a debilitating disease had made a will excluding from his bounty his near relations in favour of his wife, it was necessary to determine whether he was at the time capable of recollecting who those relations were, of understanding their respective claims on his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. In *Sivewright* v. *Sivewright's Trustees* (5) Lord Haldane, with whom Lord Dunedin and Lord Buckmaster concurred, said (1920 S.C. 64):

> The question whether there is such unsoundness of mind as renders it impossible in law to make a testamentary disposition is one of degree. A testator must be able to exercise a rational appreciation of what he is doing. He must understand the nature of his act . . . if his act is the outcome of a delusion so irrational that it is not to be taken as that of one having appreciated what he was doing sufficiently to make his action in the particular case that of a mind sane upon the question, the will cannot stand. But, in that case, if the testator is not generally insane, the will must be shown to be the outcome of the special delusion.

There is, of course, in the present case no question of insanity in the general or in the popular sense, but here the testator, who is proved to have been in the last stages of consumption and to have been reduced by disease to extreme weakness, has declared in his will that he had no relations anywhere, though if he had been of sound mind in the sense of the cases cited he must have known that the statement was untrue.

The testator immediately before giving assent to the terms of the will had said that he did not know whether he had relations elsewhere than in Fiji. This, however, does not better the case, but merely provides additional evidence of his weakness and vacillation of memory about his relations. There is evidence that at an earlier stage of his illness the testator had at one time remembered these nephews in whose favour he had made a will as recently as in February, 1944, and had been under the mistaken belief that he had made by gift adequate provision for them. At other times he appears, according to some of the evidence, to have remembered that they took benefits under the wills he had made. The evidence as a whole shows that, though the Chief Justice may or may not have been warranted in saying that there was no good ground for inferring that Jaimal's memory was defective on Mar. 31, there was a rapid degradation of his memory of his nephews till at last he reached the stage, when he executed his will, of denying their existence. It is relevant to note that he failed to employ the solicitor who had acted for him on previous occasions or even to ask him to send the previous wills or copies of them, for these are precautions which a testator of sound mind who deliberately intended to alter his will and to disinherit his near relations would naturally take. The result was that he obtained the services of a solicitor unacquainted with his family affairs and unable to judge whether he had the capacity to make a will with due regard for the claims of his nephews for whom he had till the closing days of his life always felt a warm affection. The opinion of Mr. Davidson and some other witnesses that Jaimal's mind was clear and logical and sound, though it might have had some value if the question had been one of his general sanity, is of no value in the present case where the question is whether there was a particular defect of memory caused by the weakness of disease. Witnesses were adduced to prove that the testator had a week or so before his death expressed to them his intention of leaving his property to Amirchand and Mehar. The evidence is of little relevance to the issue on which the appeal must turn. The learned Chief Justice does not mention this evidence, and their Lordships do not doubt that he had the fullest justification for ignoring it, and since it was pressed on their attention their Lordships think it proper to say that after considering it they deem it unworthy of credit and that its only effect is to deepen the suspicion which surrounds the will.

Their Lordships are satisfied that the proper conclusion, disregarding all questions of *onus*, is that the will is the product of a man so enfeebled by disease as to be without sound mind or memory at the time of execution and that the disposition of his property under it was the outcome of the delusion touching his nephews' existence. The will is, therefore, invalid. Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that judgment should be entered against the will of Apr. 3, and that probate of the will of Feb. 25, 1944, should be decreed in solemn form, and that the order for costs in the court below should be set aside, except so far as it applies to the executors of the will dated Feb. 25, 1944. The respondents will pay the appellants' A costs in the appeal.

Appeal allowed with costs.

Solicitors: *Hy. S. L. Polak* (for the appellants); *T. L. Wilson & Co.* (for the respondents).

[*Reported by* C. R. L. PHILLIPS, ESQ., *Barrister-at-Law.*]

B

Approved. SIMPSON *v.* SIMPSON.
[1951] 1 All E.R. 955.

EDWARDS *v.* EDWARDS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Barnard, J.), December 12, 1947.]

C

Divorce—Desertion—Constructive desertion—Intention to terminate cohabitation—Presumption.

Definite evidence of a clear intention on the part of one spouse to drive the other spouse away is not necessary to prove constructive desertion. A husband or wife must be presumed to intend the natural consequences of his or her acts, and, if it is a natural consequence of the behaviour of D one spouse that the other leaves the matrimonial home, the offending spouse must be presumed to intend that the other spouse should do so. The same principle applies when the conduct of the offending spouse is conduct with a third person which he or she must know will affect the other indirectly.

Charter v. *Charter*, (1901) (65 J.P. 246; 84 L.T. 272) *and dictum of* GORELL BARNES, J., in *Sickert* v. *Sickert* ([1899] P. 278, 283; 81 L.T. 495, 496) E *approved.*

Boyd v. *Boyd* ([1938] 4 All E.R. 181) *disapproved.*

[AS TO CONSTRUCTIVE DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 654, para. 964; and FOR CASES, see DIGEST, Vol. 27, pp. 315, 316, Nos. *2930-2939*.]

Cases referred to:

(1) *Charter* v. *Charter*, (1901), 84 L.T. 272; 65 J.P. 246; 27 Digest 316, *2931*.
(2) *Boyd* v. *Boyd*, [1938] 4 All E.R. 181; 159 L.T. 522; Digest Supp.
F (3) *Russell* v. *Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest 291, *2661*.
(4) *Sickert* v. *Sickert*, [1899] P. 278; 68 L.J.P. 114; 81 L.T. 495; 27 Digest 315, *2930*.

APPEAL by the husband against an order of the Liverpool city justices finding him guilty of desertion. The appeal was dismissed. The facts appear in the judgment of LORD MERRIMAN, P.

G *H. S. Law* for the husband.
Ormrod for the wife.

LORD MERRIMAN, P.: This is an appeal from the Liverpool city justices by a husband who complains that on Sept. 22, 1947, they found him guilty of desertion and made an order against him which, so far as the amount is concerned, is not challenged. The wife left the husband on Aug. 29, 1947, but the justices H found that constructively the husband was the deserter inasmuch as it was his misconduct which drove her out, and, therefore, broke up the matrimonial home. The material finding is that they were satisfied that, owing to the conduct of the husband, the wife was justified in refusing to live with him. Summing the matter up, they said that the husband's conduct on the day his wife left the matrimonial home and for a considerable time previously appeared to have been directed towards the discontinuance of the married life, and that, in their opinion, the wife was forced to leave the husband to ensure her future safety.

When the wife left home she left behind her a note in the following terms: "You can do as you like. I can work for my children. I brought police to see. Said you were mad. I am going to apply for separation. Margaret has gone to stay with your mother. Taken bed for myself and children. Don't ask me back. Glad to see the last of you." The allusion to the arrival of the police was to something which had occurred on the day she left home. The husband had, apparently, given her less money than she thought she was entitled to and she had left him a note to remind him before he went out in the morning that A she wanted some more. She went downstairs and found her husband in the kitchen, and the wife's evidence is:

> He said "Hey, you!" He got bad-tempered because I asked him for money. He picked up a chair and flung it at me. We heard him banging about. Dishes were broken. Food on the floor. Sugar-bowl upside down. Dishes smashed.

B Two neighbours and the police were called in. The wife left the house and has not returned, and she added that she could not stand it any longer. The evidence about the state of the house is corroborated by the neighbour who was called to give evidence. If that had been all, it might have been a matter for serious consideration whether an outburst of temper of that sort on an isolated occasion would justify a wife in withdrawing from cohabitation, but only six days before, the husband, who was, apparently, a keen reader, because the wife either had C not got him a book at all or had not got him the book he wanted, picked up two old ones, threw them across the room, got bad-tempered, and called her filthy names. The wife also gave evidence that he had assaulted her on many occasions. The husband denied every form of assault. The justices saw the parties, they heard the evidence, and they found that the wife's story was true and that it was for her protection and safety that she left. Subject to the point that I am about to deal with, I find it impossible to say that there is no evidence to support that D finding. I ought, perhaps, to add one general statement, and that is that the wife said that everything had been all right up to the time of the birth of the first child in 1945. She has now two infant children, and, apparently, their childish noise upset the husband. He is a little older than his wife, who said that cruelty started when the first child was born in 1945 and that it was the husband's conduct during the last two years that was complained of, not during E the whole marriage. When the wife was cross-examined, questions were put to her of a type which, unless they are made good, are apt to recoil on the head of husband who puts them forward. Here the husband made slight, but pointed, suggestions that the wife was carrying on with some unknown man. She denied it all. It does not tend to support his suggestion that he has always treated his wife with kindness, if assertions of that kind are put to her on his instructions when she goes into the witness-box. F

We have been referred to two cases on constructive desertion,—*Charter* v. *Charter* (1), a judgment of this court consisting of SIR FRANCIS JEUNE, P., and BARNES, J., and *Boyd* v. *Boyd* (2). These two cases are always produced in this court when a husband has a difficult case to argue. *Charter* v. *Charter* (1) seems to me to put shortly, but very neatly, the whole point of a charge of constructive desertion. Both cases emphasize the indisputable principle that before a spouse can be found guilty of desertion intention to desert must be proved, but I can G find nothing in SIR FRANCIS JEUNE'S judgment in *Charter* v. *Charter* (1) which helps the husband in the present case, for that case turned entirely on the fact that the husband, who had not done anything particularly serious to the wife, had, in a fit of temper, told her to get out and she had taken him at his word and had gone and refused to return when he tried to get her back. The court said it was obvious that the wife went away of her own free will and not because she H was compelled to do so and the separation was really, a separation by mutual consent at the time at which the wife walked out. It was to a case where the facts were such that SIR FRANCIS JEUNE directed the remarks which are so often relied on. He said (84 L.T. 273):

> It is clear law that desertion by a husband does not necessarily mean that he has actually turned his wife out of doors. It is sufficient to constitute desertion if his conduct is such as to compel her to leave his house. The principle which underlies the cases is the intention of the husband to break off matrimonial relations.

He went on to deal with the case before him, which he described as being merely the result of a quarrel. That shows very shortly and neatly what is the point in a charge of constructive desertion. I would only like to add that it is within my knowledge, though I cannot at the moment charge my memory with the name of a case, that on at least one occasion, if not more, when this case has been cited, this court has pointed out that the logical effect (indeed, I think, the real meaning) of what SIR FRANCIS JEUNE was saying was that a man must be taken to intend the natural consequences of his acts. SIR FRANCIS JEUNE did not use those words, but he contrasted actually turning the wife out of doors with conduct which is such as to compel her to leave the house. That is exactly the same line of reasoning. It is sufficient for me to say that in late years it has been laid down over and over again that a man must, on well-known principles, be taken to intend the natural and reasonable consequences of his own acts. There I leave *Charter* v. *Charter* (1), with nothing but approval, but without understanding how it assists the husband in this case.

That brings me to *Boyd* v. *Boyd* (2), a case in which, unlike *Charter* v. *Charter* (1) and unlike this case, the husband, who was charged with constructive desertion, had done nothing whatever to the wife directly except, as I ventured to put it in the course of the argument, to be his own extremely nasty self. Three years after the marriage, which took place in 1923, he was sentenced to five years penal servitude for incest with his daughter by a former wife—conduct which would be likely to cause any decent woman with whom he was living the greatest possible feeling of revulsion. When he came out of prison she took him back, but later he was convicted of an indecent assault on a girl under 13 years of age, and was sentenced to imprisonment for 20 months. BUCKNILL, J., who tried the case, found in terms that that was "a terrible shock to the wife and endangered her health," but, with regard to the suggestion that this amounted to desertion constructively, he said ([1938] 4 All E.R. 182) :

> It seems to me that the essential element of desertion must be an intention to bring the cohabitation to an end. It may be that the husband has behaved so badly that his wife leaves him, and it may be that his conduct amounts to cruelty, when the wife can get a divorce on that ground, but, before there can be a case of constructive desertion, the court must be satisfied that the conduct of the husband was such as to show a clear intention on his part to drive the wife away. There must be an intention on the part of the person charged with desertion to bring the cohabitation to an end. There is no evidence here of any such intention. The man seems to be a sexual pervert who is unable to control himself, but there is no evidence that at any time he has ceased to wish to live with his wife. It was his wife, on the other hand, who refused to live with him. It seems to me to be quite clear, therefore, that no case of constructive desertion has been made out.

I have the most profound respect for that learned judge's judgment and I am not conscious of ever having differed from any other judgment he has delivered, but, with the greatest respect, I think that judgment is wrong, and, as we are not bound by it and as the case is constantly being cited to us, I feel that we are not merely entitled, but bound, to say so.

I have mentioned that this court, and, indeed, many judges in the Division individually, have referred over and over again to the principle that a man must be taken to intend the natural consequences of his acts. If it is a natural consequence of a man's direct treatment of his wife that she leaves him, it is a commonplace that, whatever he says in words, he must be taken to intend that she will do so. If that is so, why does not precisely the same principle apply when the conduct of the husband is conduct with a third person which he must know will affect the wife indirectly ? Be it remembered that the learned judge himself held as a fact that when the second offence was committed it was a terrible shock to the wife who had already taken the husband back after one of the most dreadful things which could occur in married life. The learned judge found that the husband's conduct endangered the wife's health and might well amount to cruelty, but it did not amount to desertion. Cruelty does not necessarily consist of physical violence. In the well-known definition in *Russell* v. *Russell* (3) there is included misconduct which causes injury to health, bodily or mental, or, at least, a reasonable apprehension of such injury. Here it is found that the husband's conduct did cause injury to the wife's health, and I cannot understand how any man who has been taken back after one such incident by a sensitive and decent woman could contemplate anything else than that a repetition of his conduct would have the same result. It may be that the circumstances of that case were so special that it can be dealt with in isolation, but, for the reasons I have given, I cannot assent to the principle which is laid down in the passages I have quoted.

In my opinion, the present case is unarguable on the facts. There was ample material on which the justices could find that the wife was driven from home. Of course, we have also been confronted, as we are confronted in every case of A desertion, with what are said to be the inevitable consequences, *viz.*, that in three years' time she will be able to divorce the husband, and, perhaps, in this case with some justification, because the justices' reasons might, if taken literally, be taken to mean that the husband has no *locus paenitentiae* whatever. I do not think the justices meant that, but, if they did, let it be plainly understood that in every case, whether of ordinary desertion or constructive desertion, it is a question of degree what amends a husband must be prepared to make before he can suggest B that his wife should take him back. In the ordinary simple case of desertion all he has to do is to return to the matrimonial home. Where he has driven his wife away by some cruel conduct, the case is different. There may be some conduct so gross that no woman could be expected ever to resume cohabitation with him. The point is that every case must be dealt with on its merits, and if the husband's merits are so slight that he has very little hope of ever being C taken back, that is one of the consequences of his own conduct, and it ought not to affect the result of the case. For these reasons, this appeal must be dismissed.

BARNARD, J.: I agree, particularly with what my Lord has said about the judgment of BUCKNILL, J., in *Boyd* v. *Boyd* (2). BUCKNILL, J., would seem to have gone a little too far in requiring in a case of constructive desertion some definite evidence of a clear intention on the part of one spouse to drive the D other spouse away. As my Lord has said, a man must be presumed to intend the natural consequences of his acts, and there is a very striking example of that in the judgment of GORELL BARNES, J., in *Sickert* v. *Sickert* (4), a case to which, I notice, BUCKNILL, J., was not referred in *Boyd* v. *Boyd* (2). GORELL BARNES, J., in dealing with constructive desertion, gives what I think is a very clear example of a presumed intention, as follows ([1899] P. 283): E

> A wife whose husband is carrying on adulterous intercourse with another woman or other women is not bound to remain in cohabitation with him: she can at once obtain a judicial separation. She may, however, be willing to remain with her husband provided he will give up the connection complained of, and, if he refuses to do so, a wife with any self-respect has only one course to take—that is, to withdraw from cohabitation. The husband in such a case must be taken to intend the consequences of his action—that is to say, that his wife shall not live with him. The situation then produced is just the same as if the guilty husband left his wife. Desertion is F not to be tested by merely ascertaining which party left the matrimonial home first. It may be committed by a husband acting as I have just said, and if the attitude of the parties remains the same for two years the offence of desertion contemplated by the statute is complete.

I only want to say further that, for the reasons that my Lord has given, I agree that this appeal must be dismissed.

Appeal dismissed with costs. G

Solicitors: *Oswald Hickson, Collier & Co.*, agents for *G. H. Stock & Co.*, Liverpool (for the husband); *Helder, Roberts, Giles & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the wife).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

MEIER *v.* MEIER.

[COURT OF APPEAL (Scott, Somervell and Evershed, L.JJ.), December 15, 1947.]

Divorce—Decree absolute—Setting aside—Restoration of appeal—Appeal against decree nisi dismissed on failure, by mistake, to deposit security for costs—Jurisdiction of court—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 31 (1) (*e*).

The wife was granted a decree *nisi* on July 31, 1947, and on Sept. 8, 1947, the husband filed a notice of appeal. On Oct. 13, the Court of Appeal ordered the husband to lodge £50 in court on or before Oct. 27 as security for costs of the appeal and directed him to give notice of the lodgment to the wife's solicitors and the appeal clerk. The husband's solicitors by mistake failed to comply with that order, and, accordingly, the appeal stood dismissed. The decree was made absolute on Oct. 31, a fact which first came to the knowledge of the husband's solicitors on Dec. 1. The husband then applied to the Court of Appeal for an order setting aside the decree absolute and reinstating the appeal :—

HELD : no appeal lay against a decree absolute by a spouse who had had time and opportunity to appeal against the decree *nisi* unless good reason were shown on which the court could properly exercise its inherent jurisdiction to intervene in order that justice might be done ; in this case there was no such reason ; and the application must be refused.

[FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, s. 31 (1) (*e*), see HALSBURY'S STATUTES, Vol. 4, p. 161.]

APPLICATION by the husband for an order setting aside a decree absolute obtained against him by the wife and for leave to reinstate an appeal against the decree *nisi*, the appeal having stood dismissed on his failure, owing to a mistake of his solicitors, to comply with an order that he should lodge £50 in court as security for costs and give notice of the lodgment to the wife's solicitors and the appeal clerk. The application was refused.

Karminski, K.C., and *W. B. Franklin* for the husband.
Melford Stevenson, K.C., and *Marshall-Reynolds* for the wife.

SCOTT, L.J. : In this case the husband applies for an order that the decree absolute made against him may be set aside and that an appeal against the decree *nisi*, which was dismissed by reason of his failure to comply with an order of this court for payment of security for costs, may be reinstated. The relevant facts are as follows. The wife was granted a decree *nisi* of divorce on July 31, 1947. On Sept. 8, the husband filed a notice of appeal against that decree, and on Oct. 13 the wife applied to this court for security for her costs of the appeal. An order was then made by this court directing the husband to give security for the wife's costs in the sum of £50 by bond to be approved by the judge in chambers, or, alternatively, by lodging that sum in court on or before Oct. 27, in cash or by banker's draft. The order further directed that notice of such security being given or lodgment being made should be given by the husband to the wife's solicitors and to the appeal clerk on the same day as the security was given or the lodgment made, and that, in default of such security or lodgment, the appeal stood dismissed without further order. On Oct. 27, *i.e.*, the last day, the husband's solicitors paid into the Bank of England a cheque for £50 for clearance and credit of this suit, and they failed to notify the wife's solicitors or the appeal clerk. The appeal was, accordingly, struck out, and on Oct. 31 the decree *nisi* was made absolute. The husband's solicitors heard of this for the first time on Dec. 1, when notice was given to them to tax the bill of costs relating to the dismissed appeal and to the main proceedings. Counsel for the husband now moves for an order setting aside the decree absolute and restoring the appeal. He submits that the court has inherent jurisdiction to vary its own order on the ground that an injustice would otherwise be done.

The point we have to decide is not covered by any rule. If this court or the Divorce Court has power to set aside the decree absolute it must be in the exercise of its inherent jurisdiction, but, in my opinion, the case is inferentially covered by s. 31 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides :

> No appeal shall lie . . . (e) from an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree *nisi* on which the order was founded, has not appealed from that decree . . . A

The husband undoubtedly had time and opportunity to appeal, and did, in fact, give notice to that effect. It is true that, owing to the mistake of his solicitors the right to appeal was lost, but, in my opinion, there is no ground on which the court can set aside the decree absolute, nor can I see any reason why the court should allow an extension of time for the appeal. This view is supported B by s. 184 (1) of the Supreme Court of Judicature (Consolidation) Act. 1925, which provides :

> As soon as any decree for divorce is made absolute, either of the parties to the marriage may, if there is no right of appeal against the decree absolute, marry again as if the prior marriage had been dissolved by death, or, if there is such a right of appeal, may so marry again, if no appeal is presented against the decree, as soon as the time for C appealing has expired, or, if an appeal is so presented, as soon as the appeal has been dismissed.

The policy of Parliament requires that a decree absolute should be protected unless there is some ground on which the court could reasonably exercise its inherent jurisdiction to vary the order in the interests of justice. In this case, in my opinion, there is none. The principle on which Parliament has treated a decree absolute as sacrosanct is one on which this court must act. In my D opinion, therefore, this motion fails.

SOMERVELL, L.J. : I agree. The question is whether the court has jurisdiction to deprive a party of rights lawfully acquired under an order of the court in circumstances of the most complete regularity on the part of the party whom the court is asked to deprive of her rights. It may well be that there is inherent jurisdiction in the court to do this, but, speaking for myself, E I should require specific authority on the point and there does not appear to be any.

EVERSHED, L.J. : I agree.

Application refused.

Solicitors : *Eric B. Politzer & Co.* (for the husband) ; *Haslewood, Hare & Co.* (for the wife). F

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re STRATHBLAINE ESTATES, LTD. G

[CHANCERY DIVISION (Jenkins, J.), January 12, 1948.]

Practice—Vesting order—Land—Company—Dissolution—Freehold property vested in company before dissolution—Agreement by company to distribute property among shareholders—Failure to convey legal estate to shareholders—Company trustee for shareholders—Trustee Act, 1925 (c. 19), *s.* 44 (ii) (c).

Conveyance—Interest in land—Disposal by writing—Minutes of company—Law of Property Act, 1925 (c. 20), *s.* 53 (1) (*a*). H

At an extraordinary general meeting, held on Apr. 14, 1938, of a company which owned freehold properties, a resolution was passed that the company be wound-up voluntarily and it was agreed that the properties should be distributed in equal shares between the shareholders. All liabilities were discharged before the company was dissolved, but the legal estate in the unsold properties was not conveyed to the shareholders.

HELD: by the agreement of Apr. 14, 1938, the company became a trustee for the shareholders of the freehold properties in question, the minutes of the meeting being sufficient written evidence of the contract to satisfy the Law of Property Act, 1925, s. 53 (1) (*a*), and, therefore, the legal estate in fee simple in the freehold property was excepted from the provisions of the Companies Act, 1929, s. 296, and was not determined by the dissolution of the company, but continued in existence subject to the trusts on which it was formerly held by the company; since there was no necessity for creating any new legal interest, the Law of Property Act, 1925, s. 181, did not apply; and, accordingly, under the Trustee Act, 1925, s. 44 (ii) (*c*), the court could make an order vesting the properties in the shareholders for all the estate therein formerly vested in the company as joint tenants on trust for sale.

Re Wells, Swinburne-Hanham v. *Howard* ([1933] Ch. 29) *applied.*

Hastings Corpn. v. *Letton* ([1908] 1 K.B. 378) *not followed.*

[AS TO PROPERTY OF DISSOLVED COMPANY, see HALSBURY, Hailsham Edn., Vol. 5, pp. 754, 755, paras. 1280, 1281, and Supplement; and FOR CASES, see DIGEST, Vol. 10, pp. 1033, 1034, Nos. *7163-7169*, and Supplement.]

Cases referred to:

(1) *Hastings Corpn.* v. *Letton*, [1908] 1 K.B. 378; 77 L.J.K.B. 149; 97 L.T. 582; 10 Digest 1033, *7169*.

(2) *Re Wells, Swinburne-Hanham* v. *Howard*, [1933] Ch. 29; 101 L.J.Ch. 346; 148 L.T. 5; Digest Supp.

(3) *Re C. & H. Crichton* (1921), *Ltd.*, [1932] W.N. 208; Digest Supp.

ADJOURNED SUMMONS by the former shareholders of a company which had been dissolved asking for a vesting order in respect of the legal interest in freehold properties which had been vested in the company prior to its dissolution.

The company was incorporated in May, 1936, under the Companies Act, 1929, as a limited company with a nominal capital of £100, and 33 shares were allotted to each of the three shareholders, Robert Levinson, Graham Levinson and Co-operative Properties, Ltd. The objects of the company were (*inter alia*) to carry on the business of owning and managing property of all kinds and to acquire land or buildings and to manage, farm and let the same or any part thereof for any period at such rent and on such conditions as the company thought fit. Shortly after its incorporation the company acquired a large number of properties and carried on the business of managing them. By Apr. 12, 1938, the company had sold most of its properties, but certain of them (the subject-matter of the present application) were still unsold. On Apr. 13, 1938, the company filed a declaration of solvency. On Apr. 14, at an extraordinary general meeting of the shareholders a special resolution was passed that the company be wound-up voluntarily and that a liquidator be appointed, and it was agreed by the company and the shareholders that the unsold freehold properties should be distributed between the shareholders in equal shares and the title deeds were handed to them and remained in their possession. On Apr. 25, 1938, a copy of the special resolution was registered with the Registrar of Companies. On Apr. 25, 1942, the company was finally dissolved. All liabilities to creditors were discharged before the dissolution, but the fact that the legal estate in the unsold properties had not been conveyed to the shareholders was overlooked.

An originating summons for a vesting order in respect of the legal interest in the unsold properties vested in the dissolved company, taken out under the Law of Property Act, 1925, s. 181, and the Trustee Act, 1925, s. 44 (1) (ii) (*c*), was adjourned into court for argument.

Lightman for the shareholders. The shareholders are entitled to an order under s. 44 of the Trustee Act, 1925, vesting the unsold properties in them generally in equal shares. At the date of dissolution the company was a trustee of the property for the shareholders either by reason of a statutory trust under s. 247 of the Companies Act, 1929, or by reason of the agreement between the shareholders and the company that the unsold assets of the company would be distributed in specie. The agreement is evidenced by the minutes of a meeting of the directors of the company held in March and the minutes of the general meeting of the company held on Apr. 14, 1938. The minutes in each case were signed by the chairman of the company and satisfy the requirements of s. 53 of the Law of Property Act, 1925. It was suggested in chambers that it was necessary to create a new legal estate under s. 181 of the Law of Property Act, 1925: see Annual Practice, 1946-47, at p. 1058, note*; see also *Re C. & H. Crichton* (1921), *Ltd.* (3), but that case was decided before *Re Wells* (2) where the Court of Appeal held that all property which had no other owner went to the Crown irrespective of s. 296 of the Companies Act, 1929.

Danckwerts for the Attorney-General. Section 181 of the Law of Property Act, 1925, is based on the mistaken proposition that, on the dissolution of a corporation, lands belonging to it revert to the donor which is put forward in Challis's Real Property, 3rd ed., pp. 35, 36—a passage criticised by *Sweet*, the editor of that edition, at pp. 467, 468—and in *Hastings Corpn.* v. *Letton* (1), which is also criticised by *Sweet*. In view of the observations of the Court of Appeal in *Re Wells, Swinburne-Hanham* v. *Howard* (2), *Hastings Corpn.* v. *Letton* (1) and the statement in Challis at pp. 35, 36, must be regarded as wrong, and the proposition that the grant of a lease or the grant of a fee simple to a corporation determined on the dissolution of the corporation is unfounded. The Companies Act, 1929, s. 296, which provides that the property of a company on its dissolution vests in the Crown as *bona vacantia*, except property of which the company is a trustee, is also based on mistaken assumptions as the reference to leaseholds shows. The exception of property of which the company is a trustee excludes such property from the effect of s. 296, but, none the less, under the general law, on the dissolution of the company which was a trustee the trust property must vest in the Crown as *bona vacantia*, as otherwise there would be no owner: see *Re Wells* (2). In the present case it will be proper to make an order under the Trustee Act, 1925, s. 44 (ii) (*c*). The Companies Act, 1929, s. 247, is not sufficient to make the company a trustee for the applicant shareholders, but the minutes of Apr. 14, 1938, establish a contract to divide the company's freehold land between the three shareholders, so as to make the company a trustee for them of those lands, and those minutes, signed by the chairman, being in the minute book of the company which is exhibited to an affidavit of one of the shareholders, are sufficient written evidence to satisfy the Law of Property Act, 1925, s. 53 (1) (*a*).

JENKINS, J.: The minutes of Apr. 14, 1938, establish a contract to divide the company's unsold freehold properties between the shareholders in equal shares, and, accordingly, the company became a trustee of those properties for the shareholders. The minutes, signed by the chairman, are sufficient written evidence of the contract and consequent trust to satisfy the Law of Property Act, 1925, s. 53 (1) (*a*). The properties can, therefore, be vested in the shareholders under the Trustee Act, 1925, s. 44 (ii) (*c*) for all the estate therein formerly vested in the company as joint tenants on trust for sale.

Counsel for the Attorney-General submitted that it was not necessary to include in the order a direction pursuant to s. 181 of the Law of Property Act, 1925, creating a legal estate in the properties in question corresponding to the legal estate therein formerly vested in the company which could only be appropriate on the footing that the last-mentioned legal estate was determined by reason of the dissolution of the company as, in his submission, it was not. In this connection reference was made to the Companies Act, 1929, s. 296, under which all property and rights of a dissolved company "(including leasehold property but not including property held by the company on trust for any other person)" pass to the Crown as *bona vacantia*, and it was pointed out that the fact that the company held the properties on

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*Annual Practice 1946-47, p. 1058, note: Vesting Order.—Application for a vesting order in relation to the legal interest in any property, whether land, patents or otherwise, which was vested in a dissolved company, is made under s. 181 of L.P.A., 1925, except in cases in which the company held as trustee under an express trust, when the application is under s. 51 (1) (ii) (*c*) of Trustee Act, 1925.

trust for the shareholders excepted them from the operation of this section. The destination of the legal estate must, therefore, depend on the general law, as to which reference was made, on the one hand, to *Hastings Corpn.* v. *Letton* (1), where the theory that lands limited to a corporation in fee simple are held for an estate limited to continue only during the existence of the corporation and on its dissolution revert to the grantor through the consequent determination of the corporation's terminable estate, was approved, and, on the other hand, to *Re Wells, Swinburne-Hanham* v. *Howard* (2), where the Court of Appeal appears to have been quite clearly of opinion that an estate limited to a corporation in fee simple does not determine on the corporation being dissolved. Having regard, in particular, to the objections stated by ROMER, L.J. ([1933] Ch. 61-63) in *Re Wells* (2) to the view of the law of which approval was expressed in *Hastings Corpn.* v. *Letton* (1), the view of the Court of Appeal in *Re Wells* (2) is clearly to be preferred.

The right conclusion, therefore, appears to be that the legal estate in fee simple in freehold property held by a company in trust for other persons (and, accordingly, excepted from the provisions of s. 296 of the Companies Act, 1929) is not determined by the dissolution of the company, but, whether it theoretically passes to the Crown or elsewhere, continues in existence, subject to the trusts on which it was formerly held by the company. There is, therefore, no question of creating any new legal estate, and s. 181 of the Law of Property Act, 1925, has no application. The summons should, therefore, be amended by striking out references to that Act. The shareholders should produce the order to the Land Registrar. The costs of the Attorney-General as between solicitor and client are to be paid by the shareholders.

Order accordingly.

Solicitors: *D. B. Levinson & Shane* (for the shareholders); *Treasury Solicitor* (for the Crown).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Applied. SIDNEY TRADING CO., LTD. *v.* FINSBURY B.C. [1952] 1 All E.R. 460.

Followed. ALLIANCE PROPERTY CO., LTD. *v.* SHAFFER. [1948] 2 All E.R. 224.

Discussed. SEAFORD COURT ESTATES, LTD. *v.* ASHER. [1949] 2 All E.R. 155.

Applied. ALLIANCE PROPERTY CO., LTD. *v.* SHAFFER. [1949] 1 All E.R. 312.

PROPERTY HOLDING CO., LTD. *v.* CLARK.

[COURT OF APPEAL (Scott, Asquith and Evershed, L.JJ.), October 23, 24, 27, 28, December 17, 1947.]

Landlord and Tenant—Rent restriction—"Rent"—Standard rent—Payment for provision of fittings and services—Inclusion—Permitted increase—Transfer of burdens—Landlord's covenant for services, etc., in former agreement not included in later agreement—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 2 (3), *s.* 12 (1) (*a*).

By an agreement dated June 2, 1934, which was still running on Sept. 1, 1939, the landlords' predecessors in title let a flat in London to a former tenant for a "rent" (so designated) of £110 a year and an "additional payment" of £30 a year, in consideration of which additional payment the landlords covenanted to provide, for the use of the tenant, a gass cooker and certain other articles which would normally be tenant's fixtures or fittings, and for the furnishing, lighting, etc., of those parts of the building the use of which the tenant had in common with the tenants of other flats in the building. The landlords' covenant for quiet enjoyment was limited in its operation to, and co-extensive with, the time during which the tenant paid the rent of £110 and the "additional payment for services" and performed his covenants, and a right of re-entry was reserved for failure to pay "the rent or additional payment or any part thereof." By an agreement, dated Aug. 30, 1940, which did not include the covenant to provide tenant's fixtures and services, the landlords let the flat to the tenant at a rent of £80 a year. By valid notice to quit, expiring on Apr. 24, 1946, that contractual tenancy was determined and from that date the tenant became a statutory tenant under the Rent Restrictions Act, 1939. Concurrently with the notice to quit the landlords gave the tenant notice raising the rental figure to the level of what they contended was the standard rent of the flat, *viz.*, £140. In an action by the landlords for arrears of rent and mesne profits, the county court judge held that the sum of £110 only was " rent " within the meaning of s. 12 (1) (*a*) of the Act of 1920 :—

Held : (i) the sum of £30 was also part of the " rent " within the meaning of the sub-section and the total rent, which was the standard rent, was, therefore, £140 a year.

Dictum of Younger, L.J., *in Wilkes* v. *Goodwin* ([1923] 2 K.B. 105, 106) *approved.*

Artillery Mansions, Ltd. v. *Mabartney* ([1947] 1 All E.R. 686) *approved.*

(ii) having regard to the omission in the agreement of 1940 of the landlord's covenant to provide tenant's fixtures and services, there was, in 1940, a transfer to the tenant of a burden or liability previously borne by the landlord and the terms on which the flat was then let were " on the whole less favourable to the tenant than the previous terms," within the meaning of s. 2 (3) of the Act, and, therefore, the landlords were not entitled to recover such proportion of the £30 a year as was attributable to that part of the burden or liability formerly borne by the landlord which, under the agreement of 1940, in practice must be undertaken by the tenant.

[As to Standard Rent, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-315, paras. 369-370, and for Cases, see DIGEST, Vol. 31, pp. 559-561, 563-565, Nos. *7068-7084*, *7111-7127*.

As to Transfer of Burdens, see HALSBURY, Hailsham Edn., Vol. 20, p. 326, para. 387 ; and for Cases, see DIGEST, Vol. 31. p. 566, Nos. *7134*, *7135*.]

Cases referred to :

(1) *Woods (L.H.) & Co., Ltd.* v. *City and West End Properties, Ltd.*, (1921), 38 T.L.R. 98 ; 31 Digest 565, *7121.*
(2) *Wood* v. *Wallace,* [1920] 90 L.J.K.B. 319 ; 124 L.T. 539 ; 84 J.P.Jo. 517 ; 31 Digest 559, *7069.*
(3) *Hocker* v. *Solomon,* (1921), 91 L.J.Ch. 8 ; 127 L.T. 144 ; 31 Digest 560, *7070.*
(4) *Nadler* v. *Wilson,* (1924), 40 T.L.R. 639 ; 31 Digest 560, *7071.*
(5) *Wilkes* v. *Goodwin,* [1923] 2 K.B. 86 ; 92 L.J.K.B. 580 ; 129 L.T. 44 ; 31 Digest 560, *7080.*
(6) *Nye* v. *Davis,* [1922] 2 K.B. 56 ; 91 L.J.K.B. 545 ; 126 L.T. 537 ; 31 Digest 560, *7072.*
(7) *Artillery Mansions Ltd.* v. *Mabartney,* [1947] 1 All E.R. 686 ; [1947] K.B. 594.
(8) *Ellen* v. *Goldstein,* (1920), 89 L.J.Ch. 586 ; 123 L.T. 644 ; 31 Digest 558, *7055.*
(9) *Isaacs* v. *Titlebaum,* (1920), 64 Sol. Jo. 223 ; 84 J.P. Jo. 52 ; 31 Digest 565, *7120.*
(10) *Mackworth* v. *Hellard,* [1921] 2 K.B. 755 ; 90 L.J.K.B. 693 ; 125 L.T. 451 ; 85 J.P. 197 ; 31 Digest 563, *7111.*
(11) *Winchester Court Ltd.* v. *Miller,* [1944] 2 All E.R. 106 ; [1944] K.B. 734 ; 114 L.J.K.B. 152 ; 171 L.T. 150 ; Digest Supp.

Appeal by the landlords from an order of His Honour Judge Davies, K.C., made at Bloomsbury County Court and dated Dec. 18, 1946. The landlords' predecessors in title had let a flat to a former tenant for a " rent " (so designated) of £110 a year by an agreement in which the tenant covenanted to pay an " additional sum " of £30 a year in respect of the provision by the landlords of certain fittings and an undertaking to perform certain services, etc. The learned judge held that the sum of £30 was not " rent " within the meaning of s. 12 (1) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and fixed the standard rent at £110 a year. The landlords appealed, contending that the standard rent was £140 a year, and the decision of the county court judge was now reversed, but the case was remitted to the county court judge for an investigation of the extent to which the landlords' former burden under the covenant (which had been omitted from the later agreement) had been transferred to the tenant, and whether, therefore, the terms on which the tenant held the flat were " on the whole less favourable to the tenant than the previous terms " within the meaning of s. 2 (3) of the Act, so that the landlords would not be entitled to recover the £30 in addition to the £110.

Michael Hoare for the landlords.
Avgherinos for the tenant.

Cur. adv. vult.

Dec. 17. The following judgments were read.

SCOTT, L.J.: This is an appeal by the landlords under the Rent Restrictions Acts. Their claim was for arrears of rent and mesne profits due from a tenant in respect of a flat at Hampstead under a written agreement of tenancy dated Aug. 30, 1940, after a notice to quit expiring on Apr. 24, 1946. It was common ground that the notice to quit was effective under the contract of tenancy, but on Sept. 1, 1939, the flat had already come within the Rent Restrictions Act, 1939, and, therefore, on Apr. 24, 1946, the tenant had become a statutory tenant. The contractual tenancy, so ended, provided for a rent of only £80, payable monthly, the figure, no doubt, reflecting the "slump" in rents in 1940, but the landlords concurrently with the notice to quit gave the tenant notice raising the rental figure to the level of what they contended was the flat's standard rent, *viz.*, £140. This contention was based on an agreement of tenancy, granted by the present landlords' predecessors in title on June 2, 1934, to a former tenant, which provided for two payments, one of £110 therein called "rent," and a further payment of £30 not called rent, which they contended was rent within the meaning of the Act. This tenancy was still running on Sept. 1, 1939, and, if the contention was well-founded, the two figures added together, making £140, *ipso facto* make up the standard rent on that date. A contention of the tenant, that the statutory rent was £78 odd, was obviously erroneous and need not be considered further, but his alternative contention that only the £110 was "rent" was upheld by the county court judge. The only contention argued by counsel in opening the landlords' appeal was that the £30 payment under the agreement of 1934 was "rent" within the meaning of the Rent Restrictions Acts. This contention was directly challenged by counsel for the tenant; but he also raised a further contention, which, though not raised below, he was, as respondent, entitled to raise in this court, in order to hold his judgment. It was that the terms of the agreement of 1940 differed from those of the agreement of 1934 in a way which caused a "transfer of a burden or liability from the landlord to the tenant" within the meaning of s. 2 (3) of the Act of 1920, amounting to £30 a year, which under that subsection must be "deemed to be an increase of rent," so that if, contrary to his main contention and the county court judge's finding, the standard rent was held by us to be £140, £30 of it would be irrecoverable by the landlords, thus justifying the county court judgment on another ground. As the second question does not arise, unless we are with the landlords in their contention that the standard rent of the flat is £140, it will be convenient to discuss that contention first. Both issues necessarily turn on the correct interpretation of the terms of the earlier agreement of tenancy, dated June 2, 1934, between the predecessors in title of the landlords and the former tenant.

In his judgment the county court judge set out clearly, and with one exception fully, the relevant clauses of that agreement. I will, therefore, read what he says:

> The material facts and documents are as follows. By a lease dated June 2, 1934, the flat was let to one Eliot. The lease provided that "in consideration of the rent hereby reserved and the covenants on the part of the tenant hereinafter contained the landlords demise unto the tenant [the flat] together with the use in common with the landlords and occupiers of other portions of the said messuage of the entrance hall landings staircases and passages thereof . . . yielding and paying therefor the yearly rent of £110 payable quarterly in advance on the usual quarter days." The tenant convenanted (*inter alia*): "(1) To duly and punctually pay the said rent . . . and to pay for all gas and electric light consumed by him on the premises." After setting out 13 further covenants by the tenant, the lease proceeds: "And the landlords hereby agree that provided and so long as the tenant shall pay the rent and the additional payment for services hereafter provided and shall perform the covenants on his part herein contained they will: (1) Pay all rates and taxes . . ."

The exception, to which I referred, is that the learned judge did not quote the whole of the £30 clause, although it is all material to the question in issue:

I will, therefore, read it *in extenso* :

> And it is further agreed between the parties hereto that the landlords shall provide for the use of the tenant in the said flat a gas cooker a water heater and all electric light fittings shades lamp holders switches and plugs (except lamps) and shall provide for the lighting and cleaning of the staircases entrance hall landings and front steps of the said building and supply appropriate furniture carpet and linoleum for the said hall landings and staircases in consideration of which the tenant covenants to pay the sum of £7 10s. in advance on each quarterly day hereinbefore appointed for payment of the rent hereby reserved. Provided always and it is hereby agreed that if the said rent or additional payment or any part thereof respectively shall be unpaid for the space of ten days after any of the days whereon the same shall have become due and payable as aforesaid whether legally demanded or not or if the tenant shall commit any breach of any of the covenants and agreements on his part herein contained then and in either of the said cases it shall be lawful for the landlords or their agents to enter upon the said premises and the said tenant and all other occupiers forcibly to expel and for such purpose if necessary to break open any doors and windows and these presents shall be deemed a licence and authority for such purpose accordingly.

The question for our decision is whether the quarterly payments of £7 10*s*. 0*d*. were " rent " within the meaning of that word as used in s. 12 (1) (*a*) of the Act of 1920, as amended by the Act of 1939. I will read the relevant part :

> (*a*) The expression " standard rent " means the rent at which the dwelling-house was let on Sept. 2, 1939, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date . . .

The argument for the tenant, both below and before us, was, substantially, first, that these payments were not " rent " at common law, and, secondly, that, unless the parties expressly called them " rent," they could not be " rent " within the meaning of the statute. Even if the common law meaning is as definite and narrow as the tenant contends (on which I express no opinion as it is not necessary to our decision on the point), that contention is not conclusive, for the word " rent " in the relevant sections of the Acts of 1920 and 1939 may well have been used by Parliament in a sense rather wider than the common law sense, and all we have to do is ascertain whether, on its proper interpretation in the section, it does or does not cover the payments of £7 10*s* 0*d*. a quarter in the agreement of 1934. There is no judicial authority binding on this court, and I, therefore, prefer first to consider the question from the point of view of principle. ASQUITH, L.J., has made a careful examination of all the decisions and expressions of opinion and I entirely agree with it.

There are certain fundamental features of all the rent restriction legislation, or, at any rate, of the legislation from 1920 to 1939. The two most important objects of policy expressed in it are (1) to protect the tenant from eviction from the house where he is living except for defined reasons and on defined conditions ; (2) to protect him from having to pay more than a fair rent. The latter object is achieved by the provisions for standard rent with (*a*) only permitted increases, (*b*) the provisions about furniture and attendance, and (*c*) the provisions about transfers of burdens and liabilities from the landlord to the tenant which would undermine or nullify the standard rent provisions. The result has been held to be that the Acts operate *in rem* on the house and confer on the house itself the quality of ensuring to the tenant a status of irremovability. In this description of the distinguishing characteristics conferred by statute on the house, the most salient is the tenant's security of tenure—his protection against eviction—although the scope of the statutory policy about a fair rent must also be borne in mind especially in connection with the provisions relating to furniture, attendance, services and board. Before 1920 there is no reference to them. Section 12 (2) of the Act of that year, which defined the houses brought within the Act by reference to rent or rateable value, by proviso (i) excluded from the Act " houses *bona fide* let at a rent which includes payments in respect of board, attendance or use of furniture." This raised disputes, *e.g.*, as to how much furniture would suffice to take the house out of the Acts, and after some litigation there was included in the second Act of 1923 (which received the Royal Assent on July 31) the present s. 10. That section says nothing about " board " or " services," but provides that the inclusion of the use of furniture or of attendance shall not cause the house to be " deemed to be *bona fide* let at a rent which includes " either " unless the amount forms a substantial part of the whole rent." It is quite clear from these provisions that in those years Parliament did not regard the word " rent " as an unsuitable word to cover such payments, and the exact wording of s. 12 (2), proviso (i), of the Act of 1920 was re-enacted in s. 3 (2) (*b*) of the Act of 1939.

Bearing these two main considerations in mind, I now turn to the agreement of 1934. It is plain, first, that the word " rent " in the *reddendum* is restricted to the demised premises, but with the flat there was also granted, as was natural, the right to use the hall, landings, staircases and passages of the block ; secondly, that in covenant No. 10 numerous landlords' " fixtures and fittings " are treated as included in the premises let ; thirdly, that the landlords' covenant for quiet enjoyment is limited in its operation to, and co-extensive with, the time during which the tenant pays the £110 rent and also " the additional payment for services hereafter provided " (*i.e.* the £30), and " performs his covenants " ; and, fourthly, that the right to enjoy the various things for which the quarterly payment of £7 10*s.* 0*d.* is reserved is made conditional on due performance of the tenant's covenant to make the payments. The whole clause divides itself into two parts—undertakings by the landlords and undertakings by the tenant. The former is again split into two. First, the landlords are to provide—and, impliedly, to maintain—a variety of landlords' fixtures and fittings—thus making the flat an equipped, though not a furnished, flat ; secondly, they are to light and clean the staircases, entrance hall, landings and front steps, and supply appropriate furniture, carpet and linoleum for the hall, landings and staircases. The tenant, on his side, is to make the quarterly payments on the days, already named, for payment of the " rent " already reserved. Then follows an all important proviso that if " the said rent or additional payment or any part thereof " is left unpaid for 10 days after due date, the landlords may enter on the premises and forcibly expel the tenant and all other occupiers —which would include sub-tenants.

The following features should be noted. (1) The right to use the common parts of the building is a part of the grant. (2) There is included in the clause no furniture in the flat, but only furniture in the hall, etc., as contrasted with " fittings " and landlords' fixtures in the flat. (3) The enjoyment of the flat itself as equipped with landlords' fixtures and fittings, and with the benefit of water, gas, and electricity services therein is obviously conferred by the primary grant. (4) Payment for the enjoyment of everything included in the clause is treated as on a par with the rent stated in the *reddendum* ; failure to pay any part of either gives the landlords an absolute right forthwith to terminate the tenant's term and evict him by force. The conclusion at which I arrive is that the word " rent " in all the statutory provisions about standard rent carries a meaning sufficiently wide to cover each quarterly payment of £7 10*s.* 0*d.* under the clause, whether some of the benefits to the tenants, to which the payment is attributable, have been already, expressly or impliedly, included in the main grant or are only added by that clause. On that issue of interpretation the landlords' right of re-entry is, to my mind, the conclusive factor. I reject the contention that a covenant to pay cannot be a covenant to pay rent unless the payment is called " rent " in the lease or agreement. It is the substance that matters, and I am satisfied that in this case the £30 a year was a part of the rent within the meaning of the Rent Restrictions Acts. The total rent, therefore, was £140, and that is the standard rent. There is no relevant decision binding on this court, and I have, therefore, dealt with the issue as a new point, but I have read the judgment of EVERSHED, L.J., as well as that of ASQUITH, L.J., and agree with what he says about the views expressed by YOUNGER, L.J., and by DENNING, J.

The landlords will thus succeed unless the new point taken by the tenant is a good answer. Section 2 (3) of the Act of 1920 says that a transfer of a burden or liability from the landlord to a tenant shall be deemed to be an increase of rent (*i.e.*, an unpermitted increase), if and to the extent that the terms on which a demised house is held are on the whole less favourable to the tenant than the previous terms. In the present case that enactment calls for a comparison between the terms of 1934 and the terms of 1940, on the true interpretation of the two instruments. If the later terms appear to be less favourable, it calls for some process of valuation of both to discover the money measure of the unfavourable balance. As the point was not taken below no question arose there as to how that valuation is to be effected and the comparative figures ascertained. That problem of interpretation is, therefore, for us to solve.

The salient feature in the language of the subsection is that it speaks only of "terms," and says nothing about any investigation into the facts. There is no reference to the way in which, or the extent to which, the terms of the letting which fixed the standard rent have been performed or left un-performed by the landlords under the contract of tenancy before the county court judge, *e.g.*, in relation to benefits to be supplied by the landlords for the enjoyment of the tenant. If all those benefits as described in the standard contract (as I will call the contract the rent of which becomes the standard rent) appear equally as terms of the contract before the court, the possibility of a transfer of burden does not arise. It is only if benefits of potential value in terms of rent are omitted or made less advantageous to the tenant that a transference of burden to the tenant can be said to occur. In such a case if in each contract there were one undivided rent, and the later rent were equal to the standard rent, there would be a shifting of burden, which, in my opinion, would constitute a "transfer", and in that case the omitted terms would have to be valued, expert evidence of house agents presumably being admissible to value the omitted terms. There is, however, in the present case a possibility which probably is of minor importance, but yet may have to be taken into account on such a valuation, and I, therefore, mention it. It may be that some of the benefits described in the £30 clause of the standard contract had already been mentioned in the £110 part of that contract. If they had, and to the extent that they had, the £30 valuation of the benefits described in the £30 clause must be treated as the agreed value of the residual benefits in the £30 clause other than those benefits which were also in the £110 part of the standard contract, and the valuers would have to have regard to the £30 as representing the value in 1934 agreed between landlords and tenant. The point may prove to be purely academic, but I felt it ought to be mentioned. Subject to the above quite minor points, I agree entirely with the approach to the problem containd in the judgment of EVERSHED, L.J., which I have read. I agree with the form of order he proposes.

ASQUITH, L.J.: I entirely agree with the judgment delivered. The main question argued on this appeal was what meaning should be given to the word "rent" in s. 12 (1) (*a*) of the Rent Restrictions Act, 1920. It is reasonable to suppose that some light could be shed on this question not only by decisions on s. 12 (1) (*a*) itself—of which there are few—indeed, I think only one—but by decisions on the construction of other provisions of this or other Rent Restrictions Acts which employ the term "rent," and, more particularly, decisions on the construction of s. 12 (2) (i) of the Act of 1920 and s. 10 of the Act of 1923, which are relatively plentiful. If in such other provisions "rent" has been held to include, besides rent *stricto sensu*—*viz.*, a payment for the bare occupation of the realty—ingredients attributable to the use of chattels or services or other amenities, this fact, so far as it goes, points to a liberal interpretation of "rent" in s. 12 (1) (*a*).

My Lord has invited me briefly to review the relevant authorities and has been good enough to indicate that he concurs in the conclusions which seem to me to emerge from such a review. Apart from *dicta* in the Court of Appeal and other decisions of that court which may have an indirect relevance, there have been four decisions of the High Court (including one of the Divisional Court) in the early days of the Act of 1920 in which the construction of s. 12 (1) (*a*) and s. 12 (2) (i) have been considered. These are *L. H. Woods* v. *City and West End Properties Ltd.* (1); *Wood* v. *Wallace* (2); *Hocker* v. *Solomon* (3); *Nadler* v. *Wilson* (4). In *L. H. Woods* v. *City and West End Properties Ltd.* (1) (which was actually a direct decision on s. 12 (1) (*a*)) the Divisional Court held that for the purposes of that subsection a lease reserving £18 as rent plus an additional rent of 2*s.* a week in respect of a housekeeper's services, and providing, as to the latter, "such additional rent to be recoverable by distress," was a lease reserving a rent of £23 4*s.* 0*d.* a year—in other words, that a sum for rent proper plus an additional sum, also described as rent, or as recoverable by distress in respect of attendance, could, on the wording of this lease, properly be described as "rent" within s. (12) (1) (*a*). The other three decisions were all under s. 12 (2) (i).

In *Wood* v. *Wallace* (2) a sum was reserved as rent with a stipulation that in addition 10*s.* a week should be paid for service. The additional payment was not called "rent", nor was there any provision for its recovery by distress. It was held that the premises were not let "at a rent which included payments for attendance." In *Hocker* v. *Solomon* (3), over and above rent in the narrow sense, an extra £30 a year was to be "payable with and recoverable as rent" for attendance and use of furniture. It was held that the premises were not let
A at a rent which included payments for attendance and the use of furniture. In *Nadler* v. *Wilson* (4) the lease reserved a rent of £74 4*s.* 0*d.* a year and 5*s.* a week for attendance. Both amounts were to be paid quarterly in one payment, and the agreement referred to this aggregate as "rent to include attendance." LUSH, J., held it was impossible to read the agreement and hold that the rent did not include attendance. None of these cases is binding on this court. In the first, second and fourth of them the criterion seems to have been whether
B or not the payments for "extras"—elements other than the occupation of the realty—were described as rent, or described as recoverable as such or as recoverable by distress. In the third, *Hocker* v. *Solomon* (3), SARGANT, J., rejected this criterion and held that, although an extra sum was contractually described as "payable and recoverable as rent," the premises were not let "at a rent which included payments for attendance." It is clear that he would have decided
C differently if the attendance and rent proper had been a single global sum, no definite part of which was specifically allocated to attendance. In none of these four cases, indeed, was a "global" unapportioned sum stipulated for.

These four authorities are considered together because they were all decisions of the High Court in the early days of the Rent Restrictions Acts and separated *longo intervallo* from any other High Court decision on these two subsections. I must proceed to consider (*a*) pronouncements in the Court of Appeal, (*b*) a
D very recent decision of DENNING, J. The first pronouncement of the Court of Appeal consists of certain observations, already referred to by my Lord, delivered *obiter* in a minority judgment by YOUNGER, L.J., in *Wilkes* v. *Goodwin* (5) ([1923] 2 K.B. at 105, 106). The learned Lord Justice was dealing with s. 12 (2) (i). BANKES and SCRUTTON, L.JJ., did not dissent from the views expressed in this passage. They expressed no opinion on the point raised, merely keeping it open for decision when it should arise. The passage runs:

E

> The first of these [considerations] is that the word "rent" in this exception surely means not rent in the strict sense but the total payment under the instrument of letting. The exception assumes that "rent" so called may include, for example, "board," payment of which is not rent. I am here paraphrasing the statement of SHEARMAN, J., in *Nye* v. *Davis* (6) ([1922] 2 K.B. 59), with which I agree. And the second consideration is that the exception contemplates separate "payments" for any of the three things it specifies—namely, board, attendance, use of furniture, the plural
> F "payments" being in striking contrast with the singular "payment" in s. 9, where only one of these three things, namely, use of furniture, is being dealt with. In my judgment so far from the exception contemplating primarily a tenancy in which rent strictly so called is with these other payments or one of them lumped together under one composite payment designated rent, the contrary is the case. Such a composite payment may indeed be within the exception; but separate payments are within its more immediate contemplation.

G

This passage again refers directly only to the construction of the word "rent" in s. 12 (2) (i) of the Act of 1920, not the construction of the same term in s. 12 (1) (*a*).

Perhaps next in logical, though not in temporal, order comes the recent decision of DENNING, J., in *Artillery Mansions* v. *Mabartney* (7). In that case the tenant agreed to pay the landlords a "rent" of £170 a year and in addition by
H way of further or additional rent a sum of £15 a year for service charges. It is not clear from the reports whether the word "rent" or "additional rent" was actually applied in the lease to these sums. The reports rather suggest to my mind that it was, but that the learned judge did not base his conclusions on that fact. A clause is quoted which provided as follows: "The service to be provided by the company shall include keeping the rooms and furniture clean, sweeping chimneys, cleaning windows, lighting fires, valeting and general attendance." The learned judge held that the premises were *prima facie* excluded from the Rent Restrictions Acts by s. 12 (2) proviso (i), in that

the rent included payments in respect of attendance within that proviso. Another case on s. 12 (2) (i) is *Ellen* v. *Goldstein* (8). The tenant of a bakery agreed to pay a rent of £52 a year and by a supplemental agreement of even date to pay during the term a weekly sum of £1 for goodwill and use of landlords' fixtures, " to be recoverable by distress or otherwise as rent in arrear." It was argued that in these circumstances the total rent was £104 and that the premises fell outside the £70 limit prescribed by the Rent Restrictions Act then in force (that of 1919). RUSSELL, J., held that the supplemental agreement did not have this effect. The learned judge said (123 L.T. 646) : A

> It appears to me merely a document by which the defendant bargained for and obtained some additional benefit and I decline to say that it constitutes a demise of the fixtures and fittings at an additional rent . . .

The majority of the judgment was, however, devoted to another point.

In *Isaacs* v. *Titlebaum* (9), a case strongly relied on by the tenant, the Court B of Appeal was construing s. 1 (i) (iv) and (vi) of the Act of 1915 and s. 4 of the Act of 1919. The landlord paid the rates and charged a rent of £75 8*s*. 0*d* which the tenant contended was arrived at by adding £20 8*s*. 0*d*. to £55, to recoup the landlord for his outlay on the rates. It was held that s. 1 (i) (iv) and (vi) (*b*) of the Act of 1915 showed that by the word " rent " the legislature intended the whole sum which the tenant agreed to pay as rent and not merely the balance thereof after deducting so much as was payable as rates. Lastly, in *Mackworth* C v. *Hellard* (10), the Court of Appeal had to construe s. 12 (7) of the Rent Restrictions Act, 1920, which provides that " where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . " In 1916 the landlord had let a house to a tenant at £30 a year rent, the landlord paying rates and taxes. The rateable value of the premises was £40. The rates rose steeply, and at the D material time the landlord was paying £31 18*s*. 0*d*. in respect of them—38*s*. more than he received as rent. It was held that " rent payable " within s. 12 (7) meant the £30 which the tenant engaged to pay as rent, not the minus quantity arrived at by deducting £31 18*s*. 0*d*. from this sum.

In this state of the principal authorities the landlords adopt as good law and base themselves wholly on the *dictum* of YOUNGER, L.J., in *Wilkes* v. *Goodwin* (5). According to their argument if under a lease (or, at any rate, a lease in such terms E as the agreement of 1934 in this case) the tenant engages himself to pay the landlords a sum of money in respect of his occupation of the premises plus what I may call " extras " (such as board, attendance, furniture or other services or amenities), then, whether an aggregate or " global " sum be reserved in respect of all these items or separate sums for each, and whether in the latter case the sums payable for the extras are expressed to be " rent," or to be recoverable as rent, or recoverable by distress, or whether they are not so described—in all these cases F the " rent " within s. 12 (2) (i) comprises the totality of such payments and " rent " within s. 12 (1) (*a*) means the same.

The contentions of counsel for the tenant were (so far as s. 12 (2) (i) goes) that the additional payments for extras were only " rent " within that proviso if described as rent or described as recoverable as rent or the subject of distress. He based himself on the early decisions in courts of first instance many of which G at least seemed to attach crucial importance to the question whether such payments were so described. He argued that this was the criterion adopted in *L. H. Woods* v. *City and West End Properties Ltd.* (1), *Wood* v. *Wallace* (2), and *Nadler* v. *Wilson* (4), and only not adopted in *Hocker* v. *Solomon* (3) because the judge in that case thought an additional requirement must be satisfied, *viz.*, that the sum must be " global." As to the recent decision of DENNING, J., it could be supported by reference to the criterion indicated if, as seemed probable H from one at least of the reports, the " extra " was described in the lease as " additional rent." He argued that the term " rent ," except where qualified by the context or specially defined, meant rent in the ordinary sense—a sum attributable solely to occupation of the land. Section 12 (2) (i) spoke of "rent" including attendance, etc., and this meant that the extra sum earmarked to attendance or other extras must be expressed to be rent if it was to fall within the proviso. The same considerations applied to the terms " rent " and the " whole rent " in s. 10 of the Act of 1923 (he did not contend that the " rent " including " attendance, etc." must be an undivided aggregate sum.). He argued that in the present case the " additional payment " was not only not described as rent but sharply distinguished from it. The *reddendum* speaks of £110, not £140 or £110 plus £30. The provision of the extra £30 is in a special and self-contained agreement following the landlords' covenants, and in the proviso for re-entry it is provided for in the event of non-payment of the " rent or additional payment " not of the " rent or additional rent." He relied strongly on *Isaacs* v. *Titlebaum* (9), and on *Mackworth* v. *Hellard* (10)—similar cases, the argument founded on these last being, apparently, that as, where the landlord pays rates and presumably loads the rent with an element attributable to this liability, you cannot subtract the rates in arriving at the rent for the purposes of some sections of the Act, but must accept the full figure stipulated for as rent in the lease as the rent agreed to be payable, so neither must you add to the rent agreed to be payable other sums unless they are contractually agreed to be treated as rent. He also argued that the lease of 1934 must be construed where ambiguous, *contra proferentes*, who were assumed to be the landlords.

I am of opinion that on the true construction of s. 12 (2) (i) (coupled with s. 10 of the Act of 1923) these arguments, most persuasively advanced, fail; that the *dictum* of YOUNGER, L.J., is well-founded; and that the landlords succeed on this particular point. The tenant's contention involves reading into the proviso additional words such as " if and only if such payments are described in the instrument of letting as rent or recoverable as such or are included in a global sum which is itself so described." None of the cases relied on as showing that these words should be read in is binding on this court. The only decision of the Court of Appeal which counsel for the tenant attempted to rely on as directly in point is *Isaacs* v. *Titlebaum* (9). Leaving aside the fact that this case was decided on a different provision contained in a different Act, it was a case in which the tenant had, in fact, contracted to pay a total sum as rent and decides nothing as to any case in which the tenant has contracted to pay two or three sums, some one or more of which were not so described. Nor do I think it reasonable to construe " rent " in s. 12 (1) (*a*) in a stricter or narrower sense than that which it bears in s. 12 (2) (i).

For these reasons and those given by my Lord, I am of opinion that the tenant fails on this point. On the other point, however, on s. 2 (3) and s. 1 of the Act of 1920 and the order to be made, I agree with and have nothing to add to the judgment of my Lord and that of EVERSHED, L.J., which I have had the advantage of reading.

EVERSHED, L.J.: I have had the advantage of reading the judgments which have been delivered by SCOTT, L.J., and ASQUITH, L.J., and I propose to add but few observations of my own.

On the main point which has been argued, I think that for the reasons given by YOUNGER, L.J., in his judgment in *Wilkes* v. *Goodwin* (5) ([1923] 2 K.B. 105, 106), the word " rent " in proviso (i) (as amended) of s. 12 (2) of the Act of 1920 must necessarily be intended to comprehend separately quantified payments in respect of board, attendance, or use of furniture—payments which from their nature would not normally or naturally be described in terms as " rent," and I cannot think that the word " rent " in s. 12 (1) can properly or reasonably be supposed to have assigned to it any different meaning from that given to the same word in the next succeeding subsection. Further, if it be conceded that payments are to be regarded as " rent " when expressly so described, they should equally be so regarded if the substantial effect of the bargain is the same, though the word " rent " is not actually applied to them. Any other view involves an emphasis on the form rather than the substance and the introduction of an artificiality and a technique which is foreign to the general tenor of the legislation. SIR WILLIAM HOLDSWORTH in vol. VII, pp. 261 *et seq*, of his HISTORY OF ENGLISH LAW discusses the development from the mediaeval conception of rent as a " thing " or proprietary interest to the modern conception of rent as a contractual obligation to pay for the use of the property let, and the notion that " rent " must have the quality that it can be distrained for is more appropriate to the mediaeval than to the modern conception.

In my judgment, the question in each case is to determine what in substance is the subject-matter of the tenancy granted to the tenant by the contract.

Prima facie the rent is the monetary compensation payable by the tenant in consideration for the grant, however it be described or allocated. Alternatively, it may be described (as Scott, L.J., has described it) as the contractual monetary obligation the payment of which is the condition of the right to enjoy the property granted. According to either test the sum of £30 a year in the present case was, in my judgment, part of the rent. The subject-matter here granted was the exclusive right to possession of a particular flat, partly furnished, and the right to enjoy certain other amenities in connection with the flat. The landlords' covenant for quiet enjoyment was conditioned upon payment both of the rent (so described) and of the additional payment of £30 a year, and non-payment of any part of either was expressed to give rise, equally, to the landlords' power of re-entry. It is true that the draftsman of the lease appears to have been at pains to keep always distinct what were respectively described as " rent " and " additional payments," and I was at one time impressed by the argument that, if the landlords chose to adopt so careful a distinction in the terms they put forward to the tenant, they ought not now to be allowed to resile from the consequences of the distinction because for present purposes it suited them to do so, but there is no sufficient evidence, in my judgment, to justify the assumption that the document was, in fact, the landlords' document and to apply, accordingly, the rule *contra proferentes* against the landlords.

Looking, therefore, at the substance of the matter, I conclude that the " rent " within the meaning of the Act under the lease of 1934 was £140 per annum and not £110 per annum. To accept the contrary argument would appear to involve the result that a furnished letting would be within the scope of the Act, whether or not the payment for the use of the furniture was a substantial portion of the total payment to be made by the tenant, so long as the payment for the furniture was kept distinct from the " rent " and not expressly described as " rent." It is possible that the paraphrase suggested by Younger, L.J., " . . . the total payment under the instrument of letting " may be somewhat too widely stated, for, in a contract of tenancy, there may be included separate and collateral bargains, the payments to be made in respect of such bargains being in substance and reality distinct from the " rent " as I have defined it. Thus, a contract for the tenancy of a dwelling-house might include a term that, on paying the sum of, say, 10*s*. a week, the tenant might, during the tenancy or for some different period, have the privilege of garaging his car in the landlord's garage, no part of which was included in the demise. In such a case it might well be held that the sum of 10*s*. per week formed no part of the " rent " within the terms of s. 12 of the Act of 1920. Even so, the conclusion in the present case will not be affected. I, accordingly, agree also with the decision of Denning, J., in *Artillery Mansions* v. *Mabartney* (7). I add that, for the reasons given by Asquith, L.J., in his analysis of the cases, there is, in my judgment, nothing in authority to warrant or compel a conclusion contrary to that which I have reached.

There remains counsel's second point under the joint effect of s. 1 and s. 2 (3) of the Act of 1920 (as amended). By cl. 2 of the lease of 1934 the landlords contracted (*a*) to provide for the use of the tenant a gas cooker and certain other articles which would normally be tenant's fixtures or fittings, and (*b*) to provide for the lighting, cleaning and furnishing of the entrance hall, etc., the use of which the tenant had in common with the tenants of other flats in the building. The benefit of this contract was, by the terms of the lease, valued at £30 per annum. The provision found no place in the lease of 1940, and it seems to me, therefore, clear that, as a result, the terms on which the flat is now held would, on the whole, be less favourable to the tenant within the meaning of s. 2 (3) of the Act if the landlords are entitled to raise the rent to the standard figure of £140 per annum. It is true that the landlords' former contractual burden has not in terms been transferred to the tenant, but, as pointed out by Scott, L.J., in *Winchester Court Ltd.* v. *Miller* (11) ([1944] 2 All E.R. 109), the words of the subsection are to be generously construed. It is the shifting of the burden that matters, not how or by whom it is brought about. So far as the first part of the former covenant is concerned, it seems to me plain that in practice, though not as a matter of contract, the tenant would be bound to supply the articles specified or other similar articles for the ordinary and reasonable enjoyment of the flat, just as, in the *Winchester Court* case (11), the landlord would in practice have to undertake the proper upkeep of the property if he wished to preserve it as a capital asset. As regards, however, the second part of the covenant, the matter appears to me to be otherwise. If the landlords did not adequately light, clean or furnish the entrance hall, etc., the tenant would, no doubt, suffer, but would not, and, indeed, could not, with, perhaps, small exceptions, do the work himself. In any case, the matter having been raised for the first time in this court, there was no investigation of the extent to which the landlords' former burden under the lease of 1934 has been, in fact, shifted to the tenant, I agree, therefore, that on this point the case must be referred back for the necessary findings. As already indicated, however, it is, in my judgment, clear that some shifting of burden has been effected, the proper evaluation of which I will assume to be £x per annum. What is the result ? Section (2) (3) clearly distinguishes between the " sum periodically payable " (*i.e.*, the amount of rent in money which the tenant is under obligation to pay) and the increase of rent which is deemed to take place as a result of the transfer of burden, which, in the nature of things, is never, in fact, paid or payable in cash at all. As it seems to me, the latter figure (in the present instance £x) must be something which the tenant must be treated as having paid or for which he is entitled to be credited. The cash sum which the tenant is now paying is £110, to which, therefore, according to my understanding, £x must be added, so that the tenant must be regarded as paying or having paid rent at the rate of £110 plus £x per annum. The landlords' claim in the action proceeds on the basis that they can lawfully increase the rent, in the sense of the cash sum payable, to £140 per annum, *i.e.*, it is for the appropriate proportion of the difference between £140 per annum and £110 per annum, but a cash rent of £140 per annum will exceed the standard rent by £x per annum, there being in the present case no permitted increases over the standard rent. To the extent, therefore, that the rent claimed to be payable by the tenant, *viz.*, £140 per annum, exceeds, when credit is given for the sum of £x per annum, the standard rent, *viz.*, to the extent of £x per annum, such rent is irrecoverable by virtue of s. 1 of the Act. In the result, in my judgment, the landlords' present claim must be excessive and must fail to the extent of the appropriate proportion of £x per annum.

Finally, as regards the form of the direction to the county court judge to whom the case is remitted. As I read s. 2 (3) of the Act of 1920 the question of fact to be determined may thus be stated—what (expressed as so much per annum being the " deemed " increase of rent) is the extent to which the terms on which the flat is now held are less favourable to the tenant than the terms comprised in the lease of 1934 " as a result of " the transfer of the landlords' former liabilities and burdens to the tenant ? The figure to be calculated is obviously subject to the maximum or limiting figure of £30, for that was the valuation placed by the contract on the whole of the landlords' obligations under the relevant clause of the lease of 1934. The amount of the " deemed " increase of rent is, therefore, such proportion of the figure of £30 per annum as is attributable to the liabilities or burdens formerly borne by the landlords which must now in practice be undertaken by the tenant. In answering that question the county court judge will hear such evidence (including expert evidence if necessary) as is requisite to prove and evaluate the extent to which the various articles covenanted by the landlords in the relevant clause of the lease of 1934 to be provided—particularly those specified in the first part of the covenant (*i.e.*, gas cooker, water heater, etc.) –or other articles for corresponding purposes, must now be and are provided by the tenant. On the other hand, he will bear in mind that burdens and liabilities undertaken by the landlords from which the present landlords are now free—that is as regards lighting, cleaning and furnishing the entrance hall, etc.—cannot be regarded as " transferred to the tenant " if the tenant neither can nor does in fact undertake them himself. I add also (i) that the sum of £30 per annum under the lease of 1934 must be wholly referable to liabilities or burdens comprised in the relevant covenant in the landlords' covenants in the lease of 1934 to the exclusion of liabilities or burdens (if any) also covered by any other covenants in the lease on the part of the landlords express or implied, and (ii) that to the extent to which and so long as any obligations comprised in the relevant covenant in the lease of 1934 continue in fact to be discharged by the landlords they cannot be regarded as having been transferred to the tenant.

The order of this court should, I think, accordingly, be to the following effect. The appeal will be allowed and judgment entered for the landlords for the appropriate sum on the footing: (*a*) that the standard rent of the premises in question is £140 per annum, and (*b*) that (the landlords admitting that there are no permitted increases of the standard rent within the meaning of the Rent Restrictions Acts) the landlords are entitled to increase the periodical sum payable by way of rent by the tenant above the sum of £110 per annum to the extent (but only to the extent) that the liabilities and burdens covenanted to A be undertaken by the landlords in the landlords' covenants in the agreement of 1934 (such liabilities and burdens being for the purposes of this order taken to be of the annual value of £30) are shown to the satisfaction of the county court judge not to have been transferred to the tenant within the meaning of s. 2 (3) of the Rent Restrictions Act, 1920. Refer to the county court judge to determine accordingly the extent to which such liabilities and burdens have not been so transferred, with liberty to either party to apply to call such B evidence as they may be advised. As regards the costs, it is to be remembered that the point under s. 1 and s. 2 (3) of the Act of 1920 has been raised on behalf of the tenant for the first time in this court, and that on the main point of the appeal—*viz.*, as to the amount of the standard rent –the landlords have succeeded. Again, therefore, justice would appear to be done by directing that the landlords ought to have their costs of the first hearing before the county court judge and C two-thirds of their costs of this appeal, the costs of the reference back to the county court being in the discretion of the county court judge.

Order accordingly.

Solicitors: *Markby, Stewart and Wadesons* (for the landlords); *Benham, Synnott and Wade* (for the tenant).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*] D

ADDIS AND ANOTHER *v.* BURROWS.

[COURT OF APPEAL (Lord Greene, M.R., Asquith and Evershed, L.JJ.), January 14, 15, 1948.]

Landlord and Tenant—Notice to quit—Validity—Fixed term of 18 *months followed by tenancy from year to year—Notice to quit at "expiration of your tenancy which will expire next after the end of one half year from the service of this notice."*

In a tenancy agreement, dated Feb. 14, 1944, whereby premises were let to the tenant at a rent of £250 a year, the term was expressed as follows: "from Jan. 1, 1944, to June 30, 1945, for the term of one year and so on from year to year until the tenancy be determined at the end of the first or any subsequent year by one of the parties giving to the other of them 6 calendar months' previous notice in writing." The agreement was on a printed form, but the words "from Jan. 1, 1944, to June 30, 1945," were inserted in typescript. The landlord served on the tenant a notice, dated June 28, 1945, "to quit and deliver up at the expiration of your tenancy which will expire next after the end of one half year from the service of this notice possession of" the premises in question:—

HELD: (i) on the true construction of the tenancy agreement, it created a fixed term of 18 months, and thereafter a tenancy from year to year which could be determined by the requisite notice at the end of any of those years.

Doe d. Robinson v. *Dobell* (1841) (1 Q.B. 806) *distinguished.*

Croft v. *William F. Blay, Ltd.* ([1919] 2 Ch. 343; 121 L.T. 18) *applied.*

(ii) the formula used in the notice to quit was sanctioned by long usage and the notice was valid.

P. Phipps & Co. (Northampton & Towcester Breweries), Ltd. v. *Rogers* ([1925] 1 K.B. 14; 132 L.T. 240) *distinguished.*

[AS TO FORM OF NOTICE TO QUIT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 135-137, para. 145; and FOR CASES, see DIGEST, Vol. 31, pp. 445-448, Nos. *5919-5948.*]

Cases referred to:

(1) *Croft* v. *William F. Blay, Ltd.*, [1919] 2 Ch. 343; 88 L.J.Ch. 545; 121 L.T. 18; 31 Digest 444, *5910.*

(2) *Glynn* v. *Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; *affg.* S.C. *sub nom. Margetson* v. *Glynn*, [1892] 1 Q.B. 337; 17 Digest 350, *1607.*

(3) *Doe d. Robinson* v. *Dobell*, (1841), 1 Q.B. 806; 1 Gal. & Dav. 218; 10 L.J.Q.B. 242; 31 Digest 444, *5909.*

(4) *Doe d. Phillips* v. *Butler*, (1797), 2 Esp. 589; 31 Digest 447, *5939.*

(5) *Doe d. Williams* v. *Smith*, (1836), 5 Ad. & El. 350; 2 Har. & W. 176; 6 Nev. & M.K.B. 829; 5 L.J.K.B. 216; 31 Digest 450, *5967.*

(6) *Phipps (P.) & Co. (Northampton & Towcester Breweries), Ltd.* v. *Rogers*, [1925] 1 K.B. 14; 93 L.J.K.B. 1009; 132 L.T. 240; 89 J.P. 1; 31 Digest 448, *5947.*

APPEAL by the landlords (the plaintiffs) from a judgment of OLIVER, J., dated June 20, 1947.

A tenancy agreement was expressed to be "from Jan. 1, 1944, to June 30, 1945, for the term of one year and so on from year to year until the tenancy be determined at the end of the first or any subsequent year by . . . 6 calendar months' previous notice in writing." The landlords served on the tenant a notice to quit (dated June 28, 1945) "at the expiration of your tenancy which will expire next after the end of one half year from the service of this notice." In an action by the landlords for possession of the premises, OLIVER, J., held that, on the true construction of the agreement, (*a*) the current year ended on the anniversary of the commencement of the tenancy, and (*b*) the notice to quit was not valid. The landlords appealed from this decision and the Court of Appeal now allowed their appeal. The further facts appear in the judgment of EVERSHED, L.J.

J. C. Llewellyn for the landlords.
Youds for the tenant.

LORD GREENE, M.R.: I will ask EVERSHED, L.J., to deliver the first judgment.

EVERSHED, L.J., This is an appeal from a judgment of OLIVER, J., given at Liverpool on June 20, 1947. The claim by the plaintiffs is for possession of premises in Williamson Street, Liverpool. The nature of the claim appears from the first two paragraphs of a special indorsement on the writ. So far as material, those two paragraphs read as follows:

> (1) The plaintiffs are the landlords and entitled to the possession of the premises in question which were let . . . by an agreement in writing dated Feb. 14, 1944, at a rental of £250 per annum to the defendant [the defendant paying rates] from Jan. 1, 1944, until June 30, 1945, and thereafter from year to year until the tenancy thereby created should be determined at the end of the first or any subsequent year thereafter by 6 months' previous notice in writing. (2) The said tenancy was duly determined by written notice to quit dated June 28, 1945, and expiring upon June 30, 1946.

The plaintiffs alleged that the result of the notice given, having regard to the true construction of the tenancy agreement, was that the tenancy was determined on June 30, 1946.

The real points which have arisen in the case, as OLIVER, J., observed, are two. The first is: What was, on the true construction of the agreement, its meaning as regards the length of term, or, more particularly, as regards the expiration of the period on which notice to quit could be given? As indicated by the first paragraph of the statement of claim, there can be little doubt, on looking at the agreement, that the tenancy agreement did create a tenancy from year to year, the question being from what date did that "year to year tenancy" begin to run. I use the language used by EVE, J. ([1919] 2 Ch. 363) in *Croft* v. *William F. Blay, Ltd.* (1), to which I will presently refer. The second question is: Was the notice to quit, which the plaintiffs gave, a good notice to quit, having regard to the true construction of the tenancy agreement? Was it a notice to quit in accordance with the general requirements of the law that such a notice should be sufficiently clear either by naming the correct date or by using a formula from which the correct date could be ascertained so as to make it reasonably certain to the tenant that the tenancy came to an end on a date which was a proper one for the landlords to select to determine the tenancy? Both those questions the judge decided adversely to the plaintiffs.

I approach, first, the question: What is the meaning of the tenancy agreement? I confess that it appears to me on its face clearly to provide the answer to the question from what date did the year to year term begin to run. So far as relevant, the language of the tenancy agreement, which was dated Feb. 14, 1944, is as follows:

> The landlord agrees to let and the tenant to take [the premises in question] from Jan. 1, 1944, to June 30, 1945, for the term of one year and so on from year to year until the tenancy be determined at the end of the first or any subsequent year by one of the parties giving to the other of them 6 calendar months' previous notice in writing.

There were other provisions to which it is unnecessary to refer as to the dates on which the rent should be paid, repairing covenants, and so on, in ordinary form. It is obvious from the language I have read that the terms are not very artistically chosen because, having stated that the term should be from Jan. 1, 1944, to June 30, 1945, a period of eighteen calendar months, the lease goes on to describe that very period as being for the term of one year, or appears so to do. It is significant that the document itself is a printed form, the words "from Jan. 1, 1944, to June 30, 1945" being inserted in typescript.

In approaching the construction of the document, I think it is legitimate to take note of the fact that the parties to the contract must, by the words they themselves chose to put in, be taken to have expressed by those words what they intended to achieve. That general proposition finds support in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 10, p. 279, where the text is as follows:

> Where an instrument is in a printed form with written additions or alterations, the written words (subject always to be governed in point of construction by the language and terms with which they are accompanied) are entitled, in case of reasonable

doubt as to the meaning of the whole, to have a greater effect attributed to them than the printed words.

An illustration of that proposition is to be found in *Glynn* v. *Margetson & Co.* (2) to which counsel for the plaintiffs also referred. However that may be, since it is obvious that the two parties must have intended when they made this agreement to achieve something in the way of a tenancy between them, it is necessary to make sense of the words which they have used, and, making sense of them, I feel no doubt, as a matter of construction, that what they intended by this formula was that there should be a fixed term of eighteen months from Jan. 1, 1944, to June 30, 1945, and that thereafter there should come into existence a yearly tenancy beginning to run on July 1, 1945—a yearly tenancy or a tenancy from year to year which would go on until it was determined at the end of any year of the term by six calendar months' previous notice in writing.

As a matter of construction, that result may be achieved in more than one way. You may treat the printed words " for the term of one year " as having been left in in error, and, therefore, disregard them as being what is sometimes called a *falsa demonstratio.* You may regard the effect of this clause as granting a fixed term of eighteen months followed by a fixed term of one year starting from the end of the eighteen months and then a year to year tenancy thereafter, in which case the expression " at the end of the first or any subsequent year " would mean the first or any subsequent year of the yearly term. You may, perhaps, treat the formula " for the term of one year " as saying, in effect, that this fixed term of eighteen months shall be treated artificially as a year for the purposes of the rest of the agreement. It is unnecessary for the present purpose to say which is the right way of approaching the document, but I would observe that any other way, such as that suggested by counsel for the tenant, must involve first treating the phrase " and so on " as not relating to the end of the named period, which, as a matter of English, I should have thought that it must inevitably and naturally mean, and, secondly, must result in interpreting the phrase " the first or any subsequent year " as meaning " the second or any subsequent year." Without further pursuing it, as it strikes me, the meaning of the parties, having regard particularly to the phrase " and so on from year to year," appears clear to me, and it is that they created, and intended to create, a fixed term of eighteen months and thereafter a year to year tenancy which could be determined by the requisite notice at the end of any one of those years, whether or not it might have been earlier determined.

I notice that the judge was of the same opinion on the construction of the document, for, having recited the argument of counsel for the landlords, which was to the effect that I have stated, he says : " and were the matter on free ground with no authority upon it, I am bound to say that seems to be the sensible way for anybody to look at it."

The judge, however, felt himself bound by the decision in *Doe d. Robinson* v. *Dobell* (3) to come to a conclusion contrary to the view he himself took as to the meaning of the document. *Dobell's* case (3) is, in some respects, a somewhat remarkable case. By an agreement dated Aug. 13, 1838, there was a tenancy in which the term was expressed to be : " for one year and six months certain " from Aug. 13, 1838. The agreement then provided that three calendar months' notice should be given on either side previous to the determination of the tenancy. The facts were that on May 7, 1840, a notice had been given by the lessor to the tenant to quit " on or before Aug. 13 next [*i.e.*, Aug. 13, 1840], or at the expiration of the current year of your tenancy which shall expire next after the end of 3 months from and after your being served with this notice." Having regard to the fact that the tenancy was originally expressed to be " for one year and six months certain," and to the further fact that from the end of the original eighteen months the tenant may have been said to have held over as tenant from year to year, the question was whether Aug, 13, 1840, was a proper date on which to determine the tenancy, *i.e.*, whether the current year ended on Aug. 13, 1840, which was the anniversary of the commencement of the tenancy, or whether the current year ended at the expiration of the period beginning in February which started at the end of what had been called a term certain of one year and six months. The decision of the court was that, notwithstanding the terms used "for one year and six months certain," the true effect of the bargain was to have created, from the start, a year to year tenancy beginning on Aug. 13, 1838. As was pointed out by the Court of Appeal in *Croft's* case (1), the basis of the decision is to be found in the language of PATTESON, J., who said (1 Q.B. 808):

> In all cases, the "current year" refers to the time of entry, unless the parties stipulate to the contrary. Here, therefore, the current year would end on Aug. 13. A It may be that, on this construction, the "six months certain" will have no meaning; but if parties will express themselves so vaguely we cannot help the consequences.

As was pointed out by WARRINGTON, L.J. ([1919] 2 Ch. 354) in the Court of Appeal in *Croft's* case (1), the phrase "current year" in *Dobell's* case (3) appeared, not in the agreement for tenancy, but in the notice to quit. As I read the judgments in the Court of Appeal in *Croft's* case (1), I think the judges found a little difficulty in expressing with any degree of certainty what was the true basis B of the decision in *Dobell's* case (3), but, the formula in the notice to quit being well known, it seems from the judgment of PATTESON, J., that it had to be taken to be, as he states (1 Q.B. 808), the "current year" starting from the time of entry. On the facts of *Dobell's* case (3) the court came to the conclusion that the words "and for six months certain" cannot have had any effect so far as the term was concerned, the term created from the beginning being C a year to year term.

It is to be observed that there is this marked distinction between *Dobell's* case (3) and the present case. In the present case the parties themselves have expressed the term of tenancy to be not only the fixed period I have mentioned, Jan. 1, 1944, to June 30, 1945, but have also gone on to say that the tenancy becomes a tenancy "from year to year thereafter," for so I construe the words "and so on." In other words, coming back to the question put by EVE, J., D in *Croft's* case (1) where he said ([1919] 2 Ch. 363) that admittedly in the case before him there was "a tenancy from year to year and the next and important question is, as from what date," the document in the present case provides, as I think, the answer, *i.e.*, from the date when the fixed term ended, namely, July 1, 1945. If that is right as a matter of construction, it is clear that this case, which ought, as all such cases should, to be decided on its own facts and its own language, is distinct from *Dobell's* case (3). I would only E add that in *Croft's* case (1) there was no term expressed to follow on the initial period of one year and an eighth of a year, but the Court of Appeal in that case came to a different conclusion from that reached in *Dobell's* case (3) as to the date from which the year to year period which followed the end of the fixed term came into existence, or, to put it more accurately, they came to the conclusion, different from *Dobell's* case (3), that there was not in *Croft's* case (1) a yearly tenancy from the start, but there was a fixed term F and a yearly tenancy following on the end of the fixed term. If I have rightly interpreted *Dobell's* case (3) and rightly construed the agreement in the present case, I think the difficulty which the judge found in the way of his own view of the meaning of this contract is resolved.

If the contract has the meaning which I have attributed to it, the question then arises: Is the notice to quit a valid and effectual notice? The G language of the notice is as follows. It is addressed to T. H. Burrows, the tenant. It is dated June 28, 1945, and says, after the formal part:

> On the instructions of the owners we [the owners' agents] are required to give you notice to quit and deliver up at the expiration of your tenancy which will expire next after the end of one half year from the service of this notice possession of the Williamson Street premises.

The formula used in that letter is one of long standing, and in WOODFALL H ON LANDLORD AND TENANT, 24th ed., p. 973, I find the following:

> The notice need not mention the particular day on which the tenant is required to quit. Thus a notice to quit "at the expiration of the current year of the tenancy which shall expire next after the end of one half-year from the date hereof" is sufficient.

That proposition is supported by *Doe d. Phillips* v. *Butler* (4) and *Doe d. Williams* v. *Smith* (5) which were cited to us by counsel for the landlords. Indeed, in other cases cited to us it is quite plain that that formula, whether or not used as an alternative, is one of long sanction by usage. The formula I have quoted is not exactly in the terms of the letter, but for practical purposes may be taken as the same.

Leaving aside for the moment the question of an alternative form of notice, a notice in that form puts plainly on the tenant the obligation to consider what is the date that is meant by that form of words. *Prima facie*, the problem is not very difficult. As the MASTER OF THE ROLLS observed in the argument, assuming that the tenant can read and write, he requires two things only, namely, a modern calendar and his document of tenancy. Armed with those two instruments he asks himself, first: When is this notice served on me? This notice was dated June 28, and I will assume it arrived on the next day. The answer to that question, therefore, is June 29. Having regard to the form, he is next required to find out when one half year ends after the service of the notice. With the aid of his calendar he will discover that the answer to that question is Dec. 29, 1945. There then only remains the question: When does the year of his tenancy current on Dec. 29, 1945, come to an end? It is true that involves, or may involve, an interpretation of the tenancy agreement, but, if I am right in the view which I have expressed, he should have no great difficulty in answering that question as: June 30, 1946.

The gist of the argument put forward, however, by counsel for the tenant is that here, plainly, there was a doubt on the face of the tenancy agreement. The reality of this doubt, he contends, is shown by the fact that the view taken by OLIVER, J., and founded on ancient authority was different from that which I myself have just indicated. Counsel for the tenant argues that it is contrary to principle to throw on a tenant the duty of answering a problem of law, namely, determining one way or another an ambiguity set by the terms of the document, a matter of construction. It is said that to impose on a tenant that obligation is to fail to clothe the notice to quit with the required degree of clarity. It is to be observed that, whenever this form of words is used, the tenant is required to find, by examining the terms of the document, what is the answer to the question: When does the term of the year of tenancy end? In many cases it may well be said that the document is so clear that no problem in any true sense of the word arises at all. On other occasions there may be a doubt or difficulty in the language of the instrument which, however, is the tenant's instrument as well as the landlord's instrument. As has been pointed out by my Lord in the course of the argument, when the question of the validity of a notice to quit comes before the courts, judges may differ on the question whether the notice was or was not valid. The tenant is none the less bound, even though in the highest tribunal there may be a divergence of judicial opinion. Without pursuing it further, however, the whole object of this formula, as pointed out in the authorities, is to get over the difficulty a landlord might find himself in if he, the landlord, wrongly interpreted the agreement or gave a wrong date. In other words, it is intended to cast the duty on the tenant to satisfy himself, by looking at the instrument, what is the correct date on which he ought to go out. The fact that he is involved in that problem is no objection of itself to the form of words which have been used.

But here, again, the matter must be decided in the light of authority, and particularly of one authority on which counsel for the tenant relied very strongly and on the basis of which OLIVER, J., decided in his favour in the court below. That is *P. Phipps & Co. (Northampton & Towcester Breweries), Ltd.* v. *Rogers* (6), a case in which the provision in the document for giving notice was not, as I imagine, in a very usual or common form. It was as follows:

> Either party shall be at liberty to determine the tenancy [*i.e.*, of a public house] hereby created upon giving to the other 3 months' previous notice in writing of his or their intention so to do expiring on any one of the days appointed as special transfer sessions by the justices of the district in which the said premises are situate.

It is to be noted that, in using the formula "three months' previous notice," the agreement gave no indication whether lunar or calendar months were intended. The form of the notice which the landlords gave was also somewhat peculiar. The material part of it was to require the tenant to deliver up possession "on the earliest day your tenancy can legally be terminated by valid notice to quit given to you by us at the date of the service hereof," a formula widely different, obviously, on its face from the formula used in the present case. The result of using that formula was to involve the tenant in several problems. One I have already indicated—*i.e.*, whether by "three months," the words used in the agreement, three calendar months were meant, or three lunar months. That, however, was not the end of it. Atkin, L.J., said ([1925] 1 K.B. 28):

> In the present case the tenant is left to determine for himself whether 3 months means lunar or calendar months, and a lawyer of Lush, J.'s great reputation might have advised him calendar months. He might then have to determine whether the annual licensing meeting could or could not be a special transfer sessions and then he would have to find out when the special transfer sessions in fact are going to be held.

Counsel for the landlords pointed out that there was this further difficulty. Assuming that calendar months were meant (and, therefore, a longer period of notice required) at the date when the tenant received notice, it was impossible to find out when the next special transfer sessions after the expiration of three calendar months would be held because the date had not then been fixed. It is obvious, therefore, that in *Phipps & Co.* v. *Rogers* (6) there was an accumulation of difficulties provided by the joint effect of the language of the tenancy agreement and the very general and unusual form of the notice to quit. Bankes, L.J., pointed out in his judgment (*ibid.*, 21) that, in determining the question whether a notice to quit is good or bad, "each case must depend upon its own facts and circumstances . . ." In *Phipps & Co.* v. *Rogers* (6) this court, though by a majority, for Scrutton, L.J., took a different view, came to the conclusion that the tenant was involved in so many difficulties that there was a failure on the landlord's part either to give a certain date or to supply the tenant with a formula from which it could be ascertained with certainty, and that, therefore, the notice was not good.

I do not think that it would be right for me to attempt any further definition of the precise characteristics of notices of this kind. Nothing that I say should be taken as qualifying in any way the general duty of landlords to give notices in terms which are sufficiently clear and unambiguous in that the right date is either stated or can be ascertained by the tenant by reference to his tenancy agreement with the terms of which he must be taken to be familiar, but, in my judgment, the present case falls far short of the difficulties imposed on the tenant in *Phipps & Co.* v. *Rogers* (6) which ought not to be regarded as an authority conclusive against the landlords in this case or such as should make us say that the present notice is bad. As I said earlier, the present notice is one which is very familiar in form and sanctioned by very long usage. If there were no problem of construction on the tenancy agreement, it is plain, I should have thought, that no possible objection could have been taken to this notice. The objection arose because it is said that there is an ambiguity in the tenancy agreement. That ambiguity I have ventured to answer, and, to my mind, it is capable of a clear answer. In those circumstances, it seems to me that any difficulty which otherwise there might be in the wording of the notice is got rid of.

It was suggested that the formula which I find in the letter in question here is only good as a means of determining a tenancy if it is part of an alternative formula, the alternatives being, (i) naming a fixed date, and (ii) adding this form of words. In other words, if the landlords here had said: "We give you notice to quit and deliver up on Apr. 1, 1946, or . . ." the possible objections to the form of notice which are now levelled at it would be removed. In giving the illustration, I have chosen the date of Apr. 1, which is manifestly wrong as a date for determining the tenancy. It seems to me both illogical and, indeed, insensible, to suppose that a formula like this can only be animated, as it were, so as to be given life and validity, by having immediately in front of it the statement of a date which is obviously erroneous. If it narrows the field by adding a date which is wholly wrong, it only does it, as far as I can see, by removing as hopeless one out of 365 possible days in the year, and as that date is, *ex concessis,* hopeless in any event, it does not seem to me that its narrowing operation has any effect. Indeed, if, as is the fact here on any view, one of two dates only could have been properly given, I cannot see how a notice in this form, which on its proper construction could only mean one of two dates, is improved if one of those two dates is, in addition, mentioned. I only add that the use of this formula by itself, and not as one of two alternative limbs, is clearly sanctioned, as I think, by the passage which I have quoted from Woodfall on Landlord and Tenant and the two cases there cited in support of the proposition there stated.

For the reasons which I have given, I think, with all respect to him, that the judge came to a wrong conclusion on the two points which have been argued. I think that this notice validly determined the tenancy, as the plaintiffs pleaded, on June 30, 1946, and I would allow this appeal and substitute for the order made by Oliver, J., an order dependent on that view.

ASQUITH, L.J.: I agree, and will add nothing on the issue of the construction of the agreement which seems to me very plain. I would, however, like to say two or three sentences on *Phipps & Co.* v. *Rogers* (6) which, being a decision of this court, seems to me to be the main obstacle in the way of the landlords' success. It is, of course, a matter of common experience for a notice to quit which is ambiguous when viewed in abstraction to be relieved of all ambiguity when it is read along with the terms of the contract of tenancy. Such notices have repeatedly been held valid by courts of law. *Phipps & Co.* v. *Rogers* (6) does not question those decisions, but it was relied on as annexing a qualification to the effect that, whenever in such a case the true construction of the agreement of tenancy presents difficulty, the tenant is entitled to say: "I cannot be expected to know what the agreement means. You, the landlord, have not told me, and your notice is, accordingly, ambiguous and invalid." I do not think that case lays down anything like so wide a proposition. The court in that case, as Evershed, L.J., has pointed out, insisted that each of these cases must be decided on its own facts and circumstances. The circumstances there were that the tenant was forced by the form of notice to answer questions both of law and fact interlocked with each other and calling for a much more complex calculation than any involved in the present case. For these reasons, and the others stated by Evershed, L.J., I think that that case is distinguishable, and the landlords are entitled to succeed.

LORD GREENE, M.R.: I also agree, and I have nothing to add on the question of the construction of the tenancy agreement, save only that, apart from any question of striking words out, I think that the fact that the parties have deliberately typed into this document that the tenancy to which they are intending to agree is a tenancy for eighteen months make it perfectly clear that it must be so construed, and that, if necessary, the subsequent words in print must yield to that construction. It seems to me that the one thing they clearly wanted was a term certain of eighteen months, and it is only from the expiration of that term that the tenancy from year to year is to begin.

With regard to *Phipps & Co.* v. *Rogers* (6) the proposition that was put before us may, I think, be related to what I find in a well known text book, though I am not sure that other text writers have construed the decision in the same way. In Foa on Landlord and Tenant, 7th ed., p. 602, it is stated:

> At all events, the notice must indicate with reasonable clearness when possession will be demanded or given, so that the other party may know what is required of him; and if it be so worded as to leave him in doubt as to this (*e.g.*, by having to solve difficult questions of law), it will be invalid.

I am unable to accept that broad proposition as one to be extracted from *Phipps & Co.* v. *Rogers* (6) which is a case which I myself find very difficult to understand. Some reasons given by the Lords Justices are difficult to reconcile with other reasons given in the course of the judgments. That it is a decision binding in all cases of similar facts, I cannot, of course, question, but it is to be observed that it was a case where there was a combination of difficulties presented to the tenant, (i) a difficulty of construction, and (ii) a difficulty of fact. I am not prepared to extend the operation of that authority beyond a comparable case. Atkin, L.J., whose observations are principally relied on, clearly approved of a formula of the type which we have here ([1925] 1 K.B. 27), and I cannot read his judgment as in any way suggesting that the validity of that formula depends on the insertion in the notice of some alternative date. A named date with an alternative was not the formula. A named date is, *ex hypothesi*, one that is a wrong date, and the validity of the notice Atkin, L.J., is contemplating is one which depends on the formula. It is to be observed that he said (*ibid.*, 27): "It is to be noted that in such a case the legal or agreed period of notice is mentioned . . ." That is what validates the formula to his mind and makes it certain, in the sense that it gives an ascertainable date and a date which is only to be ascertained by looking at the tenancy agreement. He then added (*ibid.*)—and this I find very difficult to follow: "and the date of the expiration of the tenancy is a question of fact which the tenant knows, or can properly be deemed to know." I cannot think that Atkin, L.J., was using that expression, "a question of fact," in its technical sense, because the date on which, according to the true construction of the tenancy, the tenancy expires is a matter of construction of the tenancy agreement and is, therefore, a question of law. Atkin, L.J., then went on to say (*ibid.*, 28):

> But it appears . . . to defeat the whole object of notice, to leave the date to be ascertained by the tenant as a problem not of fact but of law.

In other words, he is distinguishing the case where the tenant ascertains the date by looking at the agreement from the case where some problem of law has to be settled. A problem of law may arise on that very point in the agreement, namely, the date, and so it is suggested here, but I cannot take those observations as meaning that it is sufficient to find "difficult questions" of construction (whatever the word "difficult" in Foa on Landlord and Tenant, 7th ed., p. 602, may mean) in the tenancy agreement to invalidate a notice expressed in this particular way. The proposition which I have quoted from Foa on Landlord and Tenant, in my opinion, is one which cannot be extracted from *Phipps & Co.* v. *Rogers* (6).

If I were wrong as to that, I should say that the question of law on the construction of this particular tenancy agreement was not difficult. The test suggested to us by counsel for the tenant was that whether it is difficult or not must depend on what a layman would say about the question. It is, perhaps, not without significance that it was only the advantage or disadvantage of having authorities to consult which persuaded Oliver, J., to take the view that he did take, and, therefore, one might expect a layman to be at a greater advantage in not having his mind liable to be misled by authorities which are certainly of some obscurity, but I do not introduce any such tests. If ever the question arises whether this statement in Foa on Landlord and Tenant correctly states the law, it will have to be discussed in another case. For the purposes of this case I cannot accept the proposition that *Phipps & Co.* v. *Rogers* (6) establishes any such principle. It was a case, as I have said, which depended on its own special facts. I agree that the appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Cunliffe & Airy*, agents for *Rutherfords*, Liverpool (for the landlords); *Silverman & Livermore*, Liverpool (for the tenant).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Applied. DONOVAN *v.* CAMMELL LAIRD & CO. [1949] 2 All E.R. 82.

HONG AND ANOTHER *v.* A. & R. BROWN, LTD. AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., Asquith and Evershed, L.JJ.), January 12, 13, 1948.]

Practice—Costs—"Bullock order"—Plaintiff's right to order—Discretion of judge—R.S.C., Ord. 16, *r.* 7.

A R.S.C., Ord. 16, r. 7, which allows a plaintiff, where he is in doubt as to the person from whom he is entitled to redress, to "join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties," merely gives an option to the plaintiff in the circumstances stated to take the course indicated in the rule, and does not entitle him B as of right to a special order as to costs (*e.g.*, a "Bullock order"), the rule having no reference whatever to costs. Whether or not a special order should be made is a matter of discretion for the judge, and the fact that, when the action was started, it was a reasonable course for the plaintiff to join the successful defendant does not entitle the plaintiff to an order that the costs of the successful defendant be paid by the unsuccessful defendant if, in the opinion of the judge, it is not reasonable C that the unsuccessful defendant should be penalised.

Besterman v. *British Motor Cab Co., Ltd.* ([1914] 3 K.B. 181) *explained.*

[AS TO "BULLOCK ORDER," see HALSBURY, Vol. 26, p. 98, para. 186; and FOR CASES, see DIGEST, Practice, pp. 877-880, Nos. *4176-4194.*]

Cases referred to:

(1) *Bullock* v. *London General Omnibus Co.*, [1907] 1 K.B. 264; 76 L.J.K.B. 127; 95 L.T. 905; Digest Practice 878, *4185.*

D (2) *Besterman* v. *British Motor Cab Co., Ltd.*, [1914] 3 K.B. 181; 83 L.J.K.B. 1014; 110 L.T. 754; Digest Practice 879, *4189.*

(3) *Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K.B. 533; 72 L.J.K.B. 761; 89 L.T. 159; Digest Practice 878, *4184.*

APPEAL by the plaintiffs on a question of costs from a decision of MACNAGHTEN, J., dated Apr. 23, 1947.

E In an action for damages for negligence the plaintiffs joined the first defendants (A. & R. Brown, Ltd.) and the second defendants (Runciman (London), Ltd.) under R.S.C., Ord. 16, r. 7, the allegations being made against them jointly or in the alternative. Judgment was given for the plaintiffs against Runciman (London), Ltd., and the action against A. & R. Brown, Ltd. was dismissed. The plaintiffs contended that they were entitled as of right to an order that the costs of A. & R. Brown, Ltd. should be paid by Runciman (London), Ltd., F but the judge refused to make such an order. The plaintiffs appealed to the Court of Appeal who now held that the judge had a discretion whether or not to make a special order, that he had properly exercised his discretion, and, therefore, the appeal must be dismissed. The facts appear in the judgment of LORD GREENE, M.R.

Wooll, K.C., and *Rose Heilbron* for the plaintiffs.

G *Laski, K.C.*, *Selwyn Lloyd, K.C.*, and *M. L. Williams for* Runciman (London), Ltd.

LORD GREENE, M.R.: This is an appeal on a matter of costs only. Such an appeal cannot be brought without the leave of the court or a judge by reason of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*h*), but that statement requires the qualification that, as costs are in the discretion of the judge, it is always possible to attack his order if it can be H shown that the discretion has never really been exercised. In that expression I would include two matters, each of which nullifies the purported exercise of a judicial discretion. One matter is the failure to act as a judge should act, *i.e.*, act judicially; the other is really a branch of the same thing, namely, to purport to exercise discretion without any materials on which discretion can be exercised.

In the present case two workmen employed in connection with repairs to a ship by the first defendants, A. & R. Brown, Ltd. (whom I will call Brown's) were injured by an escape of steam or boiling water which came through a pipe attached to a piece of mechanism which they were dismantling. The vessel was under the management of the second defendants, Runciman (London), Ltd., who were joined as co-defendants, a case being alleged against them jointly with Brown's or in the alternative. The judge held that the accident was not due to any breach of duty of Brown's to their employees, the plaintiffs, but that it was due to the negligence of the employees of Runciman's, the owners, in the conduct of the machinery for which they were responsible. He, accordingly, dismissed the action against Brown's and gave judgment for damages against Runciman's. At the conclusion of his judgment he said: "I have not yet said anything about costs. I invite applications." It was then submitted by counsel for the plaintiffs that the case was one in which the judge should make what is commonly known as a "Bullock order," [see *Bullock* v. *London General Omnibus Co.* (1)], or the modern variation of it by which a direct order is made instead of a circuitous one. The judge replied to that application by these words: "The plaintiffs' costs against Runciman (London), Ltd. will be granted and there will also be judgment for A. & R. Brown, Ltd., with costs against plaintiffs." Counsel for the plaintiffs pursued his submission that there was a rule of law which entitled him on the facts of the case to a "Bullock order." He said: "The test, my Lord, as in *Besterman* v. *British Motor Cab Co., Ltd.* (2) is: What was the reasonable state of the plaintiffs' mind at the start of the action?" The judge said that it was reasonable for the plaintiffs to make both parties defendants in the action, but added that it was not reasonable that Runciman's should be penalised. Counsel for the plaintiffs then repeated his proposition in rather different words: "The point is whether it is reasonable for the plaintiffs to believe they had a right of action against either or both of the defendants." He said that he had exercised his discretion and did not want to hear counsel any further.

Counsel for the plaintiffs takes two points. He says, first, that the judge did not behave judicially and did not act (to use the phrase of counsel for the plaintiffs) according to reason and justice in refusing to hear him any further. His other point is that there was no material before the judge which would justify him in exercising a judicial discretion in the way in which he purported to exercise it. I will deal with the second point first because, in my opinion, there is a short answer to it. Counsel for Runciman's has given us a great many points—on none of which (except a minor one) is there any controversy—which, in my judgment, show beyond question that the judge had ample material before him to justify him in exercising his discretion in the way he did exercise it, assuming that he was not bound by some rule of law to exercise the discretion in the opposite way.

Counsel for the plaintiffs asserts that this was not a case of discretion at all, and that the judge had no option but to grant a "Bullock order." To support this assertion, he relied before us—and this was the argument, no doubt, that he would have put before the judge—on an argument which consists of two parts. He, first, called attention to R.S.C., Ord. 16, r. 7, which is in the following terms:

> Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties.

Counsel for the plaintiffs said that, if the plaintiff reasonably exercises the right conferred by that rule, he is entitled as of right to a "Bullock order" against the unsuccessful defendant. He based that proposition on *Besterman* v. *British Motor Cab Co., Ltd.* (2), which he wished to quote to the judge. As Evershed, L.J., observed in the course of the argument—an observation with which I entirely agree—R.S.C., Ord. 16, r. 7, has nothing in the world to do with costs. It merely gives an option to the plaintiff in the circumstances stated to take the course indicated in the rule. What the result of his doing so may be in point of costs is not governed by that rule at all, but is governed by the general rules as to costs. If he exercises the right conferred on him by R.S.C., Ord. 16, r. 7, it cannot be said that he is acting in a way that the rules do not authorise, but, conversely, it cannot be said that the fact that he has so acted in any way entitles him to a special order as to costs. Then comes the second stage in the submission which counsel for the plaintiffs endeavours to extract from the *Besterman* case (2). Before MACNAGHTEN, J., and also before us he urged that the test is: What was the reasonable state of the plaintiffs' mind at the beginning of the action? That was the only matter in respect of which the judge did not hear counsel for the plaintiffs and indicated that he was not going to hear him. Can the fact that the judge declined to hear the argument of counsel for the plaintiffs in support of a proposition which was, in my opinion, quite incorrect, be a reason why the Court of Appeal should say that the judge did not act according to reason and justice. Everybody knows that discussions as to costs are discouraged, and rightly discouraged, by judges when they are convinced that they have all the materials before them and there is no arguable point of law. It happens every day. If it did not, it would be a great misfortune, since costs, being in the discretion of the judge, are not matters which are susceptible to sustained argument unless some proposition of law is involved. The only proposition of law which counsel for the plaintiffs wished to advance was one which, in my opinion, was untenable, and on which the judge had rightly instructed himself in saying he had a discretion. That is exactly what the *Besterman* case (2) decided.

The *Besterman* case (2) was one in which the trial judge had made a "Bullock order." The defendants who ultimately proved to be unsuccessful had not, before the issue of the writ, in response to the plaintiff's claim against them, endeavoured to throw the blame on the other defendants. In the correspondence between the two sets of defendants, the defendants who were ultimately unsuccessful accused the other of being partly to blame, and that attitude was persisted in right through the trial. It was argued that the fact that the unsuccessful defendants had not told the plaintiff that the other defendants were to blame was sufficient to deprive the judge of any right or power to make a "Bullock order." One thing that the *Besterman* case (2) decided was that the absence of any blame-throwing by the unsuccessful defendant is not sufficient to disentitle a judge to make a "Bullock order" if, on the facts of the case, he thinks that, in his discretion, he ought to make one. Accordingly, the court held that the judge was entitled as a matter of law on the facts of that case to come to the conclusion that he did. The *Besterman* case (2) also lays down the proposition in clear terms that there is no rule, except the ordinary rule as stated by KENNEDY, L.J., in that case ([1914] 3 K.B. 188), that there must be material on which the judge can exercise his discretion and, of course, he must exercise it according to the ordinary principles on which judges do act in exercise of their judicial discretion. In the *Besterman* case (2) VAUGHAN WILLIAMS, L.J., quoted with approval ([1914] 3 K.B. 186) a passage from the judgment of ROMER, L.J., in *Sanderson* v. *Blyth Theatre Co.* (3) which had been previously approved in this court by COZENS-HARDY, L.J., in *Bullock* v. *London General Omnibus Co.* (1). ROMER, L.J., said ([1903] 2 K.B. 539):

> The costs so recovered over by the plaintiff are in no true sense damages, but are ordered to be paid by the unsuccessful defendant, on the ground that in such an action as I am considering those costs have been reasonably and properly incurred by the plaintiff as between him and the last named [*i.e.*, the unsuccessful] defendant.

That distinction was clearly present to the mind of MACNAGHTEN, J., in the present case, because, although he took the view that the plaintiffs had taken a reasonable course from their point of view, it was not a reasonable course from Runciman's point of view. That proposition has been affirmed more than once in this court and it was affirmed in the *Besterman* case (2) itself. VAUGHAN WILLIAMS, L.J., said ([1914] 3 K.B. 187): "There is no rule in the matter; each case must turn upon its own circumstances . . ." That view was taken by the other members of the court, and I should not have thought that there could be any question that that is the right test. In other words, the *Besterman* case (2) is no authority for the proposition for which counsel for the plaintiffs desired to quote it. It is perfectly true that at the end of his judgment SWINFEN EADY, L.J., said (*ibid.*, 191, 192): "It is obviously convenient that those two claims should be combined in one action arising out of the same set of circumstances and be tried together; and, in my opinion, it is in the interests

of justice that the person who fails in an action brought under these circumstances should pay the costs occasioned by his negligence, including the costs reasonably and properly incurred by bringing the other defendant before the court." Having regard to the circumstances in that case, I cannot construe these words in the way in which counsel for the plaintiffs would have me construe them, which is that any plaintiff who reasonably avails himself of the power given by R.S.C., Ord. 16, r. 7, to join two defendants when he is in doubt is entitled as a matter of right to a "Bullock order." If, indeed, that were what A
SWINFEN EADY, L.J., meant, with great respect I would not agree with it. No authority has been quoted to us which lays down any such proposition. The judgment in the *Besterman* case (2) was not a reserved judgment, and it was a decision on special facts. I read the observations of SWINFEN EADY, L.J., as relating to the facts of that case and not as intending to lay down any such general rule of law as counsel for the plaintiffs endeavoured to extract from them. B

If that be the right view of this case, there is an end of the matter. In my opinion, the judge was not bound in the circumstances to listen further to a submission of law on costs which he must have realised was not maintainable. There is no word in the *Besterman* case (2) which, in my opinion, can properly be construed in any other sense. Therefore, counsel for the plaintiffs fails on both points, and in consequence he does not get C
himself outside the direction in s. 31 (1) (*h*) of the Supreme Court of Judicature (Consolidation) Act, 1925. That being so, the question what we ought to do in the circumstances does not arise. The appeal must be dismissed.

ASQUITH, L.J.: For the reasons given by my Lord, I agree that the preliminary point succeeds, and that, consequently, the appeal fails.

EVERSHED, L.J.: I also agree. D

Preliminary objection upheld; appeal dismissed with costs.

Solicitors: *Isadore Goldman & Son*, agents for *Silverman & Livermore*, Liverpool (for the plaintiffs); *Hill, Dickinson & Co.* (for Runciman (London), Ltd.); *Carpenters* (for A. & R. Brown, Ltd.)

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

E

RICE *v.* RAYNOLD-SPRING-RICE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Barnard, J.), December 16, 17, 1947.]

Divorce—Desertion—Reasonable cause for withdrawal from cohabitation—Matters for consideration—Wife's refusal to allow normal complete intercourse. F

On complaints by a wife before justices, alleging desertion and wilful neglect to maintain, the evidence disclosed that the husband had always been anxious to have a family, but that the wife had consistently refused him normal complete intercourse and refused to bear him a child, and that this attitude of the wife led to constant nagging, displays of bad temper and a serious quarrel, and, eventually, the announcement by G
the husband that he had finally decided that it was impossible to live with the wife any longer and his withdrawal from the matrimonial home. The justices took the view that the wife's conduct was such that normal married life was not possible, that the wife was not genuinely prepared to cohabit with the husband again, and that at the material time the husband was justified in refusing to live with her, and they dismissed the H
summonses:—

HELD: in dealing with the wife's claims for relief the justices had rightly taken into consideration the sexual life of the spouses.

Observation of LORD JOWITT, L.C., in *Baxter* v. *Baxter* ([1947] 2 All E.R. 886, 892) *applied.*

[AS TO REASONABLE CAUSE FOR WITHDRAWAL FROM COHABITATION, see HALSBURY, Hailsham Edn., Vol. 10, p. 837, para. 1338; and FOR CASES, see DIGEST, Vol. 27, p. 322, Nos. *3000-3013.*]

Cases referred to:

(1) *Cowen* v. *Cowen*, [1945] 2 All E.R. 197; [1946] P. 36; 114 L.J.P. 57; 173 L.T. 176; Digest Supp.

(2) *Baxter* v. *Baxter*, [1947] 2 All E.R. 886; H.L.; *affg. on other grounds* [1947] 1 All E.R. 387.

APPEAL by the wife against a dismissal, on Oct. 22, 1947, by Bootle justices of two summonses against the husband alleging wilful neglect to maintain her and desertion. The appeal was dismissed. The facts appear in the judgment A of LORD MERRIMAN, P.

Tarsh for the wife.

Glyn Burrell for the husband.

LORD MERRIMAN, P.: This is an appeal by the wife against a decision of justices for the borough of Bootle, who, on Oct. 22, 1947, dismissed her two summonses, founded on allegations of desertion and wilful neglect to provide B reasonable maintenance for her, on the ground that they did not consider that she had made out a case.

The parties were married in March, 1940, and there is no doubt, on the face of the husband's evidence, which the justices have accepted, that he was very anxious to have a family, but, in June or July, 1941, by reason of the circumstances then prevailing, the spouses came to an understanding that they would not have children during the war. Neither side attempted to go C back on that understanding so long as it subsisted, but by Easter, 1946, it is clear, things were not going well between the spouses. The wife puts the blame on the husband. The husband maintains that the background of all their troubles was the wife's refusal to bear a child. There is no doubt that there was a very serious quarrel at this Easter. The husband says that both before and after that time there was one constant course of nagging, with the wife D "bawling" at him and bad temper on her part. So far as the sexual aspect of the matter is concerned, he says that she always refused to allow him to complete the sexual act within her body. In October the wife went into hospital for a serious operation. The husband, very rightly, while she was in hospital, went to see her and did his best to avoid controversial matters, but on Nov. 22, 1946, when she was due to come out of hospital, he wrote a letter in which he said that he had finally decided it was impossible to live with her E any longer, and referred to the quarrel at Easter as the "final row." On Nov. 28 the letter was followed by the husband's petition for nullity on the ground of wilful refusal to consummate. That petition was founded on the decision in *Cowen* v. *Cowen* (1), and the wife, in her answer, cross-petitioned for nullity on precisely the same grounds. The petitions came on before OLIVER, J., at Liverpool Assizes on June 18, 1947, and both were dismissed. There was nothing in the decision of OLIVER, J., which would bind us at all, F for he said, in effect, that on the evidence each spouse had failed to satisfy him that he or she had discharged the onus of proof. That leaves everything open to us.

[HIS LORDSHIP considered the facts relating to the allegation of wilful neglect to maintain and said that that claim stood or fell with the decision on the main issue, *viz.*, desertion. On the latter issue he continued:—] There is a clear G note of the evidence and it is easy to see the material on which the justices decided the matter. In their reasons, the justices say: "We have considered these cases very carefully, and have come to the conclusion that the cases for desertion and wilful neglect to maintain have not been made out. The summonses are accordingly dismissed. The bench believed the evidence of the husband rather than that of the wife." It was entirely a matter for them. They saw both spouses, they heard the evidence which both gave, they observed H their demeanour, and we see no ground whatever for differing from the justices in preferring the evidence of the husband to that of the wife. The reasons go on: "The bench took the view that the wife did refuse the husband normal complete intercourse and did refuse to bear him children. The evidence disclosed the husband's keenness for children, which supported his statement that that was the main theme of the Easter quarrel. The bench took the view that the wife's conduct was such that normal married life was not possible . . . The bench took the view that the wife was not genuinely prepared to cohabit with the husband again."

Assuming those reasons to be justified by the evidence and maintainable in law, there is an end of the case. The decision of the House of Lords in *Baxter* v. *Baxter* (2) has a very striking bearing on the issue we are going to decide. That decision is, first, that, on the particular facts in *Baxter* v. *Baxter* (2), the Court of Appeal were not justified in holding that the husband had acquiesced, or, as the trial judge put it, was the author of his own wrong, so that, if the marriage had not been consummated, there would have been no bar to relief. That drove their Lordships back to the question whether A *Cowen* v. *Cowen* (1) was rightly decided, and their Lordships held that it was wrongly decided, that the marriage in that case had been consummated, and that the marriage in *Baxter* v. *Baxter* (2), where the facts were indistinguishable, had also been consummated, though it is only right to say, so that there may be no misapprehension, that there was no decision expressly on that aspect of *Cowen* v. *Cowen* (1) which dealt with the course of sexual relationship involving *coitus interruptus*, a practice which prevailed during part of the married life of B the parties there. Equally, in so far as that bears on the present case, we are not dealing with it in any way. At the conclusion of his speech the Lord Chancellor said ([1947] 2 All E.R. 892):

> I take the view that in this legislation [*i.e.*, the Matrimonial Causes Act, 1937, s. 7 (1) (*a*)] Parliament used the word "consummate" as that word is understood in common parlance and in the light of social conditions known to exist, and that the proper occasion for considering the subjects raised by this appeal is when the C sexual life of the spouses, and the responsibility of either or both for a childless home, form the background to some other claim for relief.

Every word of that sentence applies precisely to the case which we are considering, and the justices, in my opinion, have dealt with that aspect of the matter perfectly correctly. They have correctly appreciated the bearing of the matters which they were discussing on the parting between these spouses, D and I find myself unable to add to or detract from the statement of their reasons which seem to me to be unexceptionable.

I only wish to add one word. It was argued by counsel for the wife, and there was some justification for the argument having regard to the use of the word "final" twice repeated in the husband's statement of his own attitude, that the husband would feel that he was entitled to take up the attitude, if the justices were held to be right, that the wife herself had become a deserter E for all time in view of the fact that she is now sterile. A more detailed perusal of the Lord Chancellor's speech in *Baxter* v. *Baxter* (2) will make it clear that the fact that she is now sterile, although otherwise capable of sexual intercourse, does not affect the matter one way or the other. What does affect the matter is that the wife has been held in the past to have taken up a wrong-headed attitude towards the sexual relations between herself and her husband and to have aggravated the resentment which he felt at that attitude by her F constant nagging, quarrelling, and, to use his own words, "bawling" at him day in day out. There is nothing irrevocable about any of these matters. The wife can mend her ways. She can determine, and show she is determined, to resume cohabitation in the full sense of the word and to render her husband wifely duties not merely in connection with sexual matters, but in the daily conduct of married life. If so, the husband is not entitled to take up the view G that it is finally decided that this marriage is at an end. Far from it. It will be his duty, in turn, to be ready and willing to resume cohabitation. If not, always assuming that the wife, in the true sense of the word, is ready and willing to resume cohabitation, it will be he who will assume the character of deserter. The justices were justified in taking the view that the wife was not genuinely prepared again to cohabit with the husband, but there is nothing in that finding to the effect that, if she changes her heart about these matters, H there is any impediment to the resumption of married life. For these reasons I think this appeal must be dismissed on both summonses.

BARNARD, J.: I agree with my Lord. The sentences towards the end of the Lord Chancellor's speech in *Baxter* v. *Baxter* (2), to which my Lord has referred seem to be almost prophetic of this case. The justices here were considering a claim for relief other than annulment (which, of course, they would have no jurisdiction to consider), and, in dealing with that claim for relief, they took into consideration the sexual life of the spouses. They considered the responsibility of either or both for a childless home, and they came to the conclusion, which, I think, is a perfectly proper one, that the wife was to blame for the sexual unhappiness of the parties, which, when her husband complained of it, her attitude, led to her insults and extraordinary conduct towards him. Being satisfied that that was true, they found that the husband at that time was justified in refusing to go on living with his wife. For the reasons which my Lord has already given, with which I entirely agree, this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Bower, Cotton & Bower*, agents for *S. B. Levin*, Liverpool (for the wife); *Silverman & Livermore*, Liverpool (for the husband).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

HARRIS *v.* MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), January 12, 13, 1948].

Royal Forces—Pension—Award of entitlement—Arthritis caused by accident while in army—No present disability—Royal Warrant Concerning Retired Pay, Pensions, etc., 1943 (*Cmd.* 1943, *No.* 6489), *art.* 1 (4).

While serving in the army the claimant twice sprained his right ankle, which left him with a post-traumatic arthritis. On his release from the army, his claim to a pension on the ground of arthritis was refused because there was then no disability as a result of arthritis:—

HELD: "disablement," within art. 1 (4) of the Royal Warrant Concerning Retired Pay, Pensions, etc., 1943 (where it is defined as meaning "physical or mental injury or damage, or loss of physical or mental capacity") dose not mean disablement in the ordinary sense of "incapacity," but where there is physical injury or damage, even though not causing any loss of capacity at the moment, there is "disablement" within the meaning of the warrant, and an award of entitlement may be made although it will not give rise to the actual grant of a pension unless and until incapacity appears, and, therefore, the claimant was entitled to an award of entitlement, but for the present the amount of the pension would be *nil*.

[FOR THE PENSIONS APPEAL TRIBUNALS ACT, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 480.]

APPLICATION by the claimant for leave to appeal against a decision of a pensions appeal tribunal dismissing his claim for a pension on the ground that there was now no disability as a result of arthritis contracted by him while in the army. DENNING, J., gave leave to appeal, and decided the appeal in the claimant's favour. The facts appear in the judgment.

Crispin for the claimant.
H. L. Parker for the Minister.

DENNING, J.: In this case I give leave to appeal because a question arises as to the meaning of "disablement" in the Royal Warrant Concerning Retired Pay, Pensions, etc., 1943, and in the Pensions Appeal Tribunals Act, 1943, and, in accordance with recent practice, I proceed to decide the appeal.

The claimant, Eric Charles Kitchener Harris, joined the army in 1940. He had two accidents during his service. On two occasions he sprained his right ankle and that left him with a post-traumatic arthritis. That was treated while he was in the army and he suffered very little ill effect for the last two years of his service. When he was released he claimed a pension on the ground of arthritis. He said he had pain in both ankles, and he was examined. The movements of both ankles were found to be normal, and there was no deformity other than a slight thickening around the right metatarso-phalangeal joint. The effect of the disability on his function was said to be very slight. His claim to a pension was rejected by the Minister of Pensions on the ground that there was no disability as a result of arthritis. The claimant appealed to a pensions appeal tribunal. He was examined by the medical member, who reported: "He can stand on his toes, jump up, and return to his toes. The joints are normal in appearance. Movements are full and free. There is no grating or creaking, and there is no pain or discomfort on all active or passive movements. There is no bony abnormality in either ankle joint and no arthritis is present or evident to-day. There is no disability in the ankle joints." On that evidence the tribunal rejected the appeal. The claimant appeals to me, his point being that, although there is no disability, he is still entitled to an award of entitlement even though the amount of any pension may now be nothing, because, he says, if he should get worse in the future, he would then be entitled to a pension. A

I am satisfied that, under the warrant, in order that there should be an award of entitlement, there must be a "disablement." The existence of "disablement" is a necessary condition of an award of entitlement but "disablement" in the warrant does not mean disablement in the ordinary sense of "incapacity." It is defined in art. 1 (4) of the warrant as meaning: "physical or mental injury or damage, *or* loss of physical or mental capacity." The word used is "*or*." On that definition, if there is a physical injury or damage, B even though it does not cause any loss of capacity at the moment, it is, nevertheless, a "disablement" within the meaning of the warrant. During the argument the case was put of a shell splinter in a man's arm which may cause no loss of capacity at the moment, but may do so later. It is a physical injury which is a "disablement" on which an entitlement award may be based, but, if it causes no loss of capacity, either for work or enjoyment of life, the amount C of the pension will be *nil*. It is parallel to a declaration of liability under the Workmen's Compensation Act, 1925. An award of entitlement may be granted which will not give rise to the actual grant of a pension unless and until incapacity appears.

Applying that to this case, it is plain that there was a disablement within the definition. The diagnosis when the claimant left the army was "? Arthritis both ankles," and, giving him the benefit of any reasonable doubt, it should be D held in his favour that arthritis was then present and was attributable to war service. It was a post-traumatic arthritis which was a "physical injury or damage" and was, therefore, a disablement, but, on the evidence, it is plain that for the time being he is not entitled to any money. It is a case for a *nil* assessment at the moment. I allow the appeal and an award of entitlement must issue, but the present assessment will be *nil*.

Appeal allowed. E

Solicitors: *Culross & Trelawny* (for the claimant); *Treasury Solicitor* (for the Minister of Pensions).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

F

MIDDLESEX COUNTY COUNCIL *v.* MILLER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Singleton and Byrne, JJ.), January 13, 1948.]

Medicine and Pharmacy—Nurses—Agency—Licence by local authority—Condition—Limitation on fees receivable by agency—Nurses Act, 1943 (*c.* 17), *s.* 8 (2). G

By s. 8 (2) of the Nurses Act, 1943, it is provided that a licensing authority under the Act shall grant a licence to a person desiring to carry on an agency for nurses and applying therefor subject "to such conditions as they may think fit for securing the proper conduct of the agency, including conditions as to the fees to be charged by the person carrying on the agency, whether to the nurses or other persons supplied, or to the persons to whom they are supplied." In pursuance of their powers under this provision, a county H council, as the licensing authority, when granting a licence imposed a condition that "the licensee shall not demand or receive from any person any sum in respect of the services of any nurse or other person supplied which is in excess of the amount appropriate to that nurse or other person calculated in accordance with the scale of charges approved by the council and furnished to the licensee."

HELD: the condition was not required for securing the proper conduct of the agency, and was, therefore, *ultra vires.*

[FOR THE NURSES ACT, 1943, s. 8 (2), see HALSBURY'S STATUTES, Vol. 36, p. 214.]

CASE STATED by Middlesex justices.

At a court of summary jurisdiction sitting at Hendon on June 30, 1947, the present respondent, the holder of a licence to carry on an agency for the supply of nurses on premises at 52 Ashbourne Avenue, London, N.W. 11, within the area of the appellants, the Middlesex County Council, the licensing authority for that area under the provisions of the Nurses Act, 1943, appealed under s. 8 (4) of the Nurses Act, 1943, against the imposition by the county council of certain conditions attached to the licence. The justices allowed the appeal, and the county council now appealed to the Divisional Court which dismissed their appeal. The facts appear in the judgments.

Sir Cyril Radcliffe, K.C., and *Vernon Gattie* for the appellants.
Busse and *L. I. Halpern* for the respondent.

LORD GODDARD, C.J. : Under the Nurses Act, 1943, s. 8 (1), it is necessary that a person who carries on an agency for the supply of nurses should obtain a licence from the local authority who have conferred on them by s. 8 (2) certain powers to impose conditions. By s. 8 (4) a person who is aggrieved by a refusal to grant a licence or by the conditions imposed is given a right of appeal to a court of summary jurisdiction. The respondent having so appealed, the court of summary jurisdiction before whom his appeal came held that a condition which appeared in his licence was *ultra vires*. In my opinion, they were transparently right.

By s. 8 (2) of the Act it is provided that, if certain stipulations are complied with, the authority shall grant a licence,

> . . . subject, however, to such conditions as they may think fit for securing the proper conduct of the agency, including conditions as to the fees to be charged by the person carrying on the agency, whether to the nurses or other persons supplied, or to the persons to whom they are supplied.

The sole question for the consideration of this court is whether the magistrates were right in coming to the conclusion that the condition imposed was not one for securing the proper conduct of the agency, and, therefore, was *ultra vires*. The facts as found by the magistrates show that agencies for the supply of nurses can be divided into three categories. The first is where the person conducting the business actually employs the nurses himself, pays them a salary, and lets them out as his servants to a person who requires the services of a nurse. I say no more than that it may be open to a local authority to impose a limit to what a man who carries on his business in that way may charge for the services of his nurses because he himself is the contractor. Secondly, there are agencies which supply nurses who collect their own fees and pay the agency a commission. In other words, the agency is a mere conduit pipe for putting the patient in communication with the nurse, the nurse makes her own bargain with the patient, and pays the agent a commission for the services which he has rendered in getting her employment in exactly the same way as a domestic registry office charges a commission for supplying a domestic servant. Thirdly, and this is the present case, there are agencies which find employment for nurses on their books at the salaries which the nurses require. Mark those last words. The agency introduces a nurse to a patient at that salary and on her behalf renders accounts to the patient and collects the amount thereof from the patient, paying it to the nurse after the deduction of a commission which in the respondent's case is 10 per cent. The legal result of carrying on business in that way is clear. The agent introduces the nurse to the patient and at the nurse's implied request as her agent collects the nurse's remuneration from the patient. He has then to account to the nurse for the money he has collected from the patient, subject only to the deduction of his own commission. It is conceded that there is nothing wrong in an agency supplying nurses on the basis that they make their own bargains, nor would there be anything wrong in an agent supplying a nurse at a fee prescribed by the appellant council and the nurse then making some additional bargain with the patient and recovering some extra money from them. The condition which the appellants have inserted in this case is that the respondent shall not collect from a patient more than a maximum sum which the appellants have taken on themselves to prescribe, quite independently of whether or not the nurse is willing to work for that amount of money. If the nurse will not work for that sum, one would arrive at the rather curious position that the respondent could collect on her behalf, say, 5 gns. a week, and at the same time she would be able to say to the patient: "I want another 2 gns. a week which you pay to me direct instead of paying it to Mr. Miller."

Can it be said that, in imposing such a limit, the appellants are imposing a condition as to the proper conduct of the agency? I think that s. 8 (2) is aimed at what I may call undue fee-snatching on the part of people who carry on employment agencies of various descriptions. It is often found that unscrupulous agents charge excessive fees and may prevent people getting employment except on payment of such fees or impose on them improper or undesirable terms, and so it is thought desirable that their activities should be limited and controlled by means of conditions in the licences granted, but I can see nothing in the present case to suggest that, if a nurse is willing to work for the patients whom the respondent finds for her, but requires 7 gns. a week, and the respondent tells the patient that that is the charge, that is not proper conduct on the part of the agency. I agree with the magistrates that the condition sought to be imposed is *ultra vires*, and therefore, in my opinion, the appeal should be dismissed.

SINGLETON, J.: The magistrates came to the determination that condition 7 of the licence was *ultra vires*. In my opinion, they were right in so doing. The condition provides that except under consent,

> . . . the licensee shall not demand or receive from any person any sum in respect of the services of any nurse or other person supplied which is in excess of the amount appropriate to that nurse or other person calculated in accordance with the scale of charges approved by the council and furnished to the licensee.

That is an effort to limit the payment to be made to any nurse employed through an agency in the county. I cannot see, nor, indeed, is it argued, that the legislature has given power to the county council or licensing authority to fix maximum payments to nurses. Section 8 (2) of the Nurses Act, 1943, provides that the licensing authority shall grant a licence, "subject, however, to such conditions as they may think fit for securing the proper conduct of the agency." I do not think that the condition in question here was in any sense necessary for securing the proper conduct of the agency. I think it went outside anything of the kind, and I agree that the justices' decision was right.

BYRNE, J.: I agree.

Appeal dismissed.

Solicitors: *C. W. Radcliffe*, clerk to Middlesex County Council (for the appellants); *Reed & Reed* (for the respondent).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

Distinguished. R. v. Surrey (Mid-Eastern Area) Ass. Com. *Ex p.* Merton and Morden U.D.C. [1948] 1 All E.R. 856.

R. *v.* READING ASSESSMENT COMMITTEE AND ANOTHER. *Ex parte* McCARTHY E. FITT, LTD.

[King's Bench Division (Lord Goddard, C.J., Singleton and Bryne, JJ.), January 13, 14, 1948.]

Rates and Rating—Valuation list—Amendment—Proposal—Specification of grounds for proposed amendment—Sufficiency—Rating and Valuation Act, 1925 (c. 90), s. 37 (2).

On Mar. 13, 1947, a rating authority made a proposal for the amendment of their valuation list in respect of an industrial hereditament assessed therein, giving the grounds of the proposal as: "Existing assessment unfair, incorrect and insufficient." The amendment proposed was not stated, but in the column provided therefor in the form used were entered the words: "To be amended." Below the date appeared the words: "A further communication will be sent to you in due course." On Oct. 3, 1947, a letter was sent by the rating authority to the occupier of the hereditament stating that the assessment proposed was: Net annual value £238, apportioned for industrial purposes £218 and for non-industrial purposes £20, the rateable values being £74, £54 and £20. The corresponding figures of the existing assessment were £97, £61, £36, and £51, £15 and £36.

HELD: the "proposal" of Mar. 13, 1947, alone should be regarded and it was invalid because it did not indicate clearly what the rating authority were proposing.

R. v. *Thanet and District Assessment Committee and Kent County Valuation Committee, Ex parte Isle of Thanet Gas Light and Coke Co.* ([1939] 2 All E.R. 489) *applied.* A

[AS TO PROPOSALS FOR THE AMENDMENT OF THE VALUATION LIST, see HALSBURY, Hailsham Edn., Vol. 27, pp. 484-488, para. 913; and FOR CASES, see DIGEST, Vol. 38, p. 585, and Supp. For the RATING AND VALUATION ACT, 1925, s. 37, see HALSBURY'S STATUTES, Vol. 14, p. 665.]

Cases referred to:

(1) *R.* v. *West Norfolk Assessment Committee, Ex parte Ward* (*F. B.*), (1930), 94 J.P. 201; (1926-30) 1 B.R.A. 418, C.A.; Digest Supp. B

(2) *R.* v. *Thanet and District Assessment Committee and Kent County Valuation Committee, Ex parte Isle of Thanet Gas Light and Coke Co.*, [1939] 2 All E.R. 489; [1939] 2 K.B. 640; 108 L.J.K.B. 515; 160 L.T. 509; 103 J.P. 186; 83 Sol. Jo. 547; 37 L.G.R. 345; Digest Supp.

MOTION for order of prohibition.

The second respondents, Reading Rating Authority, made a proposal for the C amendment of their valuation list in respect of an industrial hereditament assessed therein which was occupied by the applicants. The grounds of the proposal were "Existing assessment unfair, incorrect, and insufficient." The new figures of the assessment proposed were not given, but were communicated to the applicants in a letter six months later. The applicants applied for an order of prohibition directed to the assessment committee prohibiting them from D hearing and determining the proposal on the ground that it was invalid. The Divisional Court made the order asked for. The facts appear in the judgment of the court.

Dare for the applicant ratepayers.

P. C. Lamb for the rating authority and the assessment committee.

SINGLETON, J., delivered the following judgment of the court. The E applicants, McCarthy E. Fitt, Ltd., are the occupiers of premises in Trinity Place, Reading, and on or about Mar. 13, 1947, they received a proposal for the amendment of the valuation list in respect of the premises of which they were, and still are, occupiers. That proposal was made under s. 37 of the Rating and Valuation Act, 1925, which provides:

> (1) Any person (including the county valuation committee and any local authority) F who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter, or by the valuation as a single hereditament of a building or a portion of a building occupied in parts, or otherwise with respect to the list, may make in manner provided by this section a proposal for the amendment of the list (in this section referred to as "a proposal"), and where a rating authority in pursuance of the provisions of this Act make any amendment in a rate other than the correction of a clerical or arithmetical error, or the correction of an erroneous insertion, omission, G or misdescription, the authority shall forthwith make a proposal for any necessary amendment of the list. (2) Every proposal made under this section must (*a*) be made in writing and, except where it is made by the rating authority, be served on the rating authority; (*b*) specify the grounds on which the proposed amendment is supported.

The proposal, if proposal it be, to which objection is taken is dated Mar. 13, 1947. It is on a form which has, no doubt, been adopted by rating authorities. H The form is headed "R.V.6a," and "County Borough of Reading. Rating and Valuation Acts, 1925-1940. Proposal for the amendment of the valuation list." It is addressed to the occupier, and states: "In pursuance of s. 37 of the Rating and Valuation Act, 1925, the rating authority do hereby make a proposal for the amendment of the valuation list now in force for the county borough of Reading in the manner following, namely . . ." Then the document is divided into columns, the second and third being headed "Valuation list now in force," "Proposed amendment." In the second column opposite "Gross Value" there appeared the words "Part II" and opposite "Net Annual

Value " " £97—(industrial £61 and non-industrial £36) " and opposite " Rateable Value " " £51—(industrial £15 non-industrial £36)," while in the third (or " Proposed Amendment ") column there appeared opposite each of these the words : " To be amended." This was of no help to anyone. To enter in a proposed amendment column the words " To be amended " does not lead anywhere. In the space provided for the grounds of the proposed amendment the words appear : " Existing assessment unfair, incorrect, and insufficient." The document, therefore, deals with net annual value, rateable value and the value of the industrial and non-industrial portions of the hereditament separately. The grounds of amendment nowhere indicate to whom any part of the assessment is unfair, or whether or not the industrial or the non-industrial parts or merely the net annual value and rateable value are to be altered. One of those figures might be unfair to the ratepayer, and another might be to the rating authority : there is nothing whatever to show on the face of the document. Below the date appearing on the form, Mar. 13, there appear these further words : " A further communication will be sent to you in due course."

It is not clear on the face of that document what is desired. Indeed, it may well be said that the rating authority by whom the proposal was made were not themselves sure what they wanted, because they add : " A further communication will be sent to you in due course." On Oct. 3, 1947, a further document was sent to the occupiers in these terms : " Dear Sir, Rating and Valuation Act, 1925. With reference to the proposal for amendment of the valuation list made by the rating authority on Mar. 13, 1947, a copy of which has been duly served on you pursuant to s. 37 of the above Act, I have to inform you that the proposed amendment is as under." The document proceeds to indicate that the net annual value should be raised to the sum of £238, but of that a much larger portion is to be treated as industrial, £218, leaving the non-industrial portion only £20, so that the rateable value was to be £54 plus £20, a total of £74.

Counsel for the rating authority does not seek to say that those two documents can be read as one and dated back to Mar. 13. He realises that that would be an impossible argument, and he is content to rest his submission on behalf of the authority on the document of Mar. 13. He submits that that was a good and valid proposal having regard to the terms of s. 37 of the Rating and Valuation Act, 1925, and to the various cases which have been decided under that section. The first thing which one would desire to say is that these matters ought not to be looked on too strictly. The object of the Rating and Valuation Act, 1925, and of s. 37, in particular, is that each party may know where he stands. Section 37 (2) lays down certain requirements. In the first place, the proposal must be made in writing. In the second place, it must specify the grounds on which the proposed amendment is supported. The occupier may be told that an increase in the value of the hereditament is proposed because of a change in the value of property, or because of some addition, or the like. So long as he is given some information which conforms reasonably to the section, that is all that is required. The document of March 13 did not sufficiently indicate what was proposed or suggested. The occupiers at least ought to be put in a position to be able to form a view whether they should call in professional advice or not.

A number of authorities were cited to the court, and counsel for the rating authority relied in particular on certain words of Scrutton, L.J., and Greer, L.J., in *R.* v. *West Norfolk Assessment Committee* (1). Those words were referred to by Lord Hewart, C.J., in his judgment in *R.* v. *Thanet and District Assessment Committee and Kent County Valuation Committee* (2) in this way ([1939] 2 All E.R. 494) :

> Our attention has been directed . . . to *R.* v. *West Norfolk Assessment Committee, Ex. p. Ward (F. B.)* (1). I need not reiterate the facts of that case, . . . but I do observe that Scrutton, L.J., in his judgment, said (94 J.P. 202) : " One point in this case may arise as to whether a proposal for amendment which does not state what amendment is proposed, is a good proposal." In the same case, Greer, L.J., said (*ibid.*, 203) : " It seems to me to be sufficient if his proposal says that he desires to have the list amended and states the way in which he desires to have it amended, namely, by the reduction of the total assessment without stating the amount of the reduction which he is going to ask the assessment committee to approve." Can it

> fairly be said here, though, that this so-called proposal does state what amendment is proposed? I agree that it matters not whether that which is proposed translates itself into terms of reduction or into terms of increase, but who can say what it is that is proposed here? [The matter seems to me to be left altogether too vague.]

Earlier in his judgment in the *Thanet* case (2) LORD HEWART, C.J., said (*ibid.*, 493):

> Mr. Rowe argues, and I think that he argues with some force, that that statutory requirement presupposes, first of all, that there is an amendment clearly proposed, and, secondly, that the grounds on which it is supported are clearly set out. What is the amendment which is here proposed? The answer is that the matter is left vague, except that the county valuer says that there is a proposal that the present assessments, being unfair and incorrect, should be amended. In what sense is it said that they are unfair and incorrect? When one looks at the grounds which apparently are the grounds purporting to specify the particular reasons for which the amendment of the list is proposed, one finds the following words: "Amendment . . . To such an amount as may be determined on an approved apportionment of the *cumulo* value."

It seems to us that every objection which could be taken to that which was done in the *Thanet* case (2) can be taken in the present case, and in the *Thanet* case (2) it was decided that the proposal did not sufficiently specify the grounds on which the proposed amendment was supported as required by s. 37 of the Act and was, therefore, invalid. That was the decision of this court after consideration of the words of SCRUTTON, L.J., and GREER, L.J., in the *West Norfolk Assessment Committee* case (1). Having heard the submissions of counsel we feel that in the present case we need do no more than look at the document itself which is said to be a proposal. It does not follow the requirements of s. 37. Where the proposed amendment should appear an increase or a decrease of the net annual value or the rateable value, or some change with regard to the industrial or non-industrial part of the hereditament, the only entry is: "To be amended." No one desires that occupiers should escape an increase if an increase ought to be made, but they are entitled to have something to show them what the suggestion is, in other words, a proposal which is in accordance with the terms of s. 37 of the Act. In our view, this proposal was not in accordance with that which the statute requires, and, consequently, an order of prohibition ought to be made.

Order for prohibition with costs.

Solicitors: *Berrymans*, agents for *Brain & Brain*, Reading (for the applicants); *Sharpe, Pritchard & Co.*, agents for *G. F. Darlow, Town Clerk*, Reading (for the respondent rating authority); *Sharpe, Pritchard & Co.* (for the respondent assessment committee).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

YOUNG *v.* CLAREY AND OTHERS.

[CHANCERY DIVISION (Harman, J.), January 13, 14, 1948].

Mortgage—Remedies of mortgagee—Puisne mortgagee—Title to mortgaged property extinguished—Sale by first mortgagee—Right of puisne mortgagee to surplus profits—Law of Property Act, 1925 (*c.* 20), *ss.* 104, 105, 107, 116*—Limitation Act,* 1939 (*c.* 21), *ss.* 12, 16.

On Dec. 23, 1920, B. mortgaged his freehold farm to C. to secure £3,000. On Jan. 1, 1926, the fee simple conveyed by the mortgage was converted into a term of 3,000 years by the Law of Property Act, 1925. On July 7, 1926, B. raised a further sum of £500 on the security of the farm by means of a charge by way of legal mortgage, which vested in the second mortgagee, Y., a term of years exceeding by 10 days C.'s term to which it was subject. In August, 1931, C. died. On Jan. 30, 1933, B. ceased paying the interest on the mortgages, and on Apr. 5, 1933, C.'s executors went into possession. In October, 1933, the executors received a sum of money on account, but were thereafter in possession without any acknowledgment being made which would prevent time running under the statute of limitation, and, accordingly, in October, 1945, the rights of B. and Y. became barred by the Limitation Act, 1939. On Mar. 10, 1947, the farm was sold by C.'s executors under the statutory power of sale.

HELD : Y.'s title to the mortgaged property was extinguished by the Limitation Act, 1939, ss. 12 and 16, and, accordingly, Y. could not be "the person entitled to the mortgaged property" within s. 105 of the Act of 1925, nor had ss. 107 and 116 of that Act any application so as to constitute Y. "a person authorised to give receipts for the proceeds of sale" within s. 105, and, therefore, Y. was not entitled to any sum realised in excess of the amount of the first mortgage, the interest thereon, and costs. A B

Re Alison, Johnson v. *Mounsey,* (1879) (11 Ch.D. 284), *Locking* v. *Parker* (1872) (8 Ch. App. 30), and *Re Thomson's Mortgage Trusts, Thomson* v. *Bruty* ([1920] 1 Ch. 508) *distinguished.*

[AS TO APPLICATION OF PROCEEDS OF SALE OF MORTGAGED PROPERTY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 442-444, paras. 650-653 ; and FOR CASES, see DIGEST, Vol. 35, pp. 513-517, Nos. *2434-2468.*] C

Cases referred to :

(1) *Re Alison, Johnson* v. *Mounsey,* (1879), 11 Ch.D. 284 ; 40 L.T. 234 ; 27 W.R. 537 ; 35 Digest 553, *2815.*

(2) *Locking* v. *Parker,* (1872), 8 Ch. App. 30 ; 42 L.J.Ch. 257 ; 27 L.T. 635 ; 21 W.R. 113 ; 35 Digest 552, *2814.*

(3) *Re Thomson's Mortgage Trusts, Thomson* v. *Bruty,* [1920] 1 Ch. 508 ; 89 L.J.Ch. 213 ; 123 L.T. 138 ; 35 Digest 514, *2445.*

D

ADJOURNED SUMMONS to determine whether, by virtue of the Law of Property Act, 1925, s. 105, the money received by the executors of the first mortgagee on sale of the mortgaged property under the mortgagee's statutory power of sale in excess of the costs of the sale and after discharge of the mortgage money, interest, and costs due under the mortgage ought to be held by them on trust to pay the same to the second mortgagee, or how otherwise the said money ought to be dealt with. The executors had been in possession of the property E for more than 12 years, and the rights of the mortgagor and second mortgagee were barred by the Limitation Act, 1939. HARMAN, J., made no order except as to costs. The facts appear in the judgment.

R. Lionel Edwards for the plaintiff.
Myles for the executors of the first mortgagee.
The third defendant (the mortgagor) did not appear. F

HARMAN, J. The plaintiff, Arthur Young, is a person to whom the property in question was demised by way of second mortgage in 1926. He claims as against the first two defendants, who are the personal representatives of the first mortgagee, Charles Clarey, to be entitled to an account from them of any surplus moneys arising from the recent sale by them of the property. G The cardinal point in the case is the true meaning of s. 105 of the Law of Property Act, 1925.

The property is a farm in the county of Lincoln. It was purchased by the third defendant, Harry Lucas Brown (the mortgagor), who has not entered an appearance, in 1920, and on Dec. 23, 1920, was mortgaged by him to Charles Clarey to secure £3,000 and interest. The fee simple conveyed by that mortgage was, on Jan. 1, 1926, converted into a term of 3,000 years by the H Law of Property Act, 1925 ; on July 7, 1926, the mortgagor raised a further sum of £500 on the security of the property by a second mortgage which was a charge by way of legal mortgage subject to the first mortgage, and thereby gave to the second mortgagee an estate equivalent to a term of years outlasting that vested in the first mortgagee by ten days. The first mortgagee died in August, 1931, and his will was proved by the first two defendants in February, 1932. Interest on the second mortgage, and, therefore, presumably on the first as well, was paid down to Jan. 30, 1933. On Apr. 5, 1933, the executors of the first mortgagee went into possession. The executors received a sum of money on account in October, 1933, but from that time forward they have been in possession without any acknowledgment which would interrupt the flow of the statutory period in their favour. Therefore, in October, 1945, the rights of the puisne mortgagee and of the mortgagor were barred by the Limitation Act, 1939, and their rights ceased as did their title, under sections to which I will refer.

A On Oct. 28, 1946, the executors, still purporting to act as personal representatives of the first mortgagee, contracted to sell the property for £3,900 under a written instrument from which it appears that they were selling as mortgagees. No. 4 of the Special Conditions of Sale states: "The vendors are selling as mortgagees who entered into possession prior to Sept. 1, 1939." In other words, they are relying, not on their statutory rights under the Limitation Act, but on their rights as mortgagees. That contract was completed B on Mar. 10, 1947, by a conveyance, in which is recited the mortgage, the effect of the Law of Property Act, 1925, and the death of the first mortgagee. The entry into possession is only recited in so far as it is necessary to show that no leave to sell was necessary under the Courts (Emergency Powers) Act, 1943. The operative part of the deed refers to "the sale by the vendors as personal representatives in exercise of all powers," and I think I may take C it that they were selling in exercise of their power of sale as mortgagees, because that is what the Act says that they should be deemed to do: see Law of Property Act, 1925, s. 104 (3). At any rate, I am content, for the purposes of my decision, to assume that they could and did exercise their power of sale as mortgagees.

There appears to be some reason to suppose, although it is not proved, that the sale effected by the executors might leave in their hands a sum of money over and above what would be sufficient to pay the principal, interest and D costs of their mortgage, and the plaintiff, accordingly, thinks it would be to his advantage to have decided the question whether any surplus is payable to him as the puisne mortgagee. Counsel for the plaintiff says it does not matter, though it be the fact that the executors might make a title as absolute owners under the Statute of Limitations. They have not chosen to do so, but they have chosen to exercise their powers of sale as mortgagees, and, therefore, they must be taken to be mortgagees for all purposes. The usual results E ensue, he says, which follow from a sale by a mortgagee under his power, namely, that any surplus money must be handed over to the puisne mortgagee or to the mortgagor as the case may be. It is necessary, in order to test that contention to examine the position under the statutes of a mortgagee who, having been in possession for 12 years, has given no acknowledgment to anybody in respect of the property. The Limitation Act, 1939, s. 12 provides:

> F When a mortgagee of land has been in possession of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him.

That merely bars the right of the mortgagor, or a puisne mortgagee, or a person claiming through him, to bring an action for redemption after 12 years G possession, and no-one's title is affected. To that, however, must be added s. 16, which provides (with certain exceptions which are not relevant):

> . . . at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) . . . the title of that person to the land . . . shall be extinguished.

Therefore, the position here is that in the year 1945 the period of 12 years had H expired and the title of the persons whose interest it was to redeem was extinguished.

The plaintiff, therefore, as second mortgagee, from that date on had no right, title or interest in the land. Nevertheless, he says that, though he cannot bring an action to redeem, yet, if it so chances that the mortgage money is in the hands of a person who holds it on trusts under which he is a beneficiary, he can still have his rights as such. In effect, he bases his claim on *Re Alison* (1). That case is cited in COOTE ON MORTGAGES, 8th ed., pp. 775, 945, and 9th ed., vol. I, p. 773, vol. II, pp. 911, 912, 945; and in

BANNING ON THE LIMITATION OF ACTIONS, 3rd ed., p. 173, as an authority for the proposition that a mortgagee in possession after 20 years, or 12 years as the case may be, without acknowledgment may sell under his power as mortgagee and not account for the proceeds. No doubt, *Alison's* case (1) does so decide, but, when one looks into it a little more it appears so to decide for reasons which are extremely obscure. The facts were that the mortgagee had entered into possession and remained in possession for more than 20 years before his death so that he A had acquired a title under the statute. His representatives proceeded to sell and in an action to administer the estate of the mortgagee a claim was made by or on behalf of the mortgagor that she was entitled to have an account on the footing that the mortgage was still subsisting. MALLINS, V.-C., held that she was so entitled, on the ground that, the mortgage being a mortgage by way of trust for sale and the ultimate trust being a trust for the mortgagor, the mortgagee having purported to sell in exercise of that trust must carry B out the whole of the trust, and, therefore, hold the balance of the purchase money in trust for the mortgagor. His decision was dissented from by the Court of Appeal on the ground that the case which he purported to follow, *Locking* v. *Parker* (2), did not say anything that the VICE-CHANCELLOR thought it said. In *Locking* v. *Parker* (2) the power of sale had been exercised to pay off the mortgage before the 20 years had expired, and it was there said, though C not decided, that, if there had been a surplus, the mortgagor could have applied for an account, because, having exercised the power or the trust for sale within the statutory period, the mortgagee became a trustee of the proceeds for those entitled. No such result, however, accrues, according to SIR GEORGE JESSELL, M.R., when the sale is after the 20 years. That is what I take him to have decided, although there are one or two observations in his judgment which are a little obscure. In my judgment, *Re Alison* (1) is no authority for the D plaintiff's claim in the present case because, not only is the decision the other way, but there are no reasons given in it which would favour the plaintiff's case other than those which arise, I think, out of the form of the mortgage in that case, which was a mortgage by way of trust for sale, a feature entirely absent here.

Counsel for the plaintiff also pressed me with *Re Thomson's Mortgage Trusts, Thomson* v. *Bruty* (3) where EVE, J., held that the second mortgagee was E entitled to be repaid in full out of certain surplus moneys notwithstanding that his claim to arrears of interest was barred by the Limitation Act, 1623. In that case, however, as EVE, J., says ([1920] 1 Ch. 512): "No question under the Statute of Limitations arises." The transaction had been by way of sale by the first mortgagee before any title by limitation arose, and, therefore, he was bound to deal with the proceeds on the footing that he had to account for them to the puisne incumbrancers, and the fact that one of F them could not have sued for the arrears of his interest was held by his Lordship to make no difference. That decision does not, in my view, govern this case. I do not think for this purpose I need consider what exactly the rights of a mortgagee remaining in possession may be. Whether he gets his term of 3,000 years indefeasible, *i.e.*, without any right to redeem it, or whether he acquires as a squatter a fee simple does not seem to me to matter, G because in either event he can vest a fee simple in his purchaser by the exercise of his powers. I am content to assume in this case that the sale by the personal representatives of the first mortgagee was a sale in exercise of the statutory power of sale in the mortgage. If that be so, they hold the mortgage money, as the summons suggests, on the trust declared by the Law of Property Act, 1925, s. 105, and it is on that section that I think the answer to this question wholly depends. The side-note to s. 105 is: "Application H of proceeds of sale" and the section provides:

> The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received

shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

In my judgment, the answer to this summons depends on who is the person entitled to the mortgaged property, and, whoever else may be, I cannot see how the plaintiff can possibly say that it is he, because under the Limitation Act, 1939, ss. 12 and 16, all his title has been extinguished and he has no interest in the property. His counsel seeks to avoid that by saying that though A he is not the person entitled to the property, he is authorised to give a receipt, and points to ss. 107 and 116 of the Law of Property Act, 1925, as showing that a person may yet give a good receipt though the mortgage money has been paid off and the mortgage has ceased. Those sections, in my judgment, do not go to this kind of consideration at all. They are for the protection of purchasers and other persons who in good faith pay money to a person who appears *prima facie* to have a right to receive it. That is not to say that a person who, B having been a mortgagee and having lost all his right, title and interest in the property by the lapse of time, can yet be a person entitled to give a good receipt for the proceeds of sale. In my judgment the plaintiff does not come within those words. On the other hand I am of opinion that the executors do come within those words and consequently I hold that they are the only beneficiaries under the statutory trust applicable under s. 105, no one else, C as I say, at this stage having any interest in the property except possibly a shadowy interest in the reversion subject to the term of 3,000 years. In my judgment, therefore, the summons fails and I propose to make no order on it except that the plaintiff pay the costs as between party and party.

Application dismissed. Order that plaintiff do pay defendants' costs as between party and party.

Solicitors: *Clifford-Turner & Co.*, agents for *R. E. Frearson*, Skegness (for D the plaintiff); *Peacock & Goddard*, agents for *Walker, Rainey & Owen*, Spilsey (for the executors of the first mortgagee).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

RAMSBOTTOM *v.* SNELSON.

E [KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Singleton, JJ.), January 15, 1948.]

Landlord and Tenant—Small tenement—Recovery of possession—Service occupancy—Occupation as licensee—House occupied free of rent by farm stockman—Small Tenements Recovery Act, 1838 (c. 74), *s.* 1.

A farmer required a stockman employed by him to live in a house on F the farm, free of rent and rates, for the proper performance of his duties:—

HELD: the holding being a service occupancy by leave and licence of the farmer, there was no tenancy in respect of which an order for possession could be made under the Small Tenements Recovery Act, 1838, s. 1.

Observations of LORD ALVERSTONE, C.J., *in Dover* v. *Prosser* ([1904] 1 K.B. 84, 85; 89 L.T. 724, 725), *applied.*

[AS TO JURISDICTION OF JUSTICES UNDER THE SMALL TENEMENTS RECOVERY ACT, G 1838, see HALSBURY, Hailsham Edn., Vol. 20, p. 283, para. 319; and FOR CASES, see DIGEST, Vol. 31, p. 549, Nos. 6952-6957.]

Cases referred to:

(1) *Dover* v. *Prosser*, [1904] 1 K.B. 84; 73 L.J.K.B. 13; 89 L.T. 724; 68 J.P. 37; 20 Digest 26, *140*.

(2) *Marsh* v. *Estcourt*, (1889), 24 Q.B.D. 147; 59 L.J.Q.B. 100; 54 J.P. 294; 20 Digest 26, *139*.

H (3) *M'Clean* v. *Prichard*, (1887), 20 Q.B.D. 285; 58 L.T. 337; 52 J.P. 519.

(4) *Petersfield Case, Stowe* v. *Jolliffe, Aylward's Case*, (1874), 2 O'M. & H. 94; 20 Digest 26, *138*.

CASE STATED by Stafford justices.

At a court of summary jurisdiction sitting at Stafford an application was made by the respondent, a farmer, under the Small Tenements Recovery Act, 1838, for an ejectment warrant in respect of a dwelling-house in the occupation of the appellant who was one of his employees. On Sept. 16, 1947, the court granted the application and issued a warrant ordering possession to be given to the respondent within 30 days. The appellant appealed on the ground that, as he was not a tenant, there was no power to issue a warrant under the Act. The appeal was allowed.

Colin Duncan for the appellant (the employee).
L. A. Blundell for the respondent (the farmer).

LORD GODDARD, C.J. : This is a Special Case stated by justices of the county of Stafford who made an order of possession under the Small Tenements Recovery Act, 1838, in favour of a farmer against a farm worker. Section 1 of the Act gives jurisdiction to justices to order the ejectment of a tenant :

> . . . so soon as the term or interest of the tenant of any house, land, or other corporeal hereditaments held by him at will or for any term not exceeding seven years, either without being liable to the payment of any rent or at a rent not exceeding the rate of £20 a year . . . shall have ended . . .

The sole question is whether there was a tenancy in the appellant or whether his holding of the cottage was what is commonly called a service occupancy by leave and licence of the farmer.

The justices have found as facts that the farmer engaged the appellant some twelve months ago at a wage of £4 10*s.* a week, plus insurance and milk, and a house, free of rent and rates, and that the appellant was engaged to look after stock and, as a stockman, was required to live in the house for the purpose of his employment, so that he could be available at all times of the day and night to attend to calving cows and injured animals, etc., and, generally, more efficiently carry out his duties. That seems to me to bring the case within *Dover* v. *Prosser* (1) where it is pointed out that in those circumstances the occupancy is not a tenancy but is under a licence. LORD ALVERSTONE, C.J., in giving the judgment of the court in that case, which arose on the question whether or not a man was entitled to be included in the register of voters, said ([1904] 1 K.B. 85) :

> If he [*i.e.*, the occupant] is merely permitted, but not obliged, to occupy the premises so long as he performs certain duties, that is not an occupation by virtue of any office, service, or employment, and is not sufficient to disentitle him from having his name registered in Division I. This view is supported by the judgment of WILLS, J., in *Marsh* v. *Estcourt* (2), where he said (24 Q.B.D. 151) : " In the case referred to by the learned counsel for the respondent [*M'Clean* v. *Prichard* (3)] the occupation was admitted to be occupation by virtue of service. Here the labourers were not required to reside in the cottages, but were allowed to reside in them as a privilege. It would be an abuse of language to call residence under such conditions occupation by virtue of service." If it necessarily follows from the nature of the duties which a man has to discharge that he must occupy a certain house in order properly to discharge those duties, that would be a case of a man occupying certain premises by virtue of his employment just as much as if he were expressly required to do so. An example of this class is to be found in the *Petersfield* case (4), where MELLOR, J., in dealing with a case of an occupation necessary for the discharge of the occupier's duties, instanced the case of a gamekeeper who received so much wages and also occupied a house in the centre of his employer's preserves ; in that case the gamekeeper did not live in the house as a tenant, but because the nature of his employment required him to. Those examples shew the two classes of cases and the question which we have to decide is, under which category does the present case come ?

I am not suggesting that the justices have no jurisdiction under the Small Tenements Recovery Act in every case where a farmer has cottages which go with the farm and wants his farm workers to live in them as a matter of convenience for both parties. If a farm worker is merely required to live in a house simply as a matter of convenience for all parties, he is in the true sense of the word a tenant, and can be, if he holds over after the term of his tenancy has expired, brought before justices who have jurisdiction to make an order under the Act, but where the occupancy is a service occupancy, *i.e.*, where, as in this case, the justices find that he is required to live there for the proper performance of his duty, just as a chauffeur may be required to live in the flat over his employer's garage or a gardener in a cottage in the garden, the occupancy is a service occupancy and not a tenancy. In this case I think the court is constrained to hold on the finding of the justices that the appellant was required to live in the house for the purpose of his employment, that this was a service occupancy, and, consequently, that the proceedings could not be taken under the Small Tenements Recovery Act. The appellant thus succeeds.

He achieves his object of fighting this point of high juristic principle which can be of no possible benefit to him or anybody else, and, therefore, the appeal is allowed without costs.

HUMPHREYS, J. : I agree.

SINGLETON, J. : I agree.

Appeal allowed without costs.

Solicitors : *Haslewood, Hare & Co.*, agents for *H. Wallace-Copland*, Stafford (for the appellant) ; *Ellis & Fairbairn*, agents for *Pickering and Pickering*, Stafford (for the farmer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re ORCHARD (*deceased*), CARPENTER *v.* LAUER.

[CHANCERY DIVISION (Vaisey, J.), January 16, 1948.]

Wills—Construction—Condition—" In the event of an armistice having been concluded between Great Britain and Germany in the present war before the date of my death."

By her will dated Nov. 23, 1940, a testatrix directed her trustees to hold one moiety of her residuary estate on certain trusts " in the event of an armistice having been concluded between Great Britain and Germany in the present war before the date of my death," but, in the event of no such armistice having been concluded between Great Britain and Germany before her death, there was an alternative disposition. The testatrix died on Sept. 6, 1945.

HELD : when the unconditional surrender of Germany, which took place before the testatrix's death, was tendered to and accepted by the Allies, there resulted a cessation of active hostilities for an indefinite time as a preliminary to the permanent laying down of arms which was an armistice in the sense of the word used in the will.

[AS TO CONTEXT AND MEANING OF WORDS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 222-226, paras. 278-283 ; and FOR CASES, see DIGEST, Vol. 44, pp. 574-583, Nos. *3911-4054.*]

ADJOURNED SUMMONS to determine whether, in view of the fact that Germany surrendered unconditionally, an armistice had been concluded between Great Britain and Germany before the date of the death of the testatrix within the meaning of her will. VAISEY, J., held that there was such an armistice. The facts appear in the judgment.

Whitty for the plaintiff.
Winterbotham and *B. S. Tatham* for various defendants.
Danckwerts for the Custodian of Enemy Property.

VAISEY, J. : I have to determine the meaning of an expression contained in the will of the testatrix, Mary Adele Orchard, dated Nov. 23, 1940. The testatrix died on Sept. 6, 1945. By cl. 7 of her will she directed that one moiety of her residuary estate should be held by her trustees on certain trusts " in the event of an armistice having been concluded between Great Britain and Germany in the present war before the date of my death," but, in the event of no such armistice having been concluded between Great Britain and Germany before her death, she made an alternative disposition of that moiety. In another clause of her will she says that she felt that there was no obligation on her to leave her relatives in Germany any share of her estate " in the event of an armistice as aforesaid not having been arranged prior to my death as hereinbefore provided."

I do not think that any distinction in meaning can be drawn between the arrangement of an armistice and the conclusion of an armistice. When the matter came before me during the last sittings it seemed to me that I ought, and, indeed, I think counsel invited me, to obtain some guidance from the appropriate department of State on the question whether an armistice was concluded between Great Britain and Germany in the view of those authorities, but I made it clear in the letters which I caused to be written to those departments that it was for me to decide the meaning of the word "armistice" in this context. I am informed that, in the view of the War Office, no armistice was concluded between Great Britain and Germany. Germany surrendered unconditionally, and the date of various instruments of surrender signed by the Allies and the Germans extended from a date in April to a date in May. There were, apparently, seven such instruments relating to various fields of war in different parts of Europe, and all were dated before the death of the testatrix.

If the word "armistice" is used in contradistinction to "surrender," of course, no armistice was concluded between Great Britain and Germany, but it seems to me that an unconditional surrender results in an armistice if it is accepted by the nation to whom it is tendered. I place no reliance on the fact that there were terms of surrender signed by both sides. Those instruments are not before me. I do not know whether their contents are open to the public or not, but the fact remains that an unconditional surrender results in the laying down of arms if and only if it be accepted by the victorious party. The idea that there is no armistice if there is an unconditional surrender seems to me to be ill-founded in the sense in which I think the word must have been used here. There might be circumstances in which an armistice was concluded in the testatrix's lifetime which would render it almost ridiculous to suppose that it could be an armistice within any reasonable meaning that the testatrix could possibly have attributed to it. There might have been a short cessation of hostilities for some immediate purpose with no intention that it would be more than an interlude in the conduct of the war. It might have been, for instance, for the purpose of some temporary negotiation, or for the burial of the dead, in circumstances where nobody could suppose that it was likely to result in a termination of the war in the limited sense in which ordinary people would understand it. I think that a cessation of hostilities for a specified limited time or for a specified purpose such as I have suggested probably would not have been considered to be the kind of armistice of which the testatrix was speaking, but where I find a cessation of active hostilities for an indefinite time and in such circumstances as gave rise to a general expectation that they would not be resumed, a cessation which was intended and expected to be the preliminary to the permanent laying down of arms, it seems to me that that was an armistice in the sense in which the testatrix used the word. So far from armistice being contrasted with unconditional surrender in this will—in other contexts very different conclusions might be reached—it seems to me that when the unconditional surrenders were made and accepted there was an armistice in the sense in which the word is used, that is to say, there was a cessation of hostilities for an unlimited time in the expectation or belief that that was the opening of the end of the chapter. I, therefore, think there was an armistice within the meaning of the testatrix's will some time in late April or the early part of May, 1945, which dates were prior to the testatrix's death.

I shall, therefore, declare that within the meaning of this will an armistice had been concluded between Great Britain and Germany in the then existing war before the date of her death, such armistice having resulted from the unconditional surrender of Germany and the acceptance of that surrender by those to whom Germany was opposed.

Declaration accordingly.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Carpenter & Carpenter*, Bath (for the plaintiff and the various defendants); *Solicitor to the Board of Trade* (for the Custodian of Enemy property).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

R. *v.* GERARD.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Singleton, JJ.), January 19, 1948.]

Criminal Law—Trial—Summing-up—Misdirection—Statement after caution, but before being charged—" What I have to say I will say to the court "—Comment of judge.

On being found in possession of a lorry laden with bottles of spirits, the applicant, after being cautioned, was asked by the police whether he wished to say how he came in possession of the lorry and its contents, and he replied: " What I have to say I will say to the court." Later, the applicant was charged with housebreaking, and the judge, in summing up, suggested that, if the applicant were innocent, it was curious that he had made this statement when he had not yet been charged:—

HELD: the judge's observation was perfectly proper and there was no misdirection of the jury.

R. v. *Leckey* ([1943] 2 All E.R. 665; 170 L.T. 198), *considered.*

[AS TO MISDIRECTION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 275-277, paras. 402, 403; and FOR CASES, see DIGEST, Vol. 14, pp. 533-535, Nos. *6040-6055*, and Supplement.]

Cases referred to:

(1) *R.* v. *Naylor*, [1933] 1 K.B. 685; 102 L.J.K.B. 561; 147 L.T. 159; 23 Cr. App. Rep. 177; Digest Supp.

(2) *R.* v. *Leckey*, [1943] 2 All E.R. 665; [1944] K.B. 80; 113 L.J.K.B. 98; 170 L.T. 198; 29 Cr. App. Rep. 128; Digest Supp.

(3) *R.* v. *Tune*, (1944), 29 Cr. App. Rep. 162; Digest Supp.

APPLICATION for leave to appeal against a conviction at the Middlesex Sessions on the ground of misdirection. The Court of Criminal Appeal held that there had been no misdirection and refused the application. The facts appear in the judgment of the court delivered by HUMPHREYS, J.

Melville Buckland for the applicant.

The Crown did not appear.

HUMPHREYS, J. [delivering the judgment of the court]: The applicant, was convicted at Middlesex Sessions, together with another man, who pleaded Guilty, of housebreaking and was sentenced to 3 years' penal servitude. He asks for leave to appeal against his conviction and the sentence.

So far as the conviction is concerned, counsel on his behalf suggests that there was a misdirection in the summing-up of the deputy chairman. The applicant and the other man were found at 12.30 a.m. in a lorry which had attracted the attention of a police officer. The policeman was suspicious and pulled off the sheet which was used to protect the contents of the lorry, and he found that the load consisted of a large number of cases of gin. The policeman, knowing that spirits are not easily obtainable in large quantities in these days, and that a great many public houses and distilleries have been broken into from time to time, put a harmless question to the two men: " What are you doing with this lorry ? " The result was that both men jumped off the lorry and ran away as hard as they could in different directions. The applicant had the misfortune to run straight into the arms of another policeman who brought him back. The other man was also caught. Thinking it was a case which obviously required investigation, the policeman took both the men to the police station, and there, in accordance with the practice, they were formally cautioned. They were not invited to make a statement. On the contrary, they were told that, unless they wished to make a statement about the matter, they need say nothing. The police officer said to the applicant: " Do you wish to say how you came into possession of the lorry and its contents ? " In giving his evidence, the police officer said: " I myself did not know it was stolen at that time, and I gave him a caution and he said: 'I have nothing to say. What I have to say I will say to the court'." That was an important statement from any point of view, and, when the deputy chairman came to sum up the case, after referring to the general circumstances, he made this observation to the jury :

> There is one other remark which was made and which you will have to consider. That was Gerard's statement, before he had ever been charged, that he was going to reserve his account for the court. Of course, he is not bound to say anything, as you have been told, but it may occur to you to be perhaps a little curious with a man who has not yet been charged and who merely ran away because he lost his head, not knowing what was wrong, but guessing something was wrong with Humphries and not himself. It may be a little odd to you—I do not know—that he should say : "I reserve my statement for the court," when, in fact, he has not been charged with anything or told he is going to come before a court.

Counsel for the applicant has submitted to this court that that was a misdirection. It can only be a misdirection if it was an invitation to the jury to form an adverse opinion against the applicant because he did not then give an explanation, but, in our opinion, it cannot possibly be construed as anything of the sort. It was a perfectly harmless, reasonable and true observation to make. The policeman did not know that the contents were stolen and the applicant says he had not the least idea that they were stolen. Even if the policeman was going to make further inquiries, it is a little odd, one may think, that the applicant should have said, in effect : "I shall be taken before a court and I will give my answer then."

These cases, in which the court is asked to quash a conviction on the ground of something being said to the jury by the presiding judge in regard to what an accused man said on being charged, are not infrequent. The matter was considered with great care by the court in *R.* v. *Naylor* (1), and I do not think anyone would desire to quarrel in any shape or form with the judgment in that case, but *R.* v. *Leckey* (2), a later decision, has been cited to us. All we say about *Leckey's* case (2), which was a decision of this court, is that it may be described as forming the high water mark of those cases in which convictions have been quashed because of a statement made by the presiding judge about an observation made by the accused man when he was arrested, and we are not disposed to extend the decision in that case beyond the facts of that case or some similar case, if it should come before us. The present is a totally different case, and is, we think, very much like *R.* v. *Tune* (3), which came before this court after *Leckey's* case (2). In that case, a man charged with fraudulent conversion, on being interviewed by the police after caution with regard to the charges, made a statement in which he admitted that he had been shown various documents by the police, but gave no explanation and at the end said : "I can fully explain the whole question, but would prefer to have advice before doing so in writing." It was submitted that the chairman in that case was wrong in commenting to the jury : "Could not that have been said without legal advice ?" This court held that there was nothing whatever improper in such an observation being made and declined to quash the conviction. Similarly, in the present case, in our view, what was said by the deputy chairman was a perfectly harmless and proper observation. It cannot have misled the jury into thinking that they ought to convict the applicant because he did not make some answer to the charge, when, in truth, no charge had been made against him at all. Therefore, this application for leave to appeal is refused. We do not think that the sentence is in the least degree excessive, and the application so far as the sentence is concerned is refused.

Application refused.

Solicitor : *James Fellowes* (for the applicant).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

DIVITO *v.* STICKINGS.

[King's Bench Division (Humphreys, Singleton and Birkett, JJ.), January 21, 1948.]

Highways—Offence—Pitching stall—Sale of ice-cream from van—Highways Act, 1835 (*c.* 50), *s.* 72.

The appellant was convicted before a court of summary jurisdiction with, being a "person travelling," having pitched a stall on the highway, contrary to s. 72 of the Highways Act, 1835. The appellant was a partner in a firm of ice-cream makers, and on the day in question he stopped a van which he was driving on the highway and sold ice cream from it to purchasers.

Held: while in certain circumstances a motor van might properly be found to be a "stall," it could not be said that the appellant had "pitched" his van on the highway when he stopped it, and, therefore, he had been wrongly convicted.

[For the Highways Act, 1835, s. 72, see HALSBURY'S STATUTES, Vol. 9, p. 86.]

Case Stated by Hythe (Kent) justices.

At a court of summary jurisdiction sitting at Hythe an information was preferred by the respondent, an inspector of police, charging the appellant, being a person travelling, with unlawfully pitching a stall on a highway known as Rampart Road, Hythe, contrary to s. 72 of the Highways Act, 1835. The justices convicted the appellant and fined him £1. The appellant appealed, and the court now allowed his appeal. The facts appear in the judgment of Humphreys, J.

Harold Brown for the appellant.

Tilling for the respondent.

HUMPHREYS, J.: Justices for the borough of Hythe convicted the appellant under s. 72 of the Highways Act, 1835, which provides that: "if any hawker, higgler, gipsy, or other person travelling shall pitch any tent, booth, stall, or stand, or encamp upon any part of any highway" he shall be guilty of an offence. The appellant was a partner in a firm of ice-cream manufacturers who carry on their business at Deal, and on the day in question he drove his motor van, from which he was in the habit of selling ice-cream, to Hythe and sold his ice-cream from a certain place on the highway there. It seems to me that the justices have strained language which is totally unsuitable for the purpose to prevent something which in law is not prohibited, that is, selling from a vehicle. That is clearly what they objected to, because, not only is there no finding that the appellant was guilty of any obstruction, but it is admitted by counsel for the local authority that there was none. The real gravamen of the offence was that the appellant, having come from Deal, was selling in Hythe in a way in which a hawker might sell. In my opinion, it is an extravagant use of language to say that a man who is driving a motor van and stops to make a sale then and thereby pitches a stall, to wit, his motor van, on the highway. I do not say that a motor van might not in certain circumstances be treated as and found to be a stall. If it were used for the purpose of selling things it might be, but, for there to be an offence under s. 72 there must be not only something which might be a "stall," but a stall which is "pitched" on the highway. I can imagine no English active verb less appropriate to the stopping of a motor van than to say that it is thereby "pitched" on the highway. There is no evidence here that the appellant committed the offence of which he was convicted, and his conviction should be quashed.

SINGLETON, J.: I agree.

BIRKETT, J.: I agree.

Appeal allowed with costs.

Solicitors: *Hardcastle, Sanders & Co.*, agents for *Hardman & Watson*, Deal (for the appellant); *Sharpe, Pritchard & Co.*, agents for *W. L. Platts*, County Hall, Maidstone (for the respondent).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

Reversed. C.A. [1948] 2 All E.R. 908.

Re WINGHAM (*deceased*).

[Probate, Divorce and Admiralty Division (Pilcher, J.), January 14, 21, 1948.]

Wills—Soldier's will—Actual military service—Airman training in Canada for operational duties—Wills Act, 1837 (*c.* 26), *s.* 11.

Persons in His Majesty's Forces in time of war, though technically on active service, are not entitled to make a privileged will unless they are "in actual military service" within the meaning of those words in s. 11 of the Wills Act, 1837. In deciding whether a particular soldier or airman was "in actual military service" the courts have not construed those words too literally, but have considered whether, paying due regard to the changed conditions of warfare, the soldier or airman could, at the time he made the testamentary document, be considered to be so circumstanced that he would, under the Roman law, have been regarded as "*in expeditione*," and the circumstance that he was or was not at the material time "*inops consilii*" has not been regarded as a test of the right to make a privileged will. Those service personnel in time of war who are "*in expeditione*" or "in actual military service" within the meaning of the section are confined at least to those who (1) are actually engaged on a campaign, (2) are proceeding or are under orders to proceed or to hold themselves in readiness to proceed on a campaign, (3) are situated in what can properly be called a beleaguered fortress or a war base from which active offensive or defensive operations are being conducted.

A member of the Royal Air Force, while stationed, during the war, in Canada where he had been sent for training in operational duties, executed a testamentary document which did not comply with the provisions of the Wills Act, 1837 :—

Held : he was not "in actual military service" within s. 11 of the Act, and, therefore, was not entitled to make a privileged will.

[As to Actual Military Service, see HALSBURY, Hailsham Edn., Vol. 14, p. 198, para. 325 ; and for Cases, see DIGEST, Vol. 39, pp. 333-335, Nos. *193-219.*]

Cases referred to :

(1) *In the Estate of Spark,* [1941] 2 All E.R. 782 ; [1941] P. 115 ; 110 L.J.P. 71 ; 165 L.T. 234 ; Digest Supp.

(2) *In the Goods of Gibson,* [1941] 2 All E.R. 91 ; [1941] P. 118, n. ; 110 L.J.P. 73, n. ; Digest Supp.

(3) *Drummond* v. *Parish,* (1843), 3 Curt. 522 ; 2 Notes of Cases, 318 ; 1 L.T.O.S. 207 ; 39 Digest 333, *195.*

(4) *In the Goods of Hill,* (1845), 1 Rob. Eccl. 276 ; 4 Notes of Cases, 174 ; 39 Digest 335, *209.*

(5) *In the Goods of Hiscock,* [1901] P. 78 ; 70 L.J.P. 22 ; 84 L.T. 61 ; 39 Digest 334, *202.*

(6) *Gattward* v. *Knee,* [1902] P. 99 ; 71 L.J.P. 34 ; *sub nom. In the Goods of Knee, Gattward* v. *Knee,* 86 L.T. 119 ; 39 Digest 334, *197.*

(7) *Re Stable, Dalrymple* v. *Campbell,* [1919] P. 7 ; 88 L.J.P. 32 ; 120 L.T. 160 ; 39 Digest 336, *228.*

(8) *In the Estate of Grey,* [1922] P. 140 ; 91 L.J.P. 111 ; 126 L.T. 799 ; 39 Digest 334, *196.*

(9) *Re Kitchen, Kitchen* v. *Allman,* (1919), 35 T.L.R. 612 ; 39 Digest 334, *206.*

(10) *In the Estate of Rippon,* [1943] 1 All E.R. 676 ; [1943] P. 61 ; 112 L.J.P. 65 ; 168 L.T. 357 ; Digest Supp.

(11) *In the Estate of Rowson,* [1944] 2 All E.R. 36 ; 171 L.T. 70 ; Digest Supp.

(12) *In the Estate of Anderson,* [1943] 2 All E.R. 609 ; [1944] P. 1 ; 113 L.J.P. 25 ; 169 L.T. 345 ; Digest Supp.

Motion for a grant of letters of administration with a testamentary document annexed, the document, which did not comply with the provisions of the Wills Act, 1837, having been executed by a member of the Royal Air Force during the war, while training, in Canada for operational duties. The motion was dismissed on the ground that the deceased was not "in actual military service" within the meaning of those words in s. 11 of the Act.

Harvey Moore for the plaintiffs.
The defendant appeared in person.

Cur. adv. vult.

Jan. 21. **PILCHER, J.,** read the following judgment. The plaintiffs, who stand to benefit under a testamentary document signed by the deceased on Mar. 1, 1943, ask for a grant of letters of administration with the testamentary document annexed. The defendant is the father of the deceased.

The deceased entered the Royal Air Force in February, 1940. In October, 1942, he was sent to Canada for training in operational duties. On Mar. 1, 1943, while stationed at North Battleford, Saskatchewan, he executed the testamentary document in question. This document did not comply with the provisions of the Wills Act, 1837. On Aug. 11, the deceased met his death while flying on duty in Canada in the course of his training for operational duties. The testamentary document which he executed on Mar. 1, 1943, was valid as a privileged will and the point which I have to determine is whether at the time when he executed the document the deceased was " in actual military service " within the meaning of the words in s. 11 of the Wills Act, 1837, so as to entitle him to make a privileged will. Section 5 (2) of the Wills (Soldiers and Sailors) Act, 1918, provides that for the purposes of s. 11 of the Wills Act, 1837, the expression " soldier " includes a member of the Royal Air Force. The development and scope of modern warfare as exemplified by the conditions which prevailed in the recent world war have rendered the consideration of the circumstances in which a member of the armed forces of the Crown is entitled to make a privileged will one of considerable difficulty. The decisions in the recent cases of *Spark* (1) and *Gibson* (2) are not easy to reconcile, and I may, therefore, be forgiven for making a short review of some of the authorities dealing with the point under consideration.

Section 11 of the Wills Act, 1837, provides that " any soldier being in actual military service " may dispose of his personal estate without the formalities required by the Act. The material words in this section are the same as those in s. 23 of the Statute of Frauds. The courts of this country have from time to time experienced considerable difficulty in construing these words owing to the fact that conditions of military service and of warfare generally have changed completely since the words in question found their way into the Statute Book. It is now generally accepted that the words when first inserted into the Statute of Frauds, were intended to confer on British soldiers the same testamentary rights as had been enjoyed by Roman soldiers under Roman law. The first authority to which I need refer is *Drummond* v. *Parish* (3) (1843) (3 Curt. 522). In that case SIR HERBERT JENNER FUST reviewed at considerable length the provisions of the Roman law as expounded by subsequent commentators. At p. 536 he says:

> It is quite clear from these passages from the Digest, the Code and the commentators, generally, that the privilege did not extend to soldiers of every description, they must be soldiers *expeditionibus occupati*, or called out to defend the city; this last case was of itself an exception, for it could not strictly be said to be " *expeditio*."

At pp. 537, 538, he refers to this passage in SWINBURNE ON WILLS, 7th ed. (1803), vol. 1, pp. 95, 96, dealing with *milites armati*:

> Concerning the first sort, either they be such as lie safely in some castle, or place of defence, or besieged by the enemy, only in readiness to be employed in case of invasion or rebellion, and then they do not enjoy these military privileges, or else they be such as are in expedition or actual service of wars, and such are privileged, at least during the time of their expedition . . .

At the end of his judgment, at p. 542, SIR HERBERT JENNER FUST says:

> Being of opinion from the result of the investigation of the authorities that the principle of the exemption, contained in the 11th section of the Act, was adopted from the Roman Law: I think it was adopted with the limitations to which I have adverted, and that, by the insertion of the words *actual military service* the privilege, as respects the British soldier, is confined to those who are *on an expedition.*

In the case of *Hill* (4) decided two years after *Drummond* v. *Parish* (3), SIR HERBERT JENNER FUST refused to grant probate of an unattested testamentary document made by General Hill, who was at the time he executed it in command of the Mysore Division stationed at Bangalore. As is well known, His Majesty's troops were at this time engaged in active warfare in India and it appears that the testator might at any time have been called to march against the enemy. In spite of this fact, SIR HERBERT JENNER FUST rejected the motion and refused to admit the unattested testamentary document, presumably because on the facts of the case General Hill could not be said to have been *in expeditione* when he executed the document.

No further guidance is to be obtained from reported cases as to the proper construction to be given to the words " in actual military service " until we come to the cases dealing with soldiers' wills executed during the South African war. In *Hiscock's* case (5) SIR FRANCIS JEUNE, P., pronounced in favour of a testamentary document executed by a private in a volunteer battalion. At the time of the execution of the document, the testator, having sent in his name for active service, had proceeded under orders into barracks at Chichester. He later embarked for South Africa where he received a wound from which he died. The case of *Hiscock* (5) is important because SIR FRANCIS JEUNE, after discussing SIR HERBERT JENNER FUST's decision in *Drummond* v. *Parish* (3), seems to have paid little, if any, regard to the words of the Wills Act, 1837, " in actual military service " and to have applied his mind solely to the meaning to be given under modern conditions to the words *in expeditione*. He says ([1901] P. 82, 83):

> . . . when a Roman soldier did anything towards fighting the enemy he would have been considered under the law of his time as being " in expeditione " . . . In case of invasion or civil war—both circumstances which were more present to the minds of the persons who framed the laws of this country in the time of Charles II than they are to the legislators of our own time—this step might be merely that a man was taken from his home to man the walls or defences of his own native town. In the case of invasion, I should imagine, for instance, that a man living at Dover, and who was called upon to go into the fortifications at Dover and to assist in the defence, would have been within the meaning of the term " in expeditione " or " actual military service," although the movement made or step taken by him would be small in point both of time and locality or distance.

In the result, SIR FRANCIS JEUNE held that the step taken by the testator in *Hiscock's* case (5), *viz.*, proceeding into barracks with a view to embarking for South Africa, was sufficient, and he, accordingly, pronounced in favour of the testamentary document.

In the following year SIR FRANCIS JEUNE took the matter a little further in *Gattward* v. *Knee* (6). In that case the deceased's battalion, stationed in India, was warned for service and two days later was " ordered to mobilise " for service in South Africa. The battalion was embarked on Sept. 10, 1899. Between Sept. 8 and Sept. 19, the deceased wrote an undated letter which was propounded as a soldier's will. In the course of his judgment SIR FRANCIS JEUNE said ([1902] P. 102):

> . . . I have no doubt myself that mobilization, giving to that word the effect which I understand it to carry, may be fairly taken as a commencement of that which in Roman law was expressed by the words " *in expeditione*." These words meant something more than the English words " on an expedition," because it is quite clear that when a force begins in a sense to engage in or to enter upon active service it would be said to be *in expeditione*. I thought, when deciding the case cited [*Hiscock's* case (5)] and I still think, that it is a fair test to ask whether or not the person whose testamentary dispositions are in question has done anything; but I am of opinion that if the order for mobilization has been received, although the man himself may have done nothing under it, yet that order so alters his position as practically to place him *in expeditione*. Such an order goes beyond a mere warning. I do not think a mere warning for active service would be sufficient . . .

It would seem, therefore, that up to the time of the South African war the courts of this country, when called on to decide whether a soldier was " in actual military service," considered and considered only whether such soldier would have been regarded under the Roman law as being " *in expeditione*." The decisions in *Hiscock's* case (5) and *Gattward* v. *Knee* (6), moreover, make it clear that in more modern times a soldier who in time of war takes any personal step to join the forces in the field or whose unit is ordered to mobilize for service in the field is *in expeditione* and thus entitled to make a privileged will.

The cases dealing with testamentary documents executed by soldiers during the war from 1914 to 1918 do not take the matter much further. In *Dalrymple* v. *Campbell* (7), where another point was under consideration, it seems to have been accepted by both parties that a nuncupatory will made by an officer-cadet at Sandhurst after he had received orders to proceed to France was good. In *Grey's* case (8) HILL, J., says ([1922] P. 142):

> Ever since the judgment in *Drummond* v. *Parish* (3) it has been settled that the Act does not apply to every soldier, but only to a soldier who is " on an expedition." Where that relation begins and where it ends must be decided by the circumstances of the particular soldier. As to the point at which a soldier begins to be on an expedition, *In the Goods of Hiscock* (5) shows that a liberal interpretation must be given.

In the result, HILL, J., decided that the unattested will in question, which was executed in hospital in London on May 9, 1921, could not be admitted to probate as a soldier's will although the official termination of the war did not come until Aug. 31, 1921. At the conclusion of his judgment, HILL, J., says (*ibid.*, 143) :

> (1) For a soldier to be in actual military service it is not sufficient that there should be a state of war ; he must be in some place for the purposes of the war, and (2) " actual military service " refers to a state of fact, not to a date artificially fixed by Act of Parliament or Order in Council.

Re Kitchen (9) was another case decided during the 1914-18 war, in which it was held that a soldier who had been ordered to hold himself in readiness for service overseas could make a privileged will.

It is not necessary, I think, to refer to any other case until we come to the cases decided during the recent war. The first reported case in this series of cases is a decision of HENN COLLINS, J., in the case of *Gibson* (2). In that case HENN COLLINS, J., decided that the testator, who was at the time he executed his will a lieutenant-colonel in the Army Dental Corps attached to a district command headquarters, was not " in actual military service." The report does not state where the testator was at the time when he executed the document, but it appears that he lived at his home which was situated some miles from the district command headquarters. In that case HENN COLLINS, J., is reported to have said ([1941] 2 All E.R. 92) :

> I can understand the privilege being extended to a man mobilized for service abroad or told to go to a certain place for embarkation, but a soldier who is carrying out peacetime duties, although he is under military authority, is no more a fighting soldier because he is in the Army than an ordinary civilian, who, in the circumstances of the present war, may be said to be in the front rank of the fighting.

Six months later the case of *Spark* (1) came before HODSON, J., who decided that a soldier serving in the Army in camp in England during the war was " in actual military service." After referring to *Hiscock's* case (5) and cases decided during the Boer war and the 1914-18 war, HODSON, J., said ([1941] 2 All E.R. 784) :

> It is quite clear that in the present war the extent of military operations has been very much enlarged, in depth and in height, and circumstances are different now from those which existed in earlier wars. The scope of military operations is very much larger, and it seems to me that a soldier who is in camp (even though he is in England and not under orders to proceed overseas) is thereby a mark for enemy action, and is in a position in which he is in actual military service within the meaning of the section, just as if he were engaged with the enemy in circumstances which no doubt, were envisaged by those responsible for the drafting of the Wills Act, 1837.

In the case of *Rippon* (10) I decided that the testator was " in actual military service." The circumstances were that, being an artillery officer in the Territorial Army, he executed a testamentary document on Aug. 25, 1939, a few hours after he had been ordered to re-join his battery in Kent. There was evidence that his services with his battery were " urgently required for ensuring preparedness for the defence of the Realm against external danger." On the other hand, no state of war existed on Aug. 25, 1939, and the Territorial Army was not embodied until Sept. 1 nor mobilized until Sept. 2. In the case of *Rowson* (11) WALLINGTON, J., decided that a member of the Women's Auxiliary Air Force was " in actual military service." The report of that case is silent as to the precise duties which the testatrix was performing at the time when she executed the document, but it appears that she had during the course of the war been attached to the Balloon Command and to Bomber Command and had from time to time been in charge of several stations where members of the W.A.A.F.'s were on duty. In that case WALLINGTON, J., found that having regard to these activities the lady in question was at the material time " in actual military service." In the case of *Anderson* (12) LORD MERRIMAN, P., decided that the deceased, who was a musketry instructor to a platoon in the Home Guard, was not at the time when he visited his solicitors as a civilian and gave instructions for the making of a will "in actual military service." I ought to add that I was informed by counsel that BARNARD, J., had recently pronounced in favour of a privileged will made by a member of the Royal Air Force whilst undergoing training in Canada. The case was uncontested and the learned judge did not deliver a formal judgment. In the circumstances, while bearing in mind the fact that BARNARD, J., decided as he did, I should not feel bound A to follow his decision if, after hearing argument, I came to a contrary conclusion myself.

A careful study of the cases to which I have referred seems to establish the following general propositions: (i) Not every soldier in time of war, even though technically on active service, is entitled to make a privileged will. (ii) While one of the main reasons, under both the Roman law and our law, for conferring on a soldier the right, in certain circumstances, to make a privileged will was that B such a soldier was more often than not "*inops consilii*," the circumstance that a particular soldier was or was not at the material time "*inops consilii*" is not to be regarded as a test of his right to make a privileged will. (iii) The words "in actual military service," which first appeared in the Statute of Frauds, are not to be construed too literally. In considering whether a soldier was "in actual military service" so as to entitle him to make a privileged will, the courts have paid little heed to the literal meaning of the words "actual military service," C but have considered whether, paying due regard to the changed conditions of modern warfare, the particular soldier can at the time he made the testamentary document be considered as having been so circumstanced that he would under the Roman law have been regarded as "*in expeditione*." (iv) A soldier who in time of war in pursuance of orders has made a move, however slight, to proceed on a campaign, or who, without having made any such move, has received orders D to proceed or to hold himself ready to proceed on a campaign is within the privilege. It is clear that under the Roman law soldiers engaged in defending a beleaguered fortress or city as well as those engaged in active offensive operations were entitled to make a privileged will.

For the first time for over a hundred years this country was, during the recent war, under serious threat of invasion for a prolonged period. Throughout almost the whole war she was subjected to damaging attacks from the air. E Towards the end of the war she was bombarded by long range rocket guns. Owing to the nature of the attacks to which she was subjected not every arm of the fighting services was immediately or continuously engaged in defensive measures, but all serving personnel were available to render indirect assistance when required. All service personnel, as well as the civil population, were in peril in varying degrees. The whole national resources were harnessed with a view to resisting invasion and preparing an expeditionary counter-attack when F the time was ripe. There would seem, on these facts, to be some justification for regarding this country during most of the period of the recent hostilities as a beleaguered fortress. From the passage in SWINBURNE quoted by SIR HERBERT JENNER FUST in *Drummond* v. *Parish* (3) it would seem that under the Roman law not every soldier who formed part of a garrison of a beleaguered city was entitled to make a privileged will. The privilege appears to have been G confined to those who were actually engaged in defensive operations, presumably because in those days the range of weapons was so limited that only soldiers actually engaged with the enemy were in any physical danger from hostile attack. It was clearly on this ground, *viz.*, that the camp in which the soldier was stationed was "a mark for enemy action," that HODSON, J., decided in favour of the privilege in the case of *Spark* (1). The same considerations may well have moved WALLINGTON, J., to pronounce in favour of the privileged will H of the member of the W.A.A.F. in the case of *Rowson* (11). In the case of *Gibson* (2) the testator was killed by a bomb in his own private house. Neither the facts of this case nor the judgment of HENN COLLINS, J., are very fully reported, but the learned judge appears to have decided against the privilege in this case because the testator, although a commissioned officer, was not a fighting soldier. It is well established that in the consideration of the question whether privilege exists the material time is when the will was made, and presumably, if locality is important, it is the locality in which the will is made and not the locality where the deceased meets his death which is important. In neither *Gibson's* case (2) nor *Rowson's* case (11) does the report make any mention of when or where the material testamentary document was made. If the deceased in *Gibson's* case (2) had happened to make his will at the district command headquarters to which he was attached it would have been difficult to argue that those headquarters were not a favourable mark for enemy bombs. While there may have been additional facts not contained in the report in *Gibson's* case (2) which fully justified the learned judge in arriving at the conclusion which he did, I permit myself to doubt whether, having regard to the circumstances which prevailed in this country during the recent war, the fact that a soldier was or was not in what may conveniently be called a fighting unit has any really material bearing upon his right to make a privileged will. To attempt to construe words which are no longer applicable to modern conditions is a difficult and thankless task. In my humble view, the logical construction of the words *in expeditione*, when applied to the conditions of the recent war, would be to regard the whole of this country as a beleaguered fortress or a war base from which an expedition was being prepared, in which case the testamentary documents of all service personnel in continuous employment as such would be entitled to privilege. An alternative view would be to admit as privileged wills only those testamentary documents in an area of this country which could properly be said at the material time to be a mark for enemy attack. I have ventured to make the above general observations although they are not directly relevant to the point which I have to determine in the present case because I think they may perhaps afford some assistance in the facts of the present case.

The deceased commenced his training in the Royal Air Force in this country in 1940. He remained in this country as a member of the Royal Air Force until October, 1942. During this period the whole of this country was subject to enemy air attacks. No doubt, the Royal Air Force stations or some of them where the deceased was undergoing training were particular marks for enemy bombs. In October, 1942, he was sent to Canada under the air training scheme. It is, perhaps, legitimate to infer that among the reasons which moved the authorities to send large numbers of members of the Royal Air Force to Canada to train in operational flying was that such flying could be carried out in Canada without fear of enemy interference. No doubt, there were many other reasons. Canada was not in the scene of any active hostile operations. It was not in the popular phrase a "theatre of war." The deceased was thus moved by orders of the competent authorities from an area subject to continual enemy attack to a locality far removed from active hostile operations. Counsel for the plaintiffs argued that in the recent hostilities the whole world should be regarded as a theatre of war. He further contended that in proceeding under orders to Canada for further training the deceased had taken a step and a necessary step along the path which was destined ultimately to lead him into active combat with the enemy. He contended, relying on *Hiscock's* case (5), that after taking this step he was entitled to make a privileged will. After giving the whole matter the most careful consideration, I am unable to accede to these arguments. In my opinion, the decided cases to which I have referred show that service personnel in time of war who are *in expeditione*, or, to use the words of the Wills Act, 1837, "in actual military service," are confined at least to those who: (1) are actually engaged on a campaign, (2) are proceeding or are under orders to proceed or to hold themselves in readiness to proceed on a campaign, (3) are situated in what can properly be called a beleaguered fortress or a war base from which active offensive or defensive operations are being conducted. I think it would be wrong, even under the conditions which prevailed in the last war, to regard the whole world as a theatre of war, and wrong to hold that a member of the forces who is sent under orders to a place far removed from the fighting zones in order that he may pursue his training without hostile interference is "in actual military service" so as to entitle him to make a privileged will. Counsel contended that the fact that the deceased's training in Canada involved flying risks was a matter which had some bearing on the issue to be determined. I do not take this view. Flying risks were necessarily incidental to the deceased's training as an operational pilot. The important matter, to my mind, is that, by his removal to Canada, the deceased was enabled to pursue his admittedly hazardous training in an area which was not subject to hostile interference or attack.

For the above reasons I think that this motion should be dismissed. The costs of both parties will be paid out of the estate.

Motion dismissed. Costs of both parties to be paid out of the estate.

Solicitors: *C. Morrison* (for the plaintiffs).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

Considered. Winnan *v.* Winnan. [1948] 2 All E.R. 862.

A

JAMES *v.* JAMES.

[Probate, Divorce and Admiralty Division (Lord Merriman, P., and Barnard, J.), December 18, 1947, January 13, 1948.]

Husband and Wife—Maintenance—Charge of adultery against wife—Same charge dismissed in previous High Court proceedings -Estoppel—Res judicata.

At the hearing before a judge of assize of a husband's petition for divorce on the ground of his wife's adultery, both the wife and the co-respondent denied adultery and the petition was dismissed. Subsequently, the wife brought proceedings before justices alleging wilful neglect by the husband to maintain her, and the husband, in answer, made the same charges of adultery on substantially the same evidence. Notwithstanding that the attention of the justices was drawn to the finding of the judge of assize, they dismissed the summons, presumably, though not expressly, on the ground either that the wife had committed adultery or that the husband had reasonable grounds for suspecting that she had done so. B C

Held: the justices should not have dismissed the summons on the ground on which they acted after their attention had been called to the conclusion arrived at by the judge of assize on substantially the same evidence.

Per curiam: The decision of the judge of assize that the wife did not commit adultery being a decision of a court of record, the matter was *res judicata*, and the justices were precluded, as soon as it became apparent that they were dealing with the same subject-matter, from inquiring into the matter, but there may be a distinction, in this respect, between, on the one hand, a judgment, whether of a court of summary jurisdiction or of the High Court, which finds a particular offence proved and it becomes necessary to investigate the truth of that finding in subsequent proceedings, and, on the other hand, a case in which the High Court has previously dismissed a charge. D E

[As to Estoppel in Matrimonial Causes, see HALSBURY, Hailsham Edn., Vol. 10, pp. 670-673, paras. 990-994; and for Cases, see DIGEST, Vol. 27, pp. 324-326, Nos. *3026-3051.*]

Cases referred to:

(1) *Glenister* v. *Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; Digest Supp. F

(2) *Finney* v. *Finney*, (1868), L.R. 1 P. & D. 483; 37 L.J.P. & M. 43; 18 L.T. 489; 27 Digest 324, *3030.*

(3) *Harriman* v. *Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest 321, *2995.*

(4) *Rose* v. *Rose*, (1883), 8 P.D. 98; 52 L.J.P. 25; 48 L.T. 378; 27 Digest 362, *3470.*

(5) *Gooch* v. *Gooch*, [1893] P. 99; 62 L.J.P. 73; 68 L.T. 462; 27 Digest 368, *3548.* G

(6) *Knott* v. *Knott*, [1935] P. 158; 104 L.J.P. 50; 153 L.T. 256; 99 J.P. 329; Digest Supp.

(7) *Pratt* v. *Pratt*, (1927), 96 L.J.P. 123; 137 L.T. 491; 43 T.L.R. 523; Digest Supp.

Appeal by the wife from the dismissal by Pontardawe, Glamorganshire, justices of a summons taken out by her by which she alleged that her husband had wilfully neglected to maintain her. The appeal was allowed and the case remitted to the justices for assessment of the amount to be awarded for the wife's maintenance. The facts appear in the judgment of Lord Merriman, P. H

Ogilvie Jones for the wife.

The husband was not represented. *Cur. adv. vult.*

LORD MERRIMAN, P.: This is a wife's appeal from the dismissal by the justices for the petty sessional division of Pontardawe, Glamorganshire, of her summons alleging wilful neglect of her husband to maintain her. The parties were married in 1933. During the war the husband was taken prisoner during the evacuation of Crete and was subsequently in a German prisoner-of-war camp until 1944 when he was exchanged as a disabled soldier under the repatriation scheme. Put in a sentence, he says that on his return home his wife received him coldly. She was working, after the hours of her normal employment, as assistant to the licensee of a public house. He objected to this though at first he had no particular suspicion, but at the end of September, 1944, according to one version of his story, he found protruding from the pocket of his wife's overcoat a letter which he read. The letter purported to be written by the licensee of this public house and was of the most compromising character, for it contained a statement that the writer and the wife had been together at Merthyr and at Cardiff, showed that adultery had been committed, and suggested a meeting in the near future for the same purpose. The letter, of course, was no evidence against the wife. It was evidence only against the writer, unless it was made evidence against the wife either by some conduct of her own in relation to it or because the authorship of it was brought home to the writer in the witness-box in circumstances which made any admission by him evidence against the wife. So far as the wife's conduct was concerned, at the first possible moment she asserted that she knew nothing of the letter, a position which she has maintained ever since. After about 18 months the husband filed a petition for divorce on the ground that his wife had committed adultery with the co-respondent, the licensee of the inn. Both the wife and the co-respondent filed answers. In December, 1946, the case came on as a defended suit before Lynskey, J., at Swansea Assizes, the wife and the co-respondent were represented by the same solicitor and counsel, and the case was hotly defended. After a full and most careful trial, Lynskey, J., dismissed the petition. On July 18, 1947, the wife took out her present summons, alleging wilful neglect to maintain her as from Oct. 22, 1945, which was the date when the spouses parted. At the hearing the wife was confronted, not with the counter-charge of having committed adultery, but with the answer that the justices had no right to make an order in her favour because she had committed adultery. No notice was given of the intention to bring this charge and no particulars of it were given, but, on the other hand, it does not appear that any exception was taken by the wife's representative to this defect in procedure, no adjournment being sought. It is a pity that the charge was not particularised, as this court has so often laid down is necessary in a court of summary jurisdiction, because it has been necessary for us to examine very carefully what relation, if any, the charge of adultery made before the justices bore to the charge of adultery which had been dealt with by Lynskey, J. Having examined the proceedings very carefully, I can state the result in a very few words. There cannot be the slightest doubt that it was the same charge of adultery as that presented to Lynskey, J., and, with the exception of one witness who did not add anything appreciable to the details put before Lynskey, J., it was based on the same material, the contents of the letter I have mentioned, with the difference that the case before the justices depended wholly on the letter and the evidence of the husband and wife in relation to it, whereas, when the case was tried by Lynskey, J., the co-respondent was called as a witness on his own behalf and that of the wife and gave evidence about the authorship of the letter which was as much evidence against the wife as it was against himself.

That brings me back to the reasons for Lynskey, J.'s judgment. He was favourably impressed by the wife who, as I have already said, denied throughout any knowledge of the letter and particularly denied that she had ever been familiar with the licensee of the inn or anybody else. The learned judge was not favourably impressed with the demeanour of the husband nor with that of the co-respondent. In the end he said he did not feel convinced that a charge of adultery was proved. I now return to the finding of the justices at the conclusion of the hearing. They say: "The justices were not satisfied with the wife's evidence and accepted the husband's version of the finding of the letter. On the facts stated the wife has not proved her case. Her case will be dismissed." Having read the notes very carefully, I think that can only mean one of two things—either—though it does not expressly say so—that the justices found that adultery was proved against the wife, or that they found that, whether adultery was proved or not, the wife's conduct was such as to give the husband reasonable grounds for supposing that his wife had committed adultery, and so bring him within the decision in *Glenister* v. *Glenister* (1). I do not think it makes any difference, for practical purposes, which of those two views is taken of the finding, because in substance, in the circumstances of this case, the same considerations apply whichever interpretation is placed on it.

The finding of the justices is attacked on two grounds. First, it is said that it had been judicially established on the same charge of adultery and on the same evidence or substantially the same evidence that the charge was insufficiently proved, and that the justices, therefore, had no jurisdiction to enquire into the matter. Alternatively, it is said that on any view of the matter the justices ought to have paid a great deal more respect than they appear to have paid to the fact that on a very full hearing and with more evidence than was placed before them a judge of the High Court had come to a conclusion exactly the opposite of that to which they came. I am going to deal with the last matter first, because, in my opinion, on any view of this case, that is really decisive. Apart altogether from the obvious fact that we are deprived of the immeasurable advantage which the learned judge had of seeing the witnesses, I should hesitate very long before I differed from a conclusion at which he arrived after a trial so full and careful, but, as it happens, there is one piece of material which was put in before the justices but was not before the learned judge. Lynskey, J., was suspicious about the hand-writing of the letter. The suggestion was plainly made that the husband had written it himself to lay the foundation of his case. I have now before me, as Lynskey, J., had not, three letters written by the husband from the prisoner-of-war camp to his father, in all of which the wife's Christian name appears. I am not going to express any opinion about the handwriting of the rest of the letter, but I am satisfied that there is at least as much resemblance between the writing of the wife's Christian name in these three letters and the writing of the incriminating letter as there is between any handwriting of the co-respondent in his admitted documents and the writing of the incriminating letter. I am not to be taken to be expressing any opinion that the husband was the author of the incriminating letter, but I wish to show how fully I agree with what Lynskey, J., said about the danger of relying solely on apparent resemblances in hand-writing of this sort. I, therefore, should be prepared (taking the lowest view of the effect of the trial before Lynskey, J.), to say that I regard it as impossible not to prefer his view of the facts to the view of the facts arrived at by the justices, and I am not prepared to accept the finding (if it is a finding) of the justices that the wife committed adultery on the occasions referred to.

There remains, then, the other question, that they may have found, not adultery, but only that the husband had reasonable grounds for supposing that she had committed adultery. That will not avail the husband in the circumstances of this case. I am not going to refer in detail to *Glenister* v. *Glenister* (1), but it will be apparent, on a perusal of the judgment in that case, that, as soon as there has been a judicial investigation of the matter and an acquittal, that is an end of the husband's right to say that he had reasonable grounds for suspicion. That had happened before this summons was issued, and before he had failed to maintain his wife at the time alleged. The fact that Lynskey, J., had tried this case and decided that it was not made out would be decisive of the husband's right to assert that he had reasonable ground for supposing that his wife had committed adultery.

That being the view I take of the facts, I am absolved from deciding the more difficult point whether the justices were precluded, as soon as it became apparent that they were dealing with the same subject-matter, from going into this question, and I propose to deal with that point quite shortly. In *Finney* v. *Finney* (2) it was held that when a wife's petition for judicial separation on the ground of cruelty had been dismissed, she could not put forward the same allegation of cruelty in a petition for divorce merely because she was tacking on to the allegation of cruelty the additional allegation of adultery. In *Harriman* v. *Harriman* (3) that decision was referred to with approval in so far as it dealt with the estoppel between the parties, but *Harriman* v. *Harriman* (3) made it clear that no estoppel of the parties binds the court. In my opinion, that decision does not depend on the fact that what was being put forward as an estoppel in the High Court was a decision of a court of summary jurisdiction.

Indeed, if it were so, it would be difficult to see how s. 6 of the Matrimonial Causes Act, 1937, which was plainly drafted with the decision in *Harriman* v. *Harriman* (3) in mind, could have been framed as it was. That, however, does not exhaust the matter, for the argument has shown that there may be a marked distinction in this respect between a judgment (whether it be a judgment of a court of summary jurisdiction or of the High Court) which finds a particular offence proved and where it becomes necessary to investigate the truth of that finding in some subsequent proceedings, on the one hand, and, on the other hand, a case where the High Court has dismissed a charge. I am not proposing to examine that distinction exhaustively, but it is clear that there are considerations which tend to show that the distinction is a real one. The point of *Harriman* v. *Harriman* (3) is that the statutory duty of this court to enquire into the truth of any matters alleged as a foundation for the statutory relief is absolute. SIR FRANCIS JEUNE, P., in *Gooch* v. *Gooch* (5), after pointing out that *Rose* v. *Rose* (4) established that there was no rule to prevent parties from barring themselves from founding a suit on past misconduct, said ([1893] P. 107):

> If it is a rule, that an adulterous spouse cannot obtain a judicial separation or dissolution except under certain special circumstances recognised by judicial authority, the parties, surely, cannot by any agreement relax or modify that rule. They may contract themselves out of their rights, but they cannot contract the court out of its duty.

The same applies to any other ground of estoppel of the parties. When it is a question of seeking to oblige a court to decide something contrary to its own belief on the facts because some other court has decided in the affirmative, there is the consideration that so to oblige the court would be running contrary to the statutory duties imposed on the court, whereas where a party who has already been defeated in bringing a claim for relief is trying to do exactly the same thing again, the same consideration does not apply to prevent him from being estopped from bringing that evidence before the court at all.

As I have already said, I do not wish to take this opportunity of expressing any concluded opinion on this matter, but I have referred to it because I regard this question of estoppel in matrimonial cases, and, in particular, in connection with the matrimonial jurisdiction exercised by this court, as one of very great difficulty, and I see (and I wish to take this opportunity of correcting) a passage in *Knott* v. *Knott* (6), in which I did not notice, or, at least, draw attention to, the possible distinction between the two classes of case to which I have just been alluding. I was being very careful in that case to avoid saying that there was an absolute estoppel of the court, even though the judgment was one of the High Court. I was dealing with appeals to this court, and had referred to *Harriman* v. *Harriman* (3) which dealt with a decision by justices. I said this ([1935] P. 165):

> It is not necessary to decide whether a judgment of the Divisional Court upholding a finding of adultery by the justices is conclusive against the world, as a decision of a judge of this Division would be, but a decision of the justices would not be: see *Pratt* v. *Pratt* (7) . . .

Now *Pratt* v. *Pratt* (7) was not a decision in which there was a finding of adultery, but was a case, like the present, in which the charge of adultery had been dismissed. The case is an interesting and important one. The headnote would appear to be decisive of this case, for it says (43 T.L.R. 523):

> The decision of a judge of assize on a petition for dissolution of marriage that on a specified occasion the wife did not commit adultery is that of a court of record and, after the time for appeal has expired, is conclusive against all the world. Such a decision when brought to the knowledge of the justices is a new fact on which they can revive a separation order previously revoked by them on the ground of the wife's alleged adultery on the same specified occasion.

I do not find anything in the judgment which is expressed in exactly the same words as the headnote, but LORD MERRIVALE, P., after describing how the husband against whom the order had been made succeeded in obtaining revocation on the ground of the wife's adultery, goes on (*ibid.*, 524):

> The husband, having obtained the discharge of the order, filed a petition in this court for dissolution of his marriage on the ground of adultery, alleging the adultery which had been found in point of fact by the justices. The decision of the justices was effective for the purpose for which it was applied, but it did not conclude the matter. The difference as between that and the decision of the learned judge who

heard the petition for divorce was that the learned judge could make a conclusive finding, and the learned judge after hearing the evidence tendered by the husband, came to the conclusion that the wife had not committed the alleged adultery, and he so found.

The learned President then held that this was a new fact justifying the justices in revoking their order of discharge and reviving the original order.

That case (to which I called attention after the argument was concluded) appears to go the whole length of supporting the contention that this matter is *res judicata*, but I still desire to leave open the question whether a distinction is A to be drawn between the case where the decision is that the offence has not been committed and the case in which the decision is that the offence has been committed, yet it may be, even though that finding is by a court of record, that the decision is not absolutely binding if it is necessary to adjudicate on the matter again. I prefer to base my judgment in this case on the view of the facts which I have already expressed, and to say in conclusion that, in my opinion, the B justices ought not to have taken on themselves to dismiss this charge on the ground on which they acted after their attention had been called to the fact that precisely the opposite conclusion had been come to by a judge of the High Court who had heard all the witnesses.

BARNARD, J.: I agree. *Appeal allowed with costs.*

Solicitors: *Hirst, Miles Griffiths & Co.*, agents for *Meredith & James*, C Pontardawe (for the wife).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

R. v. REGISTRAR OF PONTYPRIDD COUNTY COURT, *Ex parte* NATIONAL AMALGAMATED APPROVED SOCIETY D

(Boulton *v.* National Coal Board. Phillips *v.* Powell Duffryn, Ltd.).

R. *v.* REGISTRAR OF ABERDARE AND MOUNTAIN ASH COUNTY COURT, *Ex parte* NATIONAL AMALGAMATED APPROVED SOCIETY

(Bendle *v.* National Coal Board. Williams *v.* National Coal Board). E

R. *v.* REGISTRAR OF TREDEGAR COUNTY COURT, *Ex parte* NATIONAL AMALGAMATED APPROVED SOCIETY

(Thomas *v.* National Coal Board).

[King's Bench Division (Lord Goddard, C.J., Humphreys and Singleton, JJ.) January 15, 16, 1948.] F

Workmen's Compensation—Industrial disease—Pneumoconiosis—Compensation—Agreement for lump sum in redemption of weekly payments—Registration of memorandum of agreement—Objection by approved society with which workman insured—Duty of registrar—Workmen's Compensation Act, 1925 (c. 84), *ss.* 13, 23, 25—*Coal Mining Industry* (*Pneumoconiosis*) *Compensation Scheme,* 1943 (*S.R. & O.,* 1943, *No.* 885), *arts.* 4, 14 (1). G

Certain workmen, who had contracted pneumoconiosis in their employment, entered into agreements with their employers, the National Coal Board, to receive in each case a lump sum of £400 in settlement of their claim for compensation under the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943. In recording the memoranda of agreement under the Workmen's Compensation Act, 1925, s. 23, the registrar did not consider in each case whether or not the sum was adequate, but he H was guided merely by the knowledge that £400 was the largest amount that the Coal Board would pay and that it was the amount that had been paid in similar cases previously. It was contended by the approved society with which the workmen were insured for national health insurance that the recording of the memoranda of agreement should be quashed on the grounds (i) that there was no power under the Scheme to redeem for a lump sum the weekly payments to which the workmen were entitled, since there was no reference in the Scheme to the Workmen's Compensation

Act, 1925, s. 13, which dealt with the right to redeem; (ii) that proper consideration had not been given by the registrar to the right matters:—

HELD: (i) the Scheme of 1943 provided, by arts. 4 and 14 (1), that the procedure in regard to compensation laid down by the Act of 1925 should be applied to cases of pneumoconiosis except where there was a modification in the Scheme, and, therefore, s. 13 of the Act of 1925, as well as ss. 23 and 25 (dealing with the registration of agreements and the invalidity of A certain agreements unless registered), applied to cases of pneumoconiosis, and there was power under the Scheme to redeem for a lump sum the weekly payments to which a workman was entitled under the Scheme.

(ii) it was the duty of the registrar to consider whether or not it was in the workman's interest to commute his right to weekly payments for a lump sum, and, if so, whether the amount agreed on was adequate; he might take into account, together with other considerations, the fact B that the amount agreed on had generally been regarded as a satisfactory settlement; but, since in the present case he had treated that matter as conclusive instead of as a mere factor in determining whether the agreements should be recorded, his duty had not been properly discharged and the recording of the memoranda must be quashed.

In recording, under the Workmen's Compensation Act, 1925, s. 23, a C memorandum of agreement in regard to the redemption of the weekly payments to which a workman was entitled under the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, the registrar properly exercised a discretion and considered whether it was in the workman's interest to accept a lump sum, but he gave his decision for the agreement to be recorded in ignorance of the fact that there was on the file an objection by the approved society with which the workman was insured for national D health insurance:—

HELD: since the registrar proceeded in error and did not give the society, which, under the Acts, was an interested party, an opportunity of being heard, the recording of the memorandum must be quashed.

[AS TO REDEMPTION OF WEEKLY PAYMENTS BY PAYMENT OF LUMP SUM, see HALSBURY, Hailsham Edn., Vol. 34, p. 897, para. 1233, and pp. 955-958, paras. E 1307-1311; and FOR CASES, see DIGEST, Vol. 34, pp. 438-440, Nos. *3582-3593*.

AS TO JURISDICTION OF REGISTRAR, see WILLIS'S WORKMEN'S COMPENSATION, 37th Edn., pp. 510-513.

FOR THE COAL MINING INDUSTRY (PNEUMOCONIOSIS) COMPENSATION SCHEME, 1943, see HALSBURY'S STATUTES, Vol. 36, pp. 198-203. See also WILLIS'S WORKMEN'S COMPENSATION, 37th Edn., pp. 1065-1070, and Supplement, p. 60.]

Case referred to:

F (1) *Russell* v. *Rudd*, [1923] A.C. 309; 92 L.J.K.B. 429; 129 L.T. 193; 16 B.W.C.C. 358; 34 Digest 440, *3588*.

MOTIONS for *certiorari* and *mandamus*.

Workmen who had contracted pneumoconiosis in their employment entered into agreements with their employers for the redemption of the weekly compensation to which they were entitled under the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, for a lump sum in each case of £400. G The National Amalgamated Approved Society, with which each of the workmen was insured for national health insurance, objected to the agreements on the ground that £400 was insufficient, but in each case the registrar accepted the figure and recorded the agreement under s. 23 of the Workmen's Compensation Act, 1925. The society applied for orders of *certiorari* to bring up and quash the recording of the memoranda of agreement on the grounds (*a*) that there H was no power to make such agreements under the Scheme of 1943, and (*b*) that proper consideration had not been given by the registrar to the right matters. The society further applied in each case for an order of *mandamus* to the registrar to hear and determine the questions according to law. The Divisional Court granted the orders. The facts appear in the judgment of LORD GODDARD, C.J.

Beney, K.C., and *Dare* for the approved society.

H. L. Parker for the county court registrars.

J. P. Ashworth and *Cyril Morgan* for the National Coal Board and Powell Duffryn, Ltd.

CASES OF BOULTON, PHILLIPS, BENDLE AND WILLIAMS.

LORD GODDARD, C.J.: In each of these cases counsel for the National Amalgamated Approved Society applies for an order of *certiorari* to bring up and quash the recording of a memorandum of agreement whereby the workman entered into an agreement with his employers, the National Coal Board, to accept a lump sum in settlement of his claim for compensation. Under the decision of the House of Lords in *Russell* v. *Rudd* (1), these agreements must be considered as agreements redeeming the right to compensation. A By the Workmen's Compensation Act, 1925, s. 43, provision was made for applying the provisions of the Workmen's Compensation Acts to certain industrial diseases. Section 47 of the Act of 1925 [as extended and amended by the Acts of 1930 and 1943] provided that the Secretary of State might make schemes applying the Act of 1925 to workmen suffering from any form of pneumoconiosis, so as to give them rights to compensation as though they had met with an B accident. In these cases all the men suffered from pneumoconiosis, and they all entered into agreements which would have the effect of redeeming for a lump sum the weekly compensation to which they were entitled, the lump sum in each case being fixed at £400.

The first objection which counsel for the society took to the recording of these agreements was that, according to his contention, there was no power to record them—in other words, there is no power for a workman to redeem for a lump C sum the compensation to which he is entitled under the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943. Under the Workmen's Compensation Act, 1925, s. 1 (1):

> If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained . . . D

Under s. 13 of the Act the employer is given the right to redeem the weekly payments after he has made them for six months for a lump sum which is to be calculated in accordance with certain rules which are laid down. The section goes on to provide:

> (*a*) nothing in this section shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum.

E Counsel for the society, however, contends that, as there is no reference in the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, to s. 13 of the Act, there can be no agreement recorded for the redemption of weekly payments, and, consequently, he says that neither proviso (*a*) to s. 13, nor the provisions of ss. 23 and 25 of the Act, which deal with the registration of agreements and awards and the grounds on which those agreements can be held to be invalid, apply to this case. That point can be disposed of very shortly, F because, in the opinion of the court, ss. 13, 23 and 25 of the Act of 1925 apply, equally with any other provisions of the Act, to cases in which the workman is suffering from pneumoconiosis, except where there is a modification in the Scheme. Counsel for the county court registrars called our attention especially to arts. 4 and 14 (1) of the Scheme. Article 4 provides:

> . . . where the disease is due to employment in the industry whether under one or more employers, the workman or his dependants, as the case may be, shall be G entitled to claim compensation as if the disease as aforesaid were a personal injury by accident arising out of and in the course of that employment, as provided by the Acts, but subject to the modifications hereinafter contained.

Article 14 (1) provides:

> Any question as to the liability to pay compensation under this Scheme, and, except as otherwise provided in this Scheme, any other question arising under this Scheme shall be determined as though it were a question in proceedings arising under H the Acts and the provisions of the Acts relating to the procedure for determining compensation and settling questions and any regulations (except those determining the fees payable to medical referees) and rules of court made in pursuance thereof shall apply accordingly.

In the opinion of the court, the object of the Scheme is to apply the provisions of the Act for the determination of any questions and to apply the procedure in relation to compensation (which would also include proceedings in regard to agreements to redeem compensation), to cases arising under the Scheme, as in other cases. It is sufficient to say that we do not think that counsel for the society could succeed in obtaining an order for *certiorari* on the ground of the first objection taken by him.

The National Amalgamated Approved Society is the society in which these workmen are insured for national health insurance purposes, and it is not suggested in this case that the society has not a *locus standi*. It is an interested party under the Act, because, the more compensation the man receives or is entitled to receive from his employer, the less will the approved society have to pay to him by way of insurance. The status of the society is dealt with by the National Health Insurance Act, 1936, s. 51, and there are references in the Act of 1925 to the position of insurance companies [see s. 23 (6)], and also in the Workmen's Compensation Rules, 1926 [see rr. 43 (3), 47 (*b*)]. Since it is not suggested that the society has not a *locus standi* here, I need not deal with that point in any detail. The society objects to the recording of these agreements substantially on this ground. It says that the registrars of the county courts (whose good faith in the matter is not assailed for one moment) have proceeded from an entirely wrong angle. It appears that in South Wales a general understanding has been arrived at, perhaps by negotiations between the employers and the trade unions, that, in cases in which men are suffering from this disease, the weekly compensation can be redeemed or compounded for a sum of money which may be as little as £300 and is not more than £400, and, therefore, when an agreement in one of these cases comes to be registered, if the amount in the agreement is £400, the registrar, apparently, says to himself : " This is the largest sum the Coal Board will pay, and, therefore, it is no good going into the question whether or not it is adequate. £400 is the amount of the agreement and £400 I will approve." Two of the cases in which I am now giving judgment are put beyond any question by the frank letters written by the registrar. The National Amalgamated Approved Society wrote to the registrar objecting to the amount which was being paid to Boulton on the ground that it was insufficient and would, therefore, put a heavier liability on them in respect of national health insurance than would be put on them if a larger sum were awarded. The registrar also received from the society a medical report by Boulton's panel doctor in which the doctor had expressed the opinion that the man's earning capacity was reduced by 50 per cent., and that it was possible " that future infective processes may ensue, including extensive sclerotic changes in the lungs and accompanying tuberculosis." The doctor also stated : " Pneumoconiosis with nodulation must be regarded as a permanent injury." On May 22, 1947, the society received this letter from the registrar :

> I thank you for your letter of May 21 enclosing copy of Dr. Rice Rees' report. I interviewed the workman on May 9 and my note is as follows : " Age 38. Married, two children under 15 and one over (still attending school). Not working. Approached employers, first offer £350. Discussed matter with Mr. David Phillips (trade union representative) who left it to him." It may well be that the amount agreed to be paid is inadequate, but what is one to do ? The maximum amount which the indemnity society (now the National Coal Board (Insurance Section)) pays in cases of early stages of pneumoconiosis is based on the workman's pre-accident earnings and what it is estimated he would be able to earn in some suitable light employment, subject to a minimum of £300 and a maximum of £400. It often happens that men appear before me who are in employment when they commute and in some cases earning more than before they were certified, so that I cannot assume that the workman in this particular case would continue to be entitled to 30*s*. per week plus allowances. Again I do not know how he would be likely to fare under the National Insurance (Industrial Injuries) Act, 1946 [which, incidentally, is not in force yet] ; it may well be that his assessment would not then be a 50 per cent. disability. I am aware, too, that workmen find it difficult to secure employment whilst drawing compensation and for that reason are anxious to commute. Having already recorded many hundreds of agreements on the basis mentioned, a large number of which have been negotiated by the workmen's trade union representatives on their behalf, I feel I cannot logically refuse to record in this case, which is no different from so many others I have had to deal with.

Other letters were received in respect of one or other of these cases. For instance, in Phillips' case, after objections had been received from the society, the registrar, having set out the details with regard to this man, said :

> It may be of interest that I noted further that he looks extremely well and stated

> that he feels "very good." As the agreement is due for recording on the 21st instant, I shall be glad if you will let me hear from you on or before that date. There would appear to be no prospects of the amount being increased in any event and, as the workman appears anxious to have it recorded, and especially having regard to the fact that he is working and therefore open to the risks incidental to his work, it would be inadvisable to hold the matter up beyond the recording date in case of accident.

There is a further letter to which I think it is necessary to refer. Correspondence went on with regard to Phillips' case, and on July 22 the registrar wrote:

> I forwarded to the National Coal Board (Insurance Branch) a copy of the correspondence which had passed between you and myself and on July 18 they replied that the question of the agreement being withdrawn did not appear to arise as it had already been recorded and the money paid over to the workman on July 7. Of course, you must now take whatever course may be open to you in the matter, but I may say that, having fully considered the points stressed in your letter of July 18 against the recording of the agreement, I would not have considered it my duty to refer the matter to the judge even if it had been open to me to do so. It is only when in my opinion the amount is inadequate that it is my duty to refer an agreement such as this to the judge, but, having regard to the fact that I had already this year recorded the agreements mentioned in the enclosed list, in all of which your clients would appear to be interested, but to the recording of which no objection was raised, I could not consistently refer the agreement, the subject of this letter, to His Honour on the ground of inadequacy when it did not substantially differ from any of these nor from some two hundred others already recorded by me over the same period, to say nothing of the many hundreds of similar agreements recorded in previous years and in many of which the workmen had had the assistance of their trade unions in negotiating the settlements.

He enclosed in that letter a list of cases in which there were certain approved societies, among them the National Amalgamated Approved Society, showing those in which he had recorded agreements.

In many cases which have come before the court, it appears that, very soon after the workman is found to have met with an accident or is certified as suffering from the disease which prevents him from working underground again, he is approached by his employer. In this case some of the workmen were approached by the National Coal Board and were offered in each case a sum of £350. Although the National Coal Board are willing to give up to £400, they first offer only £350, the man asks for £500, and then, of course, it is compromised at £400. It is against exactly this kind of thing, *viz.*, holding out a temptation to the workman to accept a sum of money which may in his case be wholly inadequate, that the provisions of the Act that the matter should be considered and approved by the court are directed. Every judge who has experience of these matters knows that in any kind of personal injury case it is often the practice to make an offer to the injured man at a time when he is out of work. He is offered a sum which is probably larger than he has ever had before in his life, he may not realise the full implications of his illness, and he may accept the lump sum offered when it would be far more in his interests to receive the weekly compensation, whether or not the employer may choose, after six months, to exercise his right to redeem under s. 13 of the Act. If, after six months, the employer exercises his right to redeem, the redemption has to be on a very different footing from what may be that of an agreement arrived at between the parties. There may, of course, be cases in which it is in the interests of the workman to receive a lump sum, but in this case it appears clear to the court that the only matter which really influenced the registrar was that an agreement was put forward by which the National Coal Board agreed to pay £400, and, since the registrar knew that the Board would not pay any more, he accepted it.

The duty of the registrar in these matters seems to me to be laid down by ss. 23 and 25 of the Act of 1925. Obviously, it is his duty in all cases to satisfy himself as to the adequacy of the amount. He is there to protect the workman against himself and it is for him to satisfy himself that the workman is doing a right and proper thing in accepting a sum of money on which he can put his hands at once. It is the duty of the registrar to consider whether or not it is in the workman's interest to commute his rights for an agreed sum, and, if so, whether the amount he is receiving is adequate. In this case it is clear that what influenced the registrars was that they knew that £400 was the maximum which the National Coal Board would pay, and, therefore, if the workman wanted a lump sum settlement, he would have to accept £400 because he would not get any more.

In my judgment, that is not a proper approach to this matter. It is treating as conclusive a matter which may, perhaps, be taken into account, if other matters are also taken into account, for I am far from saying that a registrar may not pay attention to the fact that £400 has generally been regarded as a satisfactory settlement. It is, however, his duty in every case to satisfy himself that the injured man who is affected by this agreement is receiving a sum, A not because other workmen have received it in other circumstances, but because it is a fair and proper sum in his case. There are also in these cases matters which might affect what are called supplementary allowances. The Workmen's Compensation (Supplementary Allowances) Act, 1940, s. 2 (1), provides :

> Such of the provisions of s. 13 of the principal Act as relate to the method of calculating the lump sum for which a weekly payment may be redeemed, where the incapacity is permanent, shall not apply to the redemption of supplementary B allowances, and the amount of the lump sum for which any such allowances may be redeemed shall, in default of agreement and subject to the following provisions of this section, in all cases be settled by arbitration under the principal Act.

The fact that supplementary allowances are to be ignored altogether for this purpose, under s. 2 (1) of the Act of 1940, apparently was not in the mind of the registrars at all. These considerations lead us to the conclusion that we are bound to quash the record in these cases because proper consideration C has not been given to the matters I have mentioned and the registrars have treated as conclusive a matter which they ought not to have treated as conclusive because it was irrelevant except to the extent that I have indicated.

I will now deal shortly with another matter which arises. Certain points were raised by counsel for the society with regard to the procedure in these cases and whether or not objections were put in in time and whether objections ought to have been considered which were not considered. We do not think D we need go into this matter at length. It would involve the examination and consideration of a large number of letters and documents which it is unnecessary for us to consider because we are quashing the recording of the agreements on other grounds, but it seems remarkable to this court that the propriety of accepting £400 as a maximum never appears, in hundreds of cases, to have been brought before the judge. The registrars in South Wales have, apparently, E adopted this sum as the maximum which a man can or ought to get and the matter has not been considered by a judge. When objections of this sort have been put in by a responsible body like the National Amalgamated Approved Society, who are interested parties, it would certainly be desirable to obtain a judicial decision on them. We shall grant *mandamus* in this matter and send it back to the registrar to hear and determine, and it is to be hoped, although we cannot order him to do so, that he will see the importance of getting F a judicial decision by bringing the question before the court under s. 25 (4) of the Act of 1925 and asking whether or not, on the grounds which I have mentioned, he is entitled to consider this sum adequate. One advantage of such a course is that, while the registrar's approval is not subject to appeal, if the judge goes into the matter and makes an order and award, it seems to me —I speak subject to correction—that it would be appealable to the Court of Appeal like any other case which comes before him under these Acts.

G For these reasons I am of opinion that, in these cases, the *certiorari* must go and the recording of the memorandum be brought up and quashed. It follows also that in each of these cases *mandamus* must go to the registrar to hear and determine the question according to law. In all the cases the registrar should bear in mind the speech of LORD DUNEDIN in the House of Lords in *Russell* v. *Rudd* (1)—and the decision of their Lordships' House in H that matter—and remember that the lump sum, the subject of agreement, is not a mere matter of bargain, but must be a redemption of the weekly payments to which the workman is entitled.

THOMAS *v.* NATIONAL COAL BOARD

In Thomas's case, different considerations arise, so far as the £400 is concerned. It appears that Thomas was receiving only £2 12*s.* a week by way of compensation, and, as not infrequently happens, at this time he was in considerable want. He had a wife and family, apparently he could not work, and £2 12*s.* was not enough for their support. He seems to have been very anxious to get a lump sum payment. From the affidavit of the registrar, I am satisfied that he went into the matter carefully, and considered, among other things, whether it was in Thomas's interests to receive a lump sum payment. Having decided that it would be in his interests to receive such a payment, he came to the conclusion that he could sanction a lump sum payment, and he probably knew that, in any case, only £400 could be obtained. I cannot find that in this case the registrar approved the payment on what I may call the rubber stamp principle, which I think prevailed in the other cases. He did it because, after full inquiry, he came to the conclusion that it was a case in which he should approve a lump sum payment. His only alternative would have been to say to Thomas : " No, I am not going to approve a lump sum payment in your case because I do not think £400 is enough. You had much better go on receiving your weekly compensation." He would then be faced with the fact that the Coal Board might prefer to continue to pay the sum of £2 12*s*. for many months rather than claim redemption when they would have to redeem at a much higher figure. In Thomas's case I think the registrar did exercise a discretion and did consider whether it was in the interests of the man to accept a lump sum payment, and, knowing he could not get more, he said : " Very well ; I will approve it."

The difficulty, however, is that the National Amalgamated Approved Society, as an interested party, had objected to the recording of the agreement, as it was entitled to do, and, unfortunately, its objection was put into a wrong file, and the registrar gave his decision that the agreement should be recorded in ignorance of the fact that there was an objection on the file. The National Amalgamated Approved Society had written to the registrar on July 15, after an interview with Thomas :

> We have received the agreement documents in this case and from the particulars given thereon we are not satisfied that a settlement for £400 is satisfactory. We have therefore written to the panel doctor concerned for a full report and we will let you have a copy thereof, together with our observations, as soon as it comes to hand. In the meantime we hereby notify you of our preliminary objection to the recording of the agreement.

That is certainly an objection, although it is not an objection given in any particular formal manner. Counsel for the registrar has suggested that the registrar was entitled to ignore it because it was not a formal objection. The answer to that is that, in his affidavit, the registrar said that he would not have disregarded the society's letter, but would have treated it as a notice of objection, and, had he known this objection had been given, he would not have given his decision without further inquiry or without hearing the approved society, but, unfortunately, owing to a mistake of a clerk, he did not know, because the letter had been put in a wrong file. Therefore, it seems to me unnecessary to discuss at any length whether or not an objection by an approved society has to be considered if the society writes a formal letter instead of copying a form out of a book, or if the form does not seem to have been drafted in accordance with the forms in the appendix to the Workmen's Compensation Rules, 1926. Whether the registrar would have come to the same conclusion if he had known an objection had been made and if he had had the objection before him, I do not know. Because he proceeded in error without knowing the objection had been made and did not give the approved society, which had *locus standi*, an opportunity of being heard, it follows that the objection taken is a good objection and *certiorari* and *mandamus* must go.

HUMPHREYS, J. : I entirely agree.

SINGLETON, J. : I agree.

Orders for certiorari and mandamus. Costs of the approved society to be paid by the Coal Board.

Solicitors : *Kingsley Wood, Williams & Murphy* (for the approved society) ; *Treasury Solicitor* (for the county court registrars) ; *William A. Crump & Son*, agents for *A. J. Prosser & Co.*, Cardiff (for the National Coal Board and Powell Duffryn, Ltd.).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re MILES AIRCRAFT LTD. (APPLICATION OF BARCLAY'S BANK LTD. AND ERLANGERS LTD.)

[Chancery Division (Vaisey J.), January 19, 1948.]

Companies—Winding-up—Winding-up by court—Disposition of property—Order to validate disposition—Petition presented, but not finally heard—Companies Act, 1929 (*c.* 23), *s.* 173.

By the Companies Act, 1929, s. 173: "In a winding-up by the court, any disposition of the property of the company . . . made after the commencement of the winding-up, shall, unless the court otherwise orders, be void."

On Nov. 11, 1947, a petition for the winding-up of a company was presented and the hearing was subsequently adjourned and further adjourned, finally, on Jan. 19, 1948, again being adjourned for four weeks. Later on Jan. 19 an application was made for an order under s. 173 that certain dispositions of the property of the company made on Nov. 12, 1947, be not void.

Held: although, if a winding-up order were made, the date of the commencement of the winding-up would be the date of the presentation of the petition, it could not be said that a winding-up was in progress on Jan. 19 because the petition might ultimately be dismissed or withdrawn, and, consequently, the court had no jurisdiction to make an order under s. 173.

Carden v. *Albert Palace Assocn.* (1886) (56 L.J.Ch. 166); *sub nom., Re Albert Palace Assocn., Ltd., Carden* v. *Albert Palace Assocn., Ltd.* (55 L.T. 831), *distinguished and criticised.*

[For the Companies Act, 1929, s. 173, see HALSBURY'S STATUTES, Vol. 2, pp. 892, 893.]

Case referred to:

(1) *Carden* v. *Albert Palace Assocn.*, (1886), 56 L.J.Ch. 166; *sub nom., Re Albert Palace Assocn., Ltd., Carden* v. *Albert Palace Assocn., Ltd.*, 55 L.T. 831; 10 Digest 865, *5840.*

Adjourned Summons.

On Nov. 11, 1947, a petition was presented to the court for the winding-up of the company, Miles Aircraft Ltd. On Nov. 12 the company entered into a contract for the sale of certain leasehold property of which the company was the registered proprietor. On Nov. 19 a receiver was appointed of property charged by debentures which had been issued by the company. The applicants, who were debenture holders, wished to adopt the contract as, in their view, it was a contract at the best price and they feared that, if the sale were not speedily completed, it would go off as they had an equitable title only and no statutory or other power to sell or transfer a legal estate in the property without the concurrence of the company and the prospective purchaser would not accept (nor would the Land Registrar register) a title made after the presentation of the petition either by the receiver acting as attorney of the company under the provisions of the debentures or by the company acting by its board, because it was contended that any such disposition of the legal estate would be void under s. 173 of the Companies Act, 1929, if a winding-up order were made on the petition. The applicants, therefore, asked for an order under s. 173 that the contract and any disposition of the property to be made by way of completion or in pursuance of the contract should not be void in the event of an order for the winding-up of the company being made. Vaisey, J., held that in the circumstances the court had no jurisdiction to make an order under s. 173.

T. D. D. Divine for the applicants.

Gedge for the company.

P. J. Sykes for the petitioning creditors.

VAISEY, J.: On Nov. 11, 1947, a petition for the winding-up of Miles Aircraft, Ltd., was presented. The return date was Nov. 24, 1947. The petition then came on and at the request, or, at any rate, in the presence of, all parties, it was ordered to stand over until Dec. 15 when it was adjourned until today. I myself this morning sanctioned a further adjournment, and the petition now stands over to come on again this day four weeks. The position, therefore, is that this company is liable to be wound-up under the prayer of the petition, but it is not yet in winding-up. The question now arises whether in the circumstances I have jurisdiction to make an order under the Companies Act, 1929, s. 173, which provides:

> In a winding-up by the court, any disposition of the property of the company . . . made after the commencement of the winding up, shall, unless the court otherwise orders, be void.

That section replaced s. 205 (2) of the Companies (Consolidation) Act, 1908, which, so far as material, is in precisely the same terms. Going further back, A the provision from which the section now in question originated is s. 153 of the Companies Act, 1862, which provided:

> Where any company is being wound-up by the court or subject to the supervision of the court all dispositions of the property, effects, and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company made between the commencement of the winding-up and the order for winding-up, shall, unless the court otherwise orders, be void. B

In my judgment, the object of the section, both in its original and in its present form, is that, if a winding-up order is made, any transaction which has been entered into since the commencement of the winding-up—which in the present case would be the date of the presentation of the petition—is subject to review by the liquidator. If that be the true object of the section, I have great difficulty in seeing how I have jurisdiction to adjudicate on what must be an incomplete knowledge of the facts. It is not right that I should anticipate C the performance of his duty by the liquidator, if a liquidator is subsequently appointed, and it seems to me that to attempt to deal with the matter, not only by implication, but also entirely conditionally, is something which the section does not enable me to do. If there is never a winding-up, my order would be without operation. It would be completely otiose if the petition now before me is ultimately dismissed or withdrawn, but, if the petition results in D the making of a winding-up order, it will be, I think, for the liquidator to deal with the matter as he thinks proper.

Carden v. *Albert Palace Assocn.* (1) was a very different case. For one thing there was a pending action for the enforcement of a debenture holder's security, but the judge called attention to the difficulty which I feel in making an order before a winding-up when it is impossible to know whether all the parties interested are before the court. Then the judgment of CHITTY, J., proceeds E (56 L.J.Ch. 167):

> As the transaction is one which I am informed must be for the benefit of all possible parties, I will make an order both in the action and the winding-up. Such order will be in the terms of the summons; but before the part which provides for costs the order will contain, in lieu of the direction "that such deeds and documents be not void, notwithstanding s. 153 of the Companies Act, 1862," simply the words, "notwithstanding s. 153 of the Companies Act, 1862." F

Curiously, the judge seems to have refrained expressly from declaring that the documents were void, but ordered that, notwithstanding that section, they should be handed over as if they were valid. That, so far as it has attracted legal attention, is cited in only a casual way in STIEBEL'S COMPANY LAW AND PRECEDENTS, 3rd ed., p. 830, and is not referred to in BUCKLEY or PALMER. Indeed, it has never been regarded as an authority for anything. On general G principles I feel bound to say that, unless there is in progress a winding-up by the court, I am powerless to make any order under this section and I must leave the matter to the liquidator after his appointment. The difficulty in saying that there is a winding-up now in progress seems to me to be that, if the petition is ultimately dismissed or withdrawn, there never will have been a winding-up by the court. All that we have now is a contingent future possible winding-up, and I do not think the section is so framed as to give me jurisdiction H to adjudicate on this matter, so to speak, in advance. I must, therefore, dismiss this summons with costs.

Summons dismissed with costs.

Solicitors: *Durrant, Cooper & Hambling* (for the applicants); *Stephenson, Harwood & Tatham* (for the company); *Clifford-Turner & Co.* (for the petitioning creditors).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

WRIGHT *v.* BENNETT AND ANOTHER.

[Court of Appeal (Tucker, Cohen and Wrottesley, L.JJ.), January 19, 1948.]

Practice—Pleading—Striking out—Statement of claim—Frivolous and vexatious—First action alleging fraudulent misrepresentation and negligence—Second action alleging fraudulent conspiracy based on substantially same facts—Res judicata.

The plaintiff failed in an action in which he claimed damages for fraudulent misrepresentation against two defendants and damages for negligence against one of them. He then began a second action against the same defendants, covering substantially the same ground as the first, but based on an allegation of fraudulent conspiracy. On an application by the defendants to have the statement of claim struck out on the ground that the action was frivolous and vexatious,

Held: the proceedings were an abuse of the process of the court, which should exercise its inherent jurisdiction to prevent the defendants being called on to meet what in substance and reality was the same charge as that in the earlier action.

Semble: a plea of *res judicata* would have enabled the defendants to succeed in the second action.

[As to Striking out Pleadings, see HALSBURY, Hailsham Edn., Vol. 25, pp. 253-256, paras. 419, 420; and for Cases, see DIGEST, Pleading, pp. 71-92, Nos. *623-777*.]

Cases referred to:

(1) *Greenhalgh* v. *Mallard*, [1947] 2 All E.R. 255.

(2) *Macdougall* v. *Knight*, (1890), 25 Q.B.D. 1; 59 L.J.Q.B. 517; 63 L.T. 43; 54 J.P. 788; 21 Digest 205, 473.

(3) *Green* v. *Weatherill*, [1929] 2 Ch. 213; 98 L.J.Ch. 369; 142 L.T. 216; Digest Supp.

(4) *Henderson* v. *Henderson*, (1843), 3 Hare 100; 1 L.T.O.S. 410; 21 Digest 174, 276.

Interlocutory Appeal by the plaintiff from an order of Cassels, J., dated Dec. 1, 1947, upholding an order of the master that the statement of claim in the action be struck out on the ground that it was frivolous and vexatious. The Court of Appeal affirmed the decision of Cassels, J. The facts appear in the judgment of Tucker, L.J.

Neil Lawson for the plaintiff.

Devlin, K.C., and *Fletcher-Cooke* for the first defendant.

P. H. R. Bristow for the second defendant.

TUCKER, L.J.: By a writ dated May 20, 1943, the plaintiff, who is and was at all material times a solicitor, brought an action against two defendants Sydney Bennett and James Steven, claiming against both of them damages for fraudulent misrepresentation and against the defendant, Bennett, damages for negligence. The matter arose out of the purchase by the plaintiff from the defendant, Steven, of a property in Surrey known as Cobham Court. The defendant, Bennett, is a land agent and valuer. The defendant, Steven, was a farmer, and in 1942 he was the lessee of a farm under a lease dated June 19, 1931. Negotiations took place between the plaintiff and the defendant, Steven, for the purchase of the latter's interest in this property and ultimately the purchase went through. Subsequently, the plaintiff brought this action against the defendants on the ground that the sale had been brought about by their fraudulent misrepresentation, as the result whereof he had suffered damage.

One of the issues in the action was whether or not Bennett had ever been retained by the plaintiff to act as his valuer, and, if so, whether he had been guilty of negligence as such valuer. We are not concerned with that issue in the present case, but it was decided when the action first went for trial before Hilbery, J., that Bennett had never been retained to act as valuer and no question of negligence arose. Both the defendants were, on the pleadings and at the trial before Hilbery, J., charged with being personally liable for fraud and fraudulent misrepresentations. When the case got to the Court of Appeal, in view of Hilbery, J.'s finding with regard to Steven, counsel for the plaintiff did not seek to persist in the allegation that Steven had personally been guilty of fraud, but he sought to make him liable on the ground that Bennett had been fraudulent and was acting as the agent of Steven when he made fraudulent misrepresentations. At the trial, as I have said, the case was clearly made that the two defendants were both fraudulent and they were "teamed" together in the matter of negotiations leading up to the sale. The allegations of fraud are set out in paras. 3 and 4 of the statement of claim in the first action. Paragraph 3 alleges that to induce the plaintiff to purchase the property Bennett A

> . . . made . . . the following oral representations . . . on behalf of himself and the defendant, Steven. (*a*) That when the defendant, Steven, took over the farm it was in a very derelict condition, but, owing to the way he had farmed the said farm and improved it, he had made it the best farm in Surrey. (*b*) That he, the defendant, Bennett, betted that out of the farm and another farm at Tolworth, the defendant, Steven, had made not less than £3,000 profit a year. (*c*) That the defendant, Bennett, had always made the valuations for the defendant, Steven, and knew what they B were and that it would cost at least £12,000 to take over the farm. (*d*) That there was no serious liability under the said lease in respect of Cobham Court or the Lands Farm House, cottages, cowsheds and outbuildings known as Cobham Court Farm; that the document of record referred to in the said lease was very valuable.

It was alleged that representations (*a*), (*c*) and (*d*) were made in the presence of Steven. In para. 4, after alleging that Bennett was retained or instructed to act as the plaintiff's valuer and that pursuant to that retainer or those instructions C he had prepared a valuation, it was stated that Bennett sent that valuation to the plaintiff by a letter dated Apr. 13, 1942, referring to it therein as a summary. It went on to allege that the parties met on Wednesday, Apr. 15, 1942, and Bennett said he could not act further for both parties, but that the plaintiff could take it that the statements and figures in the summary were quite fair and reasonable, with which Steven agreed. It was alleged that that was a fraudulent misrepresentation. All those allegations of fraudulent misrepresentation D were negatived by HILBERY, J., on the trial of the action. On the twelfth day of the hearing it was conceded for the first time that the document I have mentioned, which was headed "Summary of Valuation—Live and Dead Farm Stock at Cobham Court Farm, Cobham, Surrey" was not a valuation, but was what it was stated in the covering letter to be, namely, a summary of the stock on the farm with detailed prices. E

In his defence, pleading to para. 4, Bennett denied "that the plaintiff at any time orally invited the defendant, Bennett, to act as his valuer for the purpose of preparing any valuation between the plaintiff and the defendant, Steven." He then continued: "The letter dated Apr. 13, 1942, and the memorandum of agreement referred to in para. 4 of the statement of claim are admitted subject to production. It is admitted that the defendant, Bennett, prepared the valuation sent to the plaintiff by the said letter F of Apr. 13, 1942. It is denied that the defendant, Bennett, made the representation alleged in the said para. 4." It is to be observed that Bennett was denying that he had ever been appointed a valuer, but he was admitting that he had prepared this document which was called a valuation and had sent it under cover of the letter of Apr. 13. I only pause to say that, if he never was retained to value the property—and that was denied—it was a little curious that he should have prepared the valuation. It was made clear by counsel for Bennett G at the trial that his case was that this document never was a valuation, and never purported to be a valuation, but was prepared in response to a request by the plaintiff to get out some detailed particulars of the sum of £12,000 which Steven was asking, and that it had been accompanied by a letter in these terms:

> Dear Mr. Wright, I went to Cobham Court on Saturday and went into the figures with Mr. Steven and enclose you herewith a summary of the stock at present on the H farm with detailed prices. The figure works out at £11,972 11*s.* 0*d.* which is the lowest figure that Mr. Steven is prepared to accept.

It was said that that letter made it clear that the document enclosed was not a valuation in the ordinary sense of the word. After the twelfth day the action proceeded on that basis. It was some nine months before the hearing was concluded, delays being caused *inter alia* by the judge going on circuit and the Long Vacation, and throughout all those months the plaintiff and his advisers knew what the defendants' case was with regard to this document of valuation and they were in a position to make up their minds whether they desired to amend their statement of claim. No such step was taken and the case went on for trial. None the less, they sought to argue before HILBERY, J., that, apart altogether from the oral representations which had been set out in the statement of claim, this so-called valuation headed "Summary of Valuation of Live and Dead Stock" was itself a fraudulent misrepresentation and that the covering letter was a cloak to cover up the fraud by giving the defendant a loophole for describing it as something else. HILBERY, J., expressed a view unfavourable to the plaintiff with regard to that point on the merits, but he said that, in any event, it was not covered by the pleadings. The case came to the Court of Appeal and there counsel for the plaintiff strongly contended that this point was open to him and invited the court to come to a different conclusion from that at which HILBERY, J., had arrived and to say, on this document, coupled with all the other statements in the case, that the plaintiff had clearly made out a case of fraud against Bennett. The appeal failed, the court—of which I was a member—agreeing with the decision of HILBERY, J., that this point was not open to the plaintiff on his pleadings, and I certainly expressed the opinion that on the material laid before the court there was no substance in the allegation.

That being the position, the plaintiff has started a fresh action by a writ dated June 6, 1947, which in substance sets up the same story against the defendants. They are both charged with being fraudulent and the cause of action is stated to be a fraudulent conspiracy. After twelve paragraphs which are said to be matters of inducement and cover a great deal of the ground covered by the previous action, in para. 13 we reach the cause of action relied on. It is:

> The defendants, knowing the matters referred to in paras. 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 hereof, wrongfully and maliciously conspired together to cheat and defraud the plaintiff by inducing him to agree to purchase and to purchase the defendant, Steven's, aforesaid interest in the said farm for £12,000, which was greatly in excess of its value.

A number of overt acts are set out which are relied on as constituting a conspiracy. Then it is said:

> The defendants and each of them at all material times concealed from the plaintiff and did not disclose to him the fact that (i) the only valuation of the defendant, Steven's, interest in the said farm made by the defendant, Bennett, was the valuation referred to in para. 4 hereof which (excluding the value of wheat, oats and hay harvested, ensilage, the car and the lorry which were intended to be and were excluded from the plaintiff's purchase) amounted to approximately £7,600.

In this statement of claim, the plaintiff makes it clear that this document, which was called a valuation, is relied on as a fraudulent document forming part of the conspiracy. Particulars under heading (D) of this paragraph are:

> On Apr. 11, 1942, the defendants met together at the said farm and together prepared a document to be submitted to the plaintiff as a summary of a valuation which the defendant, Bennett, had that day made or taken of the defendant, Steven's, interest in the said farm and of the live and dead stock thereon in order to induce the plaintiff to believe that such document was a valuation of the live and dead stock at the said farm and purported to represent and show that the value of the defendant, Steven's, aforesaid interest to be acquired by the plaintiff was £11,972 11*s.*

That, in substance, was the case which the plaintiff had endeavoured to make before HILBERY, J., and in the Court of Appeal, but he had not in terms called it a conspiracy. That is the only difference. There may be some minor details showing a few variations from the matters set out in the first action, but, in substance, it is the same story. That being so, the court was asked to strike out this statement of claim as being frivolous and vexatious. That means that, in effect, it is an abuse of the process of the court that the defendants are, in substance, being called on to meet the same allegations covering the same ground, and that they find themselves once more charged with fraud, but fraud which is the basis of a somewhat different cause of action. Counsel for the plaintiff has drawn our attention to all the relevant authorities and has cited a number of cases in most of which the courts have had to consider whether or not an action should be stayed owing to the fact that it was clear that a plea of *res judicata*, which had been pleaded, was bound to succeed, or that such a plea, if pleaded, would be bound to succeed. In many of those cases the matter was considered under two heads, namely, whether the action should be stayed or dismissed because a plea of *res judicata* would inevitably succeed, or whether the court would stay the action under its inherent jurisdiction to prevent a frivolous and vexatious action which would be oppressive to the defendants. Those two points are inclined to overlap each other in these cases. In the present appeal I express no view whether a plea of *res judicata* would inevitably succeed. I agree, if I may say so, with what was recently said by A Somervell, L.J., in *Greenhalgh* v. *Mallard* (1) ([1947] 2 All E.R. 257) :

> I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. B

I agree that that is the result of the cases and that the plea of *res judicata* is not necessarily confined to the identical nature of the issues in each action. What has to be considered are the issues and facts which are part of the subject-matter of the litigation. I do not think it is necessary, as I have already indicated, to express a view with regard to *res judicata* because I think that this case is one in which the court clearly should exercise the inherent jurisdiction which it has to prevent its own process being used in any way which would be C an abuse by calling on defendants in substance and in reality to meet the same old charge.

In *McDougall* v. *Knight* (2) the distinction between stopping a case *in limine* on the ground of *res judicata* and stopping it on the ground of the exercise by the court of its inherent jurisdiction is made clear. In that case a libel action had been brought in respect of part of the contents of a document and subsequently D a second libel action was brought with regard to another part of the contents of the same document. After dealing with the matter on the basis of *res judicata*, Lord Esher, in the concluding part of his judgment, said (25 Q.B.D. 9) :

> On that ground I think the action should be stayed; but even if the plaintiff could in law split up the defamatory matter in the report into different causes of action, I think such a course would be vexatious, so that either way I am of the opinion the appeal must be allowed and the action stayed. E

Fry, L.J., said (*ibid.*, 10) :

> The short ground for this application is either that a plea of *res judicata*, if put on the record, must succeed; or that the proceedings in this action are shewn to be vexatious and an abuse of the process of the court. In my opinion, the defendant is right in both these contentions.

Finally he said, after dealing with *res judicata* : F

> Suppose, however, this to be otherwise, still, in such case, I do not hesitate to say that such successive actions in respect of the same libel would be an abuse of the process of the court, and so, *quacunque via*, the application should succeed, and the action be stayed.

I think that that sentence in the judgment of Fry, L.J., is completely applicable to the present action, that the decision arrived at by the master and Cassels, J., was clearly right, and that this action was properly dismissed. G

COHEN, L.J. : I agree that the pleadings in the second action show plainly that the facts relied on and dealt with at great length in the first action are in substance the same as those on which the plaintiff seeks to rely in the action with which we are now concerned. Among the overt acts now relied on as establishing conspiracy are some of the oral representations which were relied on as fraudulent in the first action. That being the position, I agree with my Lord that the H decision of Cassels, J., was plainly right. I am inclined to think that the plea of *res judicata* could succeed. Counsel for the plaintiff invited us to hold that it could not because he said the cause of action in the second action was different from the cause of action in the first, although the facts giving rise to it were in substance the same. He said that in no case has a plea of *res judicata* succeeded where the cause of action was different in the later proceedings except in *Green* v. *Weatherill* (3), a decision of Maugham, J. In that case, Maugham, J., said ([1929] 2 Ch. 221) :

In my opinion it must be admitted that the cause of action in the two cases is strictly speaking not the same. On the other hand, the plea of *res judicata* is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation.

Counsel sought to explain that case by saying that there the plaintiff had in effect elected to adopt one cause of action and could not be allowed to adopt another. I do not find it necessary to consider whether that is the explanation of that case, but, if it be so, I think the same might be said of the plaintiff in the present case. I think it would be most unjust if he, having pleaded the case fully and there having been arguments on those facts for 19 days, were to be allowed to set up an alternative cause of action on the same facts in other proceedings. I do not, however, find it necessary to reach a definite conclusion whether or not the plea of *res judicata* would succeed as I am satisfied on the alternative ground that this is an abuse of the process of the court and it ought to be stayed under the inherent jurisdiction of the court.

WROTTESLEY, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *H. S. Wright & Webb* (for the plaintiff); *George C. Carter & Co.* (for the defendant Bennett); *Wilkinson, Howlett & Moorhouse* (for the defendant Steven).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Re COOK (*deceased*), BECK *v.* GRANT.

[CHANCERY DIVISION (Harman, J.), January 20, 1948.]

Trusts and Trustees—Joint tenants—Statutory trust for sale—Whole property accruing to survivor—Continuance of trust—Law of Property Act, 1925 (*c.* 20), *s.* 36 (1) (2).

Wills—Construction—"Personal estate."

In March, 1924, freehold property was conveyed by deed for valuable consideration to the testatrix and her husband "in fee simple as joint tenants." On Jan. 1, 1926, by the operation of the Law of Property Act, 1925, s. 36 (1), a statutory trust for sale was created whereby the testatrix and her husband became trustees of the proceeds of sale for themselves jointly. In January, 1944, the husband died, and in March, 1944, the testatrix made her will providing: "I give and bequeath unto my nieces and nephew . . . All my personal estate whatsoever to be equally divided." On Sept. 28, 1944, the testatrix died.

HELD: (i) the trust for sale imposed by s. 36 (1) came to an end on the death of the husband in January, 1944, and thereafter the testatrix was the absolute owner free from the trust.

(ii) the gift in her will of "personal estate" did not operate to dispose of the freehold property.

[AS TO STATUTORY TRUST FOR SALE IMPOSED ON BENEFICIAL JOINT TENANCY, see HALSBURY, Hailsham Edn., Vol. 27, pp. 659-660, para. 1141.]

Case referred to:

(1) *Re Selous, Thomson* v. *Selous*, [1901] 1 Ch. 921; 70 L.J.Ch. 402; 84 L.T. 318; 43 Digest 667, *986*.

ADJOURNED SUMMONS to determine whether the term "personal estate" as used in a will was effective to dispose of freehold property vested in the testatrix as the survivor in a joint tenancy on which the Law of Property Act, 1925, s. 36 (1) had operated to create a trust for sale. HARMAN, J., held that the term did not have that effect. The facts appear in the judgment.

Ungoed-Thomas, K.C. for the plaintiffs.
F. Bower Alcock for the first defendant.
E. J. A. Freeman for the second defendant.
Danckwerts for the Custodian of Enemy Property.

HARMAN, J.: By a deed executed in March, 1924, it was provided that:

> . . . in consideration of the sum of £930 now paid to the vendor by the purchasers out of moneys belonging to them on a joint account . . . the vendor . . . conveys unto the purchasers [the freehold property called 16 Kirton Park Terrace, North Shields]. To hold the same . . . unto and to the use of the purchasers in fee simple as joint tenants.

The purchasers were the testatrix, Caroline Cook, and her husband, the late John Robert Cook.

The Law of Property Act, 1925, s. 36, provides :

> Where a legal estate . . . is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common . . .

There was, therefore, imposed on this beneficial tenancy on Jan. 1, 1926, a trust for sale whereby the two joint tenants became trustees of the proceeds of sale for themselves jointly. I do not think that it is necessary for me to decide whether the words "is beneficially limited to or held in trust for" mean immediately before the Act came into force or from the time when the Act comes into being and thereafter. The effect in either case is the same.

No disposition was made by the husband and wife. The husband died in January, 1944, and the question to be decided is : Did the trust for sale imposed by s. 36 thereupon come to an end ? After that date there is no doubt that the entire interest in the property, both legal and equitable, became vested in the wife. It is said by counsel for the Custodian of Enemy Property that, according to the ordinary and well-known rule (see, *e.g.*, per Farwell, J., ([1901] 1 Ch. 922) in *Re Selous, Thomson* v. *Selous* (1)), the legal estate swallows up the equitable, that there is a merger between the two, and that from January, 1944, onwards the wife was merely the owner of the property and no trust for sale could exist because A. cannot be trustee for A. I think counsel for the beneficiaries under the wife's will would admit that to be so if this were anything but what is known as a statutory trust, but he submits that, this trust being the creature of statute, without any statutory ending it continues, and he points out that under the Law of Property Act, 1925, s. 23, a trust for sale may, at any rate so far as protection of a purchaser is concerned, be deemed to go on indefinitely. Even so, I think he would be in great difficulty but for the following addition to s. 36 of the Act inserted by the Law of Property (Amendment) Act, 1926, s. 7, providing :

> Nothing in this Act affects the right of a survivor of joint tenants, who is solely and beneficially interested, to deal with his legal estate as if it were not held on trust for sale.

Counsel for the beneficiary argues, and I think with force, that the inference from that is inevitable, namely, that the legal estate is held on trust for sale although the owner of it is given leave by the Act to deal with it as if it were not. If that were the true meaning of it, he says, it follows that a trust for sale still does affect the property until it is dealt with in some way inconsistent with that position. I feel the force of that, but I do not think it is enough to alter the view which I should have taken if it were not there. This sentence is an afterthought introduced into the Act *ex cautela* because of some danger, real or imaginary, that was thought to exist after the Act of 1925 had come into force, and, in my judgment, it is not enough to alter the *prima facie* rule that you cannot have a trust existing when nobody is interested under it except the trustee, because nobody can enforce it, and in fact there is no trust in existence. I get some assistance also from s. 36 (1) itself because it contains the words "shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common." As soon as only one person is beneficially entitled there are no persons who could be tenants in common because there is only one person interested. The phrase "persons beneficially entitled" must, as counsel for the second defendant submitted to me, mean what it says, namely, "persons" in the plural, and, therefore, s. 36 (1) does not apply as soon as only one person is interested in the whole of the property. Consequently, I hold that on the death of her husband the testatrix became the absolute owner of this property and there was no trust for sale subsisting beyond that date.

The testatrix made her will in March, 1944, on a printed form, and provided, after appointing executors and directing payment of her debts :

> I give and bequeath unto my nieces and nephew Clara Sophie Karoline Beck nee Grant and Rose Magdaline Mary Grant and Frederick Grant pork butcher West Street Gateshead co. Durham All my personal estate whatsoever to be equally divided.

If I am right so far, this house was at the time of her will and at the time of her death real estate to which she was entitled in fee simple. She had another house to which she was undoubtedly entitled in fee simple, and she had a small personal estate. It seems unlikely that she intended to dispose only of the personal estate, in the lawyer's sense of that word, and not to deal with the more substantial part of her property, namely, this house (in which she lived) and her other freehold house, but this is a case where a layman has chosen to use a term of art. The words " all my personal estate " are words so well-known to lawyers that it must take a very strong context to make them include real estate. Testators can cause black to mean white if they make their intention sufficiently clear, but this testatrix has not done so. It may well be that she thought " personal estate " meant " all my worldly goods." I do not know. In the absence of something to show that the phrase ought not to be so construed, I must suppose that she used the term " personal estate " in its ordinary meaning as a term of art. Consequently, I hold that, the testatrix only succeeded in disposing of what lawyers would call her personal estate and that she did not dispose of this house, No. 16 Kirton Park Terrace, which, therefore, devolves as on an intestacy.

Order accordingly. Costs as between solicitor and client out of the estate in due course of administration.

Solicitors: *Doyle, Devonshire & Co.*, agents for *John H. Sinton & Co.*, Newcastle-upon-Tyne (for plaintiffs and first two defendants); *Solicitor*, Board of Trade (for custodian of enemy property).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

HILL *v.* BUTTERLEY CO., LTD.

[COURT OF APPEAL (Scott, Bucknill and Somervell, L.JJ.), January 23, 26, 1948.]

Workmen's Compensation—" Arising out of and in the course of the employment "—Accident within company's premises—Workman on way to " clock in " before starting work—Accident where public allowed to cross company's premises, although no right of way—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1 (1).

While crossing her employers' premises on her way to the office to " clock in " before starting work, a workman slipped on an icy slope and was injured. Although there was no public right of way across the premises and no actual road there, a practice had sprung up during a limited number of years without objection by the employers by which the inhabitants of a neighbouring village crossed the part of the premises where the accident occurred to reach an adjoining railway station :—

HELD : the accident arose " out of and in the course of " the workman's employment, within the Workmen's Compensation Act, 1925, s. 1 (1), because the employers' exclusive right of property had not been altered by the fact that, during a limited time, they had allowed members of the village to cross their premises, and, therefore, the risk incurred by the workman was not identical with the risks incurred by members of the public in a public street.

John Stewart & Son (1912), *Ltd.* v. *Longhurst* ([1917] A.C. 249 ; 116 L.T. 763), *applied.*

Clark v. *Stephens, Sutton, Ltd.* (1937) (30 B.W.C.C. 340), *distinguished.*

[AS TO ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 822-856, paras. 1160-1180 ; and FOR CASES, see DIGEST, Vol. 34, pp. 276-279, Nos. *2332-2357*, and Supplement.]

Cases referred to :

(1) *Stewart (John) & Son* (1912), *Ltd.* v. *Longhurst*, [1917] A.C. 249 ; 86 L.J.K.B. 729 ; 116 L.T. 763 ; 10 B.W.C.C. 266 ; 34 Digest 279, *2357*.

(2) *Clark* v. *Stephens, Sutton, Ltd.*, (1937), 30 B.W.C.C. 340 ; Digest Supp.

APPEAL by the workman from an award of HIS HONOUR JUDGE WILLES at Alfreton County Court on Oct. 25, 1947.

The workman, who was employed by a colliery company, met with an accident on the employers' premises while on her way to the office to " clock in " before starting work. The county court judge held that she was not entitled to compensation under the Workmen's Compensation Act, 1925, s. 1 (1), because the risk incurred by her which resulted in the accident was identical with the risks incurred by members of the public in a public street, since the employers allowed the public to cross their premises at the place where the accident occurred, and, therefore, the accident did not arise " in the course of the employment." The workman appealed and the Court of Appeal now allowed the appeal. The facts appear in the judgment of Scott, L.J.

Philip Curtis for the workman.
E. M. Jukes for the employers.

SCOTT, L.J.: The workman was employed as a charwoman at the surgery of a colliery company and, while going to her work one morning during the hard weather of last year, she slipped within the premises of her employers as she was going to the office where it was her duty, under her contract with them, to " clock in," *i.e.*, to register the time of her arrival. She suffered serious injuries, and the question before us, as it was before the court below, is the primary question : Did the accident occur, in the words of the Workmen's Compensation Act, 1925, s. 1 (1), " out of and in the course of " her employment ? We have been referred to the leading cases on this subject, but I will express my own conclusion on the matter without regard to them in the first instance.

There was no plan of the premises agreed between the parties below, but the colliery company have prepared a rough sketch plan showing the *locus in quo* approximately, and their counsel has given the court the advantage of copies of the plan to make the case intelligible. The workman lived at No. 9, Forge Row, which is outside and to the south of the premises of the colliery company and at right angles to the main approach road, Monument Road, which leads north-west to a bridge over a main railway line immediately to the west of the local station. Going northwards from that railway bridge, one passes a notice board put up by the colliery company saying " No thoroughfare. Private." One then comes to a private colliery railway of two lines which is on the level of the ground at that point. To get to the surgery or the " clocking in " office the workman would have to cross that line of railway and continue northwards, leaving a large building called the coke house on her left and the wagonshop stores on her right. Further north she would pass, on the left, the surgery where she was going to work, and, on the right, some little distance away, a bricklayers' cabin. Between those four buildings is an area of open ground. If she continued over another private railway line she would find the " clocking in " office on her right. The ground over which, on the occasion in question, she came from the south slopes down rather steeply to that line of railway. There was a lot of ice on the ground and she slipped and suffered her injuries somewhere on that slope before she reached the office where she was going to " clock in." The distance across the railway line between the surgery and the office is said to be only twenty yards. She, therefore, met her accident quite close to the " clocking in " office where she was bound to go as part of her duty before she started her daily work at the surgery.

The first question is whether the accident arose " out of or in the course of her employment." It clearly arose " out of " it, and I have no doubt it was " in the course of " it. The workman had been on her employers' premises ever since she crossed the railway bridge near her house and she had reached a point which was something like three times as far from her house as was the railway bridge. The judge gave no express finding of fact on that question, but I think his judgment assumed it in favour of the workman, namely, that *prima facie* the accident did occur in the course of her employment. He decided against her, however, on this ground. During the war the habit grew up of people from a village called Jacksdale, to the north of the company's premises, coming down the road from the village to the northern private railway line, walking across the open piece of ground between the four buildings to which I have referred, over the next line of private railway, past the " No thoroughfare " notice board, and so to the station on the main line which is to the east of the railway bridge. The judge took the view that, although there was no right of way for these people to go across the colliery company's premises, they had been allowed to do so " in the sense that the practice had not been objected to," and he came to the conclusion that, because members of the public were allowed to walk over that area and be exposed to the risk of slippery ground in the same way as the workman, the colliery company were entitled to say that the case ought to be decided in accordance with those cases which have held that, if a workman employed by a company meets with an accident, not on the company's works, but on a public road leading to or from the works of the company, it cannot be said that the accident arises in the course of his employment or out of it because he is then incurring the same risks as any ordinary member of the public.

I do not think it is necessary to analyse the cases. It is contended for the colliery company that, if any members of the public were allowed to walk through the company's works, that necessarily brought this case within the principle of the public thoroughfare cases. I cannot see on what principle of law that argument can be based. The workman was close to the surgery where she was going to work. She was less than 20 yards from the place where she had to "clock in." She was going there because of her work. Since she was on the company's premises close to the place where she was going to work, the judge was justified in assuming—it may be that that was the reason why he did not expressly decide it—that, but for this other point, she was clearly within the Act. I base my judgment on that assumption, with which I agree. I cannot see how the cases which depend on the risk incurred by the workman being identical with the risks incurred by members of the public in a public street, as in an ordinary street accident, can have any application to this case. There was no definite "way" on which members of the public coming from the village were authorised by the company to cross their premises. There was no suggestion that the company's exclusive right of property had in any way been altered by the courtesy they had extended to members of the village over a limited number of years, and I cannot find any basis for saying that, because a similar risk might have been incurred by members of the public passing over the premises without objection, therefore, the workman should lose her right to compensation. For these reasons I think the appeal ought to be allowed.

BUCKNILL, L.J. : I agree.

SOMERVELL, L.J. : I agree. I think, on the question of the user of this part of the colliery company's premises by the public, I ought to proceed on the basis that the company established that the part of the land with which we are concerned was, and had been since the war, used by the public, with the permission of the company, to get to the station. In my opinion, this case turns on a very short point. In *John Stewart & Son* (1912), *Ltd.* v. *Longhurst* (1) a workman, who was employed to do certain work on a barge met with an accident after he had left his work at the end of the day and while he was attempting to reach the gates which led from the docks to the public road. In his speech, LORD FINLAY, L.C., said ([1917] A.C. 255) :

> To my mind the present case is like that of a workman whose work lies in a particular part of a large factory, and who in order to get to it has to go through the rest of the factory and meets with an accident while so going.

I think the present case is in the same class. I think there is sufficient in the evidence and in what I think are the necessary inferences to be drawn from the county court judge's judgment to determine it on the basis that the workman had arrived at the place where she was employed. When the county court judge said she had entered the works, I think he was intending to find that she had entered the place where she was employed, and, having entered the place where she was employed, she was proceeding, in accordance with the conditions of her employment, to "clock in." In my opinion, *Clark* v. *Stephens, Sutton, Ltd.* (2), which was relied on by counsel for the colliery company, deals with quite a different legal position, because in that case the workman, who was returning from work when he met with the accident, was on a road which plainly was a mode of access to the place where he was going to work as distinguished from the place of work itself. Therefore, I do not think that what was said there applies here, where the workman had got to the place where her work began. For these reasons I think the appeal should be allowed.

Appeal allowed with costs.

Solicitors : *Fred Hollis* (for the workman) ; *Bell, Brodrick & Gray*, agents for *Harold Jackson & Co.*, Sheffield (for the employers).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WILLIAMS *v.* TREDEGAR IRON AND COAL CO., LTD.

[COURT OF APPEAL (Scott, Bucknill and Somervell, L.JJ.), January 21, 1948.]

Workmen's Compensation—Industrial disease—Silicosis—Certificate of medical board—Conclusiveness—"Conditions not associated with disease"—Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931, *arts.* 3, 5.

The Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931 (which was made under the powers given by the Workmen's Compensation Act, 1925, s. 47), provided, by art. 3, for the appointment of a medical board "consisting of specially qualified medical practitioners" to make medical examinations and give the medical certificates required under the Scheme, and by art. 5: "Any certificate given by the medical board in pursuance of the provisions of this Scheme shall be conclusive evidence of the matters therein certified." At the end of a certificate of suspension given by them, the medical board added the words: "He [the workman] is, however, unfit for any work owing to conditions not associated with the disease":—

HELD: the statement contained in the last sentence of the certificate was not conclusive evidence of the matters stated in it, within art. 5 of the Scheme, because it was not of a kind contemplated by the Scheme and, therefore, the medical board had no jurisdiction to make it.

[FOR THE SILICOSIS AND ASBESTOSIS (MEDICAL ARRANGEMENTS) SCHEME, 1931 (as amended), see WILLIS'S WORKMEN'S COMPENSATION, 37th Edn., pp. 1077-1092.]

APPEAL by the employers from an award of HIS HONOUR JUDGE L. C. THOMAS, made at Tredegar County Court on June 20, 1947.

A medical board constituted under the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931, gave a certificate of suspension to a workman under the provisions of the Scheme, but added at the end of the certificate a statement that the workman was "unfit for any work owing to conditions not associated with the disease." The employers contended that, under art. 5 of the Scheme, this statement was conclusive evidence of the fact therein stated. The Court of Appeal held that the medical board had no jurisdiction to make the statement in question, and, therefore, it was not conclusive within the meaning of art. 5 of the Scheme, and the appeal was dismissed.

Wallis-Jones for the employers.
Paull, K.C., and *Marven Everett* for the workman.

SCOTT, L.J.: This is an appeal with regard to a sentence in a certificate given by a medical board under the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931. That sentence appears at the end of the certificate and is as follows:

> He [the workman] is, however, unfit for any work owing to conditions not associated with the disease.

Article 5 of the Scheme is in these terms:

> Any certificate given by the medical board in pursuance of the provisions of this Scheme shall be conclusive evidence of the matters therein certified . . .

It is contended for the employers that the added sentence at the end of the certificate is, by art. 5 of the Scheme, made conclusive evidence of the facts therein stated. It is conceded that, if it is not conclusive evidence of the facts, the appeal must be dismissed. I am clear that it is not conclusive evidence of the facts stated in that one sentence and that is sufficient to dispose of the appeal. I only add the observation that the policy of Parliament and of the delegated legislation entrusted to the Minister by the Workmen's Compensation Act, 1925, s. 47, the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930, and the Workmen's Compensation Act, 1943, and contained in the Scheme (as amended), was to give a very special jurisdiction to a specially qualified board, as appears from art. 3 of the Scheme which says:

> A medical board consisting of specially qualified medical practitioners shall be appointed . . .

"Specially" obviously means specially qualified in relation to the disease in question. It would be manifestly against the policy of the Acts and of the Scheme that any sentence, added by the board, of a different kind from that contemplated by the Scheme as constituting the subject-matter of their jurisdiction should be given the quality of conclusiveness conferred on statements in a certificate given by them within their jurisdiction. The appeal is dismissed, with costs.

A **BUCKNILL, L.J.:** I agree. One has to be careful, when Parliament makes a certificate conclusive evidence of matters therein certified, that the certificate should keep closely within the four corners of the powers of those who are entitled to make it. It seems to me, when one looks at Form C [*i.e.*, the form for a "certificate of suspension on account of silicosis or asbestosis . . . accompanied by tuberculosis"] under which this certificate has been given, that B the words "the general physical capacity of the . . . workman for employment is impaired by reason of the disease" cannot include impairment by reason of some complaint other than the disease in respect of which the certificate is given. The last sentence in the certificate before us does not refer to any disease. It simply says: "He is, however, unfit for any work owing to conditions not associated with the disease." That might cover a complaint of any kind, and, to my mind, it is clear that those words are outside the powers given to the board C to make a certificate which is conclusive evidence.

SOMERVELL, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *William A. Crump & Son*, agents for *A. J. Prosser & Co.*, Cardiff (for the employers); *Theodore Goddard & Co.*, agents for *T. S. Edwards & Son*, Newport, Mon. (for the workman).

D [*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

TOMKINS *v.* TOMKINS.

[COURT OF APPEAL (Lord Greene, M.R., Asquith, L.J., and Harman, J.), January 22, 23, 1948.]

E *Divorce—Variation of settlements—Separation deed—Wife's covenant to pay husband £5 per week—Husband's adultery—Decree absolute—Variation of deed—Discretion of court.*

A husband and wife entered into a separation deed under which the wife covenanted to pay the husband an allowance of £5 per week free of income tax during their joint lives. The husband subsequently committed adultery, and on that ground the wife was granted a decree *nisi* of divorce, which F was made absolute. The wife applied to have cancelled the covenant to pay £5 per week. On appeal from the registrar, the judge cancelled the covenant, basing his decision on the ground that the dissolution of the marriage brought about a fundamental change in the status of the parties, drawing an analogy with the failure of consideration in an ordinary contract. He also held that the fact that a guilty husband might be left in destitution was G not a matter which the court should consider.

HELD: the judge had misdirected himself in law as to the matters relevant for consideration, but, having regard to all the circumstances consequent upon the husband's remarriage, including the fact that the allowance, if continued, might go towards the ordinary household expenses of the husband and his new wife, it was proper to extinguish the covenant.

Dictum of SIR GEORGE JESSEL, M.R., in *Wigney* v. *Wigney* (1882) (7 P.D. 177, 181; 46 L.T. 441, 442), *applied.*

Observations on the matter relevant to be considered in the exercise of judicial discretion with regard to the variation of a separation deed.

[AS TO VARIATION OF SETTLEMENTS AFTER DISSOLUTION OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 800-809, paras. 1274-1292; and FOR CASES, see DIGEST, Vol. 27, pp. 517-525, Nos. *5576-5666.*]

Case referred to:

(1) *Wigney* v. *Wigney* (1882), 7 P.D. 177; 51 L.J.P. 60; 46 L.T. 441; 27 Digest 525, *5664.*

Appeal by a respondent husband against an order of Willmer, J., made on Dec. 18, 1947, reversing an order of the registrar, and cancelling a covenant in a separation deed by which the wife agreed to pay an allowance to the husband for his maintenance. Willmer, J., considered that a decree of divorce granted to the wife had so changed the relationship between the husband and wife that the basis of the agreement had been withdrawn. The Court of Appeal held that the judge had misdirected himself in law, but affirmed the cancellation on different grounds.

Colin Duncan for the husband.

T. F. Turner, K.C., and *Wishart* for the wife.

LORD GREENE, M.R. : This is an appeal by the respondent in a divorce suit, the husband, against whom a decree was obtained by the wife, and for convenience I shall call them husband and wife, although the decree has now been made absolute on the ground of the husband's adultery. They had been separated for a good many years, and after the separation had continued for some six or seven years they entered into a formal deed of separation. It was an application by the wife to have the settlement constituted by that deed varied pursuant to the Judicature Act, 1925, s. 192, which has given rise to this appeal.

The separation deed was dated Oct. 4, 1937. The parties were the wife, the husband, and a trustee. The deed recites unhappy differences, agreement to live apart, and agreement by the wife to make her husband an allowance of £5 a week free of income tax during the joint lives of herself and her husband for his maintenance and support. That sum she covenants by the deed to pay to the trustee who holds on a protective trust for the benefit of the husband. The deed contains many of the usual clauses in a separation deed—a covenant to live apart, covenants by the husband not to molest the wife and by the wife not to molest the husband, provisions as to furniture and so on, and the wife is to have the sole custody and control of and over the two daughters of the marriage and their education and bringing up. There is a proviso that, if the spouses should come together and cohabit again, the payment of £5 should cease. On the face of it that covenant is expressed to be a covenant for joint lives, not a covenant which is to determine in the event of the marriage being dissolved while both parties are alive. Nevertheless, it had in it necessarily an element of potential change in the sense that it was made under the existing state of the law, which has endured for nearly 100 years, that settlements of this kind are always subject to variation by order of the court in the event of the marriage being dissolved. The two daughters of the marriage were at the time well on in their 'teens. Now they have for several years passed their majority.

The application to vary the settlement asked for a complete cancellation of the covenant to pay £5 to the husband. The matter came before the registrar who made a report in which he expressed the opinion that there were no grounds for varying the deed. The main factor which led him to that conclusion is, I think, expressed in para. 7 of the report as follows :

> It will be realised that she covenanted to pay this money to this man at a time when for all practical purposes they had ceased to be husband and wife, and it is now suggested that this one night adultery and the decree of dissolution based thereon afford sufficient grounds for tearing up the agreement into which the petitioner entered with the assent of her advisers.

The wife appealed, and Willmer, J., allowed the appeal and varied the settlement by extinguishing that particular covenant. For the husband it is said that, although the discretion of the judge in matters such as this is not to be interfered with by the Court of Appeal save on well known principles, the judge's judgment shows that he misdirected himself in law by adopting a wrong principle and excluding from his consideration certain matters of fact which he ought to have taken into consideration. As against that argument it is said, first, that, on the true construction of the judge's judgment, he did not apply any wrong principle or misdirect himself, and, secondly, that the facts of the case were such as amply to justify the judge in coming to the conclusion and making the order he did, that he must have had those facts in mind, and that his judgment must be read on the footing that he came to his decision in reference to them. Thirdly, it is said that, if the judge's judgment can be attacked on the ground that it is based on a wrong principle, this court would have a free hand to come to such conclusion as it thought was a just result on the facts.

I will deal, first, with the argument with which counsel opened the case for the husband, namely, that of the suggested wrong principle adopted by the judge. The real basis of his judgment was the fact that the dissolution of the marriage had brought about a fundamental change in the status of the parties—in other words, that at the time of the separation deed their relative positions were still those of husband and wife with the possibility of reconciliation, whereas the divorce entirely changed that relationship. On that point he said: " One can, perhaps, look by way of analogy at the principles governing an ordinary contract. It could very well be said, if this were an ordinary contract, that the consideration in respect of which the weekly payment was agreed to be made had now wholly failed." If those words mean what I am bound to confess they appear to me to mean, with all respect to the judge he was laying down and guiding himself by a principle which cannot be supported. The analogy of an ordinary contract, which appears to have weighed on his mind, appears to me to be a misleading one. No question of failure of consideration, no question of anything like frustration, can possibly come into a case under this jurisdiction. On the other hand, it is, in my view, relevant for the court to consider what is the nature of the settlement which it is sought to vary, the circumstances in which it was made, and the circumstances in relation to which it was executed. That is very far from saying that the result is anything like that which occurs in the case of an ordinary contract when there is failure of consideration. I cannot think that the way in which the judge directed himself is right. He says that the change in the status of the parties was the fundamental consideration, and then goes on:

> I can see no ground for the argument put forward by Mr. *Latey*, founded on the cases where the guilty party was the wife, that a guilty husband should not be left in destitution. I do not agree that the principle on which those cases were decided furnishes a valid reason for not making the variation asked for in this case. To apply that principle in this case would, I think, be breaking entirely new ground. I do not feel disposed to do so.

There it is said, and again I am bound to confess I think the argument is right, the judge is really saying that, if the guilty husband is going to be left in destitution by a variation of the settlement, " that is a fact which the court has not in the past considered and I, as a judge, am not going to be the first to consider it." In other words, it seems to me he was really excluding from his mind as a circumstance relevant to consider that particular circumstance of the alleged destitution of this husband. We were not referred to any case in which provision had been made for a guilty destitute husband. In *Wigney* v. *Wigney* (1), however, SIR GEORGE JESSEL, M.R., said (7 P.D. 181):

> It was the course of the House of Lords in marriage annulling bills to allow maintenance to a guilty wife, and it would be reasonable for the court in the same case to exercise its discretion in the same way, but it would not be right to make the same provision for her if guilty as would be made if she were innocent. In the case of a husband similar considerations must be entertained. Suppose a guilty husband is incapacitated by physical infirmity from earning a livelihood, and has no means of his own, I do not say that no provision can in any case be made for him out of the wife's property.

Had the judge had that guidance in his mind he would not, I think, have expressed himself in the way in which he did express himself in the paragraph to which I have just referred.

In the result, giving the best consideration that I can to the matter, I cannot avoid the conclusion that the judge's reasons for exercising his discretion as he did and the grounds on which he directed himself as to the proper considerations that he should have in mind cannot stand and that his judgment is open to attack on that ground. The true position, which, I think, flows from the authorities which have been cited is that when circumstances have arisen which under the statute entitle the court to entertain an application for variation of a settlement, the matter, so to speak, is at large. There is a total discretion in the judge as to the order he shall make which is restricted only by the ordinary principles that govern a judicial discretion. In other words, whatever is relevant he may, and should, take into consideration. When I say " relevant " I mean " so nearly touching the matter in issue as to be such that a judicial mind ought to regard it as a proper thing to be taken into consideration." There are certain things which the courts have said are irrelevant, and the judge exercising a discretion is no more entitled to take an irrelevant matter into consideration than he is to exclude relevant matters. When one comes to consider the relevant matters the answer on a great many points is mere common sense, but one does get guidance from other cases where one finds considerations which the court rules were relevant in those cases. As to irrelevant matters, it has been laid down clearly that the element of punishment, the idea that this is some sort of a penal jurisdiction against the guilty spouse, is to be excluded. If a judge were to make an order based on the idea of punishing a person as being a guilty spouse, that order could not stand. On the other hand, matters which may, I think, be taken into consideration are the relevant financial position of the spouses, the question how one or other or both of them will be affected if matters are left as they are, the position of children, obviously, in cases where children take an interest in the settled property or where one or other of the parties undertakes by contract or by law the maintenance of infant children. I am not myself prepared to exclude the consideration of the position even of adult children who may take no interest in any settled fund. I can well understand it being said, without deciding it, that for a parent to be reduced to destitution and beggary, even if he be a guilty parent, is so disadvantageous to the members of the family, including the adult members of it, that the court ought to avoid producing that result if it fairly can.

In the present case there was a number of additional facts, which, although not put in evidence in a formal way, were admitted by counsel when the matter came before the judge. We were told what they were and there is no dispute about them. They bore on various matters which are undoubtedly relevant. I have already said that a relevant matter, in my opinion, is the nature of the document itself and the circumstances in relation to which it was executed. That is not conclusive by any means, but it should not be excluded and should be given such weight as the judge may think right. There is an essential difference between a separation deed and, say, an ante-nuptial settlement because a separation deed is clearly contemplating, and is executed in contemplation of, an abnormal state of affairs, but I think it is wrong to regard the continuance of that state of affairs as something essential before the guilty party can be left to the enjoyment of the benefits under the document or some of them. The additional facts put before us are relevant again because they bear on the means of the parties and certain other circumstances. The evidence shows that the wife came from rich parents, she has considerable expectations, and her present income is in the order of £2,000 a year. Of the two children, one is, unfortunately, a patient in a home and is being supported by her mother who is also supporting the infant child of that child. The husband has remarried. On Apr. 8, 1947, shortly after the decree absolute, which was in January, 1947, the husband swore in an affidavit which was in evidence before the judge and the registrar on the present application :

> I am entirely dependent upon the £5 a week payable to me under the said deed of separation. I have no assets or property and no earnings. I am endeavouring to build up a business for the manufacture of matches, but in the present position of industry cannot guarantee any success whatever and am deriving no income of any kind from the venture. Nor have I any income from any other source than the deed . . . Having regard to the petitioner's large fortune and her covenant to pay me this stipend, and to my poverty and age [he was, apparently, 63 at the time he swore this affidavit] I humbly crave that this Honourable Court will leave the deed undisturbed.

When that was first read to us I got from it the impression that we were dealing with an elderly man with no real means of support who was going to be left entirely destitute if this allowance of £5 was going to be withdrawn. It appears, however, that that is far from being the case. First, he has re-married, and all the indications point to the fact that he was already married at the time he swore that affidavit. If he was not married, he was clearly engaged to the woman he afterwards did marry. Before the registrar there was in evidence a letter from the husband written a year before that affidavit was sworn, and dated Mar. 4, 1946, before the divorce proceedings began. In it he says that in the near future he intends to give the necessary evidence for divorce and he goes on : "My prospects are exceedingly good as there is now little doubt about the match." That, we are told, means there was no doubt he was going to marry the woman whom he did afterwards marry. He goes on : "Regarding the £5 per week, in any case I shall probably be able to do without this by the end of the year." He says that when the divorce is made absolute the covenant under the separation deed will end as his solicitor advises. That, of course, was not correct, but that was the impression under which he was when he was proposing to get married, namely, that the £5 would be cut off. Then he says:

> As I can assure you that the moment I can do without such a payment from you I shall stop it as I know how exceedingly short of money you must be as it seems you are keeping everyone. What I want to feel is that I can have the £5 per week if, and only if, it is absolutely necessary . . . The lady I am marrying has also made a condition that is that she wishes you to feel that I am free to come down to see you at any time regarding Pam, etc., as she feels you have had a hell of a time with her. It is very nice of her, I think, to ask for this although it is not necessary as I shall be exactly the same to you and the children as I am now, in fact it will be a home for Pam to come to if it is necessary. The lady I am marrying is in a £500 a year post and is keeping it on but has expectations of inheriting money. I have plenty of money to pay for the divorce as I have just sold the 26 garages I purchased for £2,200 at Putney for £4,000—and I get one third of the profit, which is about £550. I have also a little money invested.

That appears to me to put a very different complexion on two matters, the financial position of the husband and the financial position of the wife, because here he is in this letter, with full knowledge of the facts, knowing what the financial burden on the wife is owing to the fact that she has to maintain this invalid daughter and the little grand-daughter I have mentioned, proposing to marry and saying that his prospects are exceedingly good. Indeed, he was marrying a woman with money and an income of her own, in a position which was bringing her in good income, and she had expectations. With his eyes open and in the belief that his marriage is going to lose him the £5 he still, nevertheless, proposes to marry. He was, at the time, 62 or 63 and very naturally desired to get married, though he was not quite like a young man who might have other considerations in mind than his financial future and the reasonable companionship to which he refers in the letter.

I cannot accept the view that counsel for the wife proposed, that the judgment must be construed and approached on the footing that the judge really decided this case on the facts, including, in particular, the facts mentioned to us by counsel which are not in the affidavits. If he had been doing that he would, I think, have said so. I am forced to the conclusion that the duty of this court is to exercise its own discretion on the facts before it. It seems to me that this is a case where we must have in mind another relevant fact. I have not attempted to give a category of the facts which the court can consider. I am only considering the relevance of certain facts in this case. One fact which is certainly relevant is that this money, provided by the wife, if the settlement is allowed to stand as it is, will, or may, go into the ordinary household expenses of the husband and his new wife and help in the maintenance of his new wife. I am not saying that that is a conclusive consideration. It is not, but it is a consideration which the court ought to have in mind and ought to weigh together with all other relevant considerations. So here we have a wife who, in contemplation of a separation which has come to an end, entered into a personal covenant for the payment to her husband of a weekly sum, a husband who, I agree, was the guilty party and was responsible for the termination of the marriage and altering the whole outlook, if one may so call it, of the separation deed. He was not a destitute husband by any means, but a husband who, in the belief that he is going thereby to lose the £5 on marriage, is nevertheless proposing to marry a woman who he says is a woman of means and expectations. In those circumstances, I have to ask myself what is the course this court ought to adopt. In my opinion, the order made by the judge, although for a different reason, must stand and the appeal must be dismissed with costs.

ASQUITH, L.J.: I am in complete agreement with the judgment just delivered and desire to add nothing.

HARMAN, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Victor D. Deeks* (for the husband); *Haslewood, Hare & Co.*, agents for *Mayo & Perkins*, Eastbourne (for the wife).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

HEWITT *v.* HEWITT.

[Court of Appeal (Tucker, Cohen and Wrottesley, L.JJ.), January 20, 1948.]

Divorce—Practice—Restitution of conjugal rights—Plea of justification—Right to begin.

In a suit for restitution of conjugal rights where the separation is not denied, but the respondent pleads justification, it is the usual practice for the respondent to begin.

In a suit by the wife for restitution of conjugal rights, the fact of separation was not denied, but the husband pleaded justification. The wife, by her counsel, opened her case without objection by the husband, but, when counsel had dealt with the issues in considerable detail, the court, of its own motion, took the point that it was for the husband to begin, and required him to call his evidence before that of the wife. As the case had already been opened by the wife, the husband claimed the right to call his evidence after that of the wife, and, on the court ruling that this was not open to him, he declined to call any evidence. After evidence had been given for the wife, an order was made in her favour without hearing the evidence for the husband. The husband appealed:—

Held: as the wife had already opened her case in considerable detail, evidence in support of the opening statement should have been called before the husband was required to call his evidence, and there must be a new trial.

Burroughs v. *Burroughs* (1862) (2 Sw. & Tr. 544; 5 L.T. 771), *distinguished.* *Cherry* v. *Cherry* (1858) (1 Sw. & Tr. 319; 32 L.T.O.S. 198), and *Smith* v. *Smith* ([1900] P. 66), *applied.*

[As to Right to Begin in Matrimonial Causes, see HALSBURY, Hailsham Edn., Vol. 10, p. 747, para. 1165; and for Cases, see DIGEST, Vol. 27, pp. 451, 452, Nos. *4663-4675.*]

Cases referred to:

(1) *Cherry* v. *Cherry*, (1858), 1 Sw. & Tr. 319; 28 L.J.P. & M. 36; 32 L.T.O.S. 198; 27 Digest 451, *4668.*

(2) *Smith* v. *Smith, Smith* v. *Smith & Charlesworth*, [1900] P. 66; 69 L.J.P. 44; 27 Digest 451, *4670.*

(3) *Burroughs* v. *Burroughs*, (1862), 2 Sw. & Tr. 544; 31 L.J.P.M. & A. 56; 5 L.T. 771; 27 Digest 451, *4664.*

Appeal by the husband from an order of Mr. Commissioner Grazebrook, dated May 20, 1947, that the husband should return to his wife and render her conjugal rights. The appeal was allowed and the case remitted for a new trial.

Linton Thorp, K.C., and *O'Malley* for husband. *Gerald Gardiner* for wife.

TUCKER, L.J.: This is an appeal by the husband from an order made by Mr. Commissioner Grazebrook that the husband should return to the wife and render her conjugal rights. The petition, which is dated Dec. 5, 1945, alleged, first, the marriage between the parties in July, 1943, the subsequent cohabitation, the absence of children, and the usual formal matters. Then, by para. 6:

> On or about Aug. 11, 1945, the respondent withdrew from cohabitation with the petitioner and refused, and has ever since refused, and still refuses, to return to her and to render her conjugal rights.

There follow particulars of that allegation. Paragraph 7 avers:

> The petitioner desires that the respondent shall return to cohabitation with her and is willing to render him conjugal rights.

The husband pleaded in his answer:

> 1. That he admits that he has ceased to live with the petitioner and says that by reason of the matters hereinafter set out he had and still has just cause for refusing to live with her. 2. Further or alternatively by reason of the said matters the respondent says that the petitioner has no sincere desire to return to the respondent and resume cohabitation.

Paragraph 3 sets out certain facts which are relied on as particulars under paras. 1 and 2, *i.e.*, they are relied on as justification for the husband refusing to live with his wife. They are also particulars of the allegation of absence of sincerity. The answer specifically denies the allegations contained in a number of the paragraphs containing particulars of the petition, and in para. 5 the husband admits that the wife wrote the letters that had been referred to in the petition by way of particulars and that he did not reply to them. He denies that the contents of the letters are truly or accurately set out in that paragraph. Then he specifically denies the allegation in para. 7 that the wife desires that the husband shall return to cohabitation with her and is willing to render him conjugal rights.

The case came on for trial before Mr. Commissioner Grazebrook on May 20, 1947. Counsel for the wife opened the case without any objection from counsel for the husband or from the court. No specific agreement had, apparently, been come to between the parties as to who was entitled to open the case on these pleadings. It is to be observed that the right to open a case is generally regarded as a privilege for which one or other party is contending. The case was opened at considerable length, the whole ground of the matter being covered and a number, if not all, of the letters in the agreed bundle of correspondence being read. When counsel had reached the end of his opening, the learned commissioner, of his own motion, took the point that on the pleadings it was for the husband to begin. An adjournment was granted for a short period that the husband's counsel might consider his position. The result was that counsel for the husband claimed the right to reserve the calling of his evidence until after the wife had called her evidence pursuant to the facts and matters that her counsel had opened in his opening statement, but the learned commissioner intimated that he must call his evidence forthwith if he desired to tender evidence. Thereupon counsel for the husband intimated that, in view of that ruling, he did not intend to call evidence. Thereafter the wife was called and gave evidence in accordance with the case that had been opened and it was sought to prove that there had been withdrawal of cohabitation by the husband without lawful justification and it was sought to satisfy the court as to the wife's sincerity.

The necessity for calling that evidence was due to the fact that by s. 186 of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided :

> A petition for restitution of conjugal rights may be presented to the court either by the husband or the wife, and the court, on being satisfied that the allegations contained in the petition are true, and that there is no legal ground why a decree for restitution of conjugal rights should not be granted, may make the decree accordingly.

Before the court can grant such a decree it must be satisfied that a proper case has been made out by the petitioner and that the petitioner is sincere in the presentation of his or her case. It is the duty of the court to be satisfied on those matters, whatever course has been taken by the respondent and whether the case is defended or undefended, but, although the petitioner has ultimately to satisfy the court of these matters, it appears from the authorities and the statements in the text books on the practice in the Divorce Division that the respondent may be allowed to open the case where the pleadings are in the state in which the present pleadings are. In RAYDEN ON DIVORCE, 4th ed., p. 335, the statement is :

> In a suit for restitution of conjugal rights, if, as is usual, the fact of separation is not denied, the respondent begins by proving justification.

It is, I think, interesting to observe that in the forms of pleadings in RAYDEN, as they appear on pp. 674, 675, the common form allegation in a suit asking for an order for restitution of conjugal rights is :

> That on the — day of — the respondent withdrew from cohabitation with the petitioner [without any just cause whatever] and he has refused and still refuses to return to her and to render her conjugal rights.

The form of answer is, in para. 1 :

> That he admits that he has ceased to live with the petitioner, but says that by reason of the facts hereinafter stated he had and still has just cause for refusing to live with her.

The pleadings in the present case follow this precedent. I think that an answer in this form is always treated as being an admission, and a justification. It amounts to an admission that the husband has withdrawn from cohabitation, and an allegation that he did so for good cause and, therefore, the wife is not entitled to the relief sought.

In this state of the pleadings, therefore, it would seem to have been the practice in the Divorce Division to allow the respondent to open his case. I think for all practical purposes the pleadings in the present case are to the same effect as those in *Cherry* v. *Cherry* (1). There the husband alleged that his wife did

> on Sept. 29, 1855, without lawful cause, leave his residence at Burghfield, and did from the said day up to the date of the said petition, to wit, Feb. 15, 1858 (with the exception of two or three days in the month of September 1856) withdraw herself from cohabitation with him and refuse to render him conjugal rights,

In her answer, the wife denied that she withdrew herself from cohabitation with her husband without lawful cause as set forth in the petition and she further alleged, in substance, that she was justified in so withdrawing, if she did, by reason of the threats of personal violence to which she had been subjected. Thereupon the husband challenged the truth of the allegations contained in the answer and joined issue thereon. On those pleadings the Judge Ordinary ruled as follows (1 Sw. & Tr. 320):

> I think substantially the affirmative issue is on the respondent. She means by her answer not to deny that she withdrew at all, but she denies that she withdrew without reasonable cause, and specifies that cause, which she is bound to prove. I think, therefore, her counsel have a right to begin.

In *Smith* v. *Smith* (2) the headnote is as follows ([1900] P. 66):

> Where a wife petitioned for restitution of conjugal rights, and the husband in answer alleged that she had committed adultery, and, in a cross-petition, claimed the dissolution of his marriage on that ground:—*Held*, that the husband's counsel ought to begin.

Sir Francis Jeune, P., in giving judgment deciding the matter, said that he thought the decision in *Cherry* v. *Cherry* (1) really covered the case and he said (*ibid.*, 68): "I think the husband's counsel should begin in the present case." We were also referred to *Burroughs* v. *Burroughs* (3), where the headnote is (2 Sw. & Tr. 544):

> When the wife's petition for restitution of conjugal rights is heard before the court without a jury, her counsel have a right to begin, though the substantive issue may be raised on the husband's answer.

In that case the Judge Ordinary, referring to *Cherry* v. *Cherry* (1) said (*ibid.*):

> That case was tried before a jury, and the only issue on the record was cruelty. Here the case comes before me on the whole petition. The petitioner must prove the marriage, etc., in the usual course, and must therefore begin.

That case seems to me to differ somewhat from the other two cases to which I have referred, but I think it all comes down to this: Who has the right to begin in these cases? That must be very largely a matter of convenience, a matter which is often settled by agreement between counsel and which depends on the precise way in which the pleadings are framed. The right to begin cannot affect the question where ultimately the onus of proof lies. As to that, the petitioner has to satisfy the court on the matters to which I have referred, but it seems to have been the practice in the Divorce Court for a number of years with pleadings in the state in which the present pleadings are to allow the respondent's counsel to open the case.

I think the present case is a peculiar one having regard to the course which was taken. Here, as I have already said, counsel for the wife opened his case in considerable detail. The matter was not raised at the outset as to who had the right to begin. It was tacitly conceded that counsel for the wife had the right to begin and he did begin. In those circumstances I think that he should have been required to call his evidence in support of his opening statement before the husband was required to call his evidence. I, therefore, think that in the circumstances of this case, and having regard to the turn the case took, the learned commissioner was erroneous in refusing to accede to the submission of counsel for the husband that the wife should be required to call her evidence to substantiate her counsel's opening before he, the husband, was compelled to tender his evidence. The unfortunate result of this is that the case has never, in fact, been tried. I think in the circumstances it should be tried in order that justice may be done between the parties and the real issues decided. For these reasons I think the case must go back for a new trial.

COHEN, L.J.: I agree.

WROTTESLEY, L.J.: I also agree.

Appeal allowed. Decree rescinded. New trial ordered. Husband to pay two-thirds of wife's costs of appeal. Costs of first trial to be in the discretion of the judge who retries the case.

Solicitors: *Woodham Smith, Borradaile & Martin* (for the husband); *Vincent & Vincent* (for the wife).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

W. J. GUY & SON (a Firm) *v.* GLEN LINE, LTD.

[COURT OF APPEAL (Scott, Bucknill and Somervell, L.JJ.), January 19, 20, 1948.]

Shipping—Towage—Collision between tug and ship—Liability of shipowners—"Whilst towing"—United Kingdom Standard Towage Conditions, cl. (1), (3).

A ship lying off Barry Docks was approached by a tug pursuant to a towage agreement. When the tug was within 20 to 30 feet, the tugmaster was hailed to keep away. He, therefore, dropped astern until he saw the ship's navigation lights put on, when he again approached the ship and was told that he was not wanted yet and that he was to wait until the ship "got in a bit." He waited until the ship had gone further ahead, and then he approached her again and was ready to take her in tow, but he received an order to tell the dock master that the ship would not dock on that tide. As he dropped back once more, he touched the ship and was damaged. The tugowners claimed damages from the shipowners.

The United Kingdom Standard Towage Conditions, to which, by the towage agreement, the tug services were made subject, provide: "(1) . . . the phrase 'whilst towing' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines, or when the towrope has been passed to or by the tug, whichever is the sooner . . . (3) The tugowner shall not, whilst towing, bear . . . damage of any description done . . . to the tug."

HELD: there was no warrant for reading into cl. 1 of the Conditions, after the words "to pick up ropes and lines," the words "and the ship is ready to give orders," the tug was "towing" within the meaning of cl. 3 at the time of the collision; and the shipowners were liable.

The Uranienborg ([1936] P. 21; 154 L.T. 664), *distinguished.*

Per BUCKNILL, L.J.: If the master or pilot of the ship had made it clear to the tug before she got into position to receive orders that he was not ready to give orders, then the tug could not, by putting herself in a position to receive orders, have brought herself within cl. 1.

[AS TO SPECIAL CONDITIONS RELIEVING TUGS, see HALSBURY, Hailsham Edn., Vol. 30, p. 660, para. 841; and FOR CASES, see DIGEST, Vol. 41, pp. 683-685, Nos. *5125-5138.*]

Case referred to:

(1) *The Uranienborg*, [1936] P. 21; 105 L.J.P. 10; 154 L.T. 664; Digest Supp.

APPEAL by the defendants from an order of HIS HONOUR JUDGE L. C. THOMAS, Cardiff and Barry County Court, made on Oct. 10, 1947, ordering the defendants to pay damages to the plaintiffs for damage done to the plaintiffs' tug in a collision with the defendants' ship. The county court judge held that at the time of the collision the tug was "towing" within the meaning of cl. 3 of the United Kingdom Standard Towage Conditions to which the tug services had by agreement been made subject, and, therefore, the shipowners were liable. The Court of Appeal now affirmed that decision. The facts appear in the judgment of SCOTT, L.J.

A. J. Hodgson and *J. B. Hewson* for the defendants.
Bucknill for the plaintiffs.

SCOTT, L.J.: In this appeal a ship inward bound to Barry Docks was hit slightly by a tug that had come out to tow her from Barry Roads into dock, and the question is whether or not under the towage contract the owners of the tug are entitled to be paid by the owners of the ship for the damage suffered by the tug. The date of the incident was Apr. 5, 1947. The ship, the Glenaffaric, had been lying in the roads since early morning. The tug went out pursuant to the terms of a towage agreement entered into between the plaintiffs, the tugowners, and Alfred Holt & Co., managing owners for the defendants, Glen Lines, owners of the ship, on Nov. 22, 1939. The whole case depends on the proper interpretation of the contract between the parties and the application of it to the facts of the case. The memorandum of agreement then made was very sketchy and general, but quite definite and clear in its effect. It provided:

> The tugowners to receive at least twelve hours' notice of ordered tugs. Tugs ordered and not used to be paid half rates. All tug services subject to the United Kingdom Standard Towage Conditions. This agreement subject to three months' notice of termination by either party.

We were told that those Conditions have been in operation for many years. Curiously enough, they have never come before the High Court except once, in 1936, in a case considered by Lord Merriman, P., *The Uranienborg* (1). They are obviously of great importance just because they are in general use. They begin with the clause on which the decision in this case mainly depends : A

> For the purpose of these conditions, the phrase "whilst towing" shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines, or when the towrope has been passed to or by the tug, whichever is the sooner.

Clause 3 contains these provisions :

> The tugowner shall not, whilst towing, bear or be liable for damage of any B description done by or to the tug, or done by or to the hirer's vessel . . . and the hirer shall pay for all loss or damage and personal injury or loss of life, and shall also indemnify the tugowner against all consequences thereof . . .

The words with which we have to deal are : "The tugowner shall not, whilst towing, bear . . . damage of any description done . . . to the tug."

The tugowner brought an action in the county court for the damage done C to the tug, the judge decided in favour of the tugowner and awarded him damages, and the shipowner has appealed to this court. The substantial question is whether the words I have read from cl. 1, "when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines," cover the occasion in question. The vessel was lying in Barry Roads about a mile and a half or a mile and three-quarters from Barry Docks. It was a dark morning. The tug came up on the starboard quarter, the ship heading down channel, the D tide running pretty strong up channel. The ship was carrying the usual anchor lights. The tug got to a point 20 or 30 feet away from the ship. The master of the tug was ready to receive orders and to heave a line aboard the ship for tow. This was in accordance with usual practice, the tug's mate being ready to heave the line. According to the judge's note, the master said in evidence : "Received order to keep away by word of mouth. Presume pilot." Then he states what the hail was : "We are not ready. Clear away." He then dropped E astern, leaving the ship still at anchor, but he kept his engines going to stem the tide. After a time he saw the ship's navigation lights put on, and he then went up to within 20 feet of the ship and was then told : "Don't want you yet, wait till we get in a bit." He dropped astern again and waited until the ship had got further ahead and then again approached her. Then he received an order not to receive a rope, but to go to Barry to tell the dock master that the ship would not dock on that tide. He adds that he was ready to take the ship in tow, and F that, as he dropped back, he touched the ship on her starboard quarter and received the damage. He delivered the order to the dock master. He adds : "Normal practice for tug to take over before anchor is hoved." The pilot was called for the shipowners. He spoke to the first occasion and said he "told the tug to *keep* away," not to *go* away, but to *keep* away. The tug came back a second time, that intimation was repeated, and the tug master called out: G "I understand you were hailing us." A few minutes after that the pilot decided to anchor the ship as the windlass was found to be out of repair and could not be repaired by tide time. It was then that he hailed the tug to inform the dock master. That was at about three-quarters of a mile from the breakwater light, the ship then being under way and not again at anchor. He adds : "When navigation lights came on it would be normal thing for tug to come up and receive orders. Told him 'Sheer off and come up when we are closer in.' But for H the windlass trouble we should have docked that morning." The judge decided in favour of the tugowner as against what, apparently, was the chief argument on behalf of the shipowner, *viz.*, that it was not the practice, or that it was not reasonable, for the tug to offer its services until two cables' lengths from the dock. The judge took the view, very properly, that there was nothing in the contract to that effect, and that to add that term was impossible.

Before us counsel for the shipowners made five points. He said : (1) That no towrope was ever passed. That is agreed. (2) That the tug was ready and willing to take off a line. That is agreed. (3) That the ship was never ready and never intended to pass a line to the tug. (4) That the tug was hailed three times to keep off. (5) That the damage occurred only after the tug had been told to go to Barry as she was not wanted to tow on that tide. In my view, there is nothing in any of those points that saves the shipowners from liability. The question really is whether we can imply from the language which I quoted from cl. 1 any words modifying its plain meaning. In my view, we cannot. The words are quite simple. The provision in cl. 1 is that "whilst towing" shall be deemed to cover a period of time before the towing proper actually begins, namely, a period "commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines." It is clear on the evidence, as the judge held, that the tug was in that position. The mate was standing by ready to heave the line and so pick up a rope from the ship, and I reject the argument of counsel for the shipowners because, to make it good, he has to read into the clause, after the words "when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines," the further words "and the ship is ready to give orders," which are not there. Had that been the intention of the parties to the contract or those who framed the "United Kingdom Standard Towage Conditions," some such words would have been inserted in the clause. They were omitted, and I think it is clear why they were omitted. After the tug has arrived at the ship at a proper time, namely, the normal time in accordance with ordinary practice, to take the ship in tow, she is from then in attendance on the ship and necessarily then begins to incur the risk of damage to herself by contact with the ship. After that, obviously, as it seems to me, there can be no justification for implying the suggested words. Such an additional condition protecting the shipowner could easily have been expressed, and I can see no possible ground for implication according to the ordinary rule of construction that nothing can be implied, unless it is necessary to give business efficacy to the bargain that the two parties must have intended when they made the contract. Counsel did not actually submit that those words ought to be implied, but, unless they are, his argument must fail.

Counsel for the shipowners referred to *The Uranienborg* (1) because it is the only case where these conditions of towage have been previously considered. That was quite a different case. There the tug was employed to go to a wharf in the Thames where the vessel was discharging to assist her in her passage from the wharf by towing. The tug arrived before the vessel was ready, and while discharging was still going on. In my view, one answer to the question, which was raised in that case indirectly, is that the primary condition precedent to the whole business of towing, namely, that the ship was ready to be towed, had not come into operation, and Lord Merriman, P., so held. He deals with an additional reason which I think I ought to read ([1936] P. 28) :

> Mr. Bateson argues that the Tanga quite plainly was in a position to receive orders to pick up ropes or lines. This is true in the sense that she was within 300 feet and within hailing distance, but in no other sense ; she knew that the time was not ripe and was acting accordingly. There is not a shred of evidence from the Kenia that anybody, from the master downwards, was even thinking in terms of ropes and lines at the material time. Certainly they had come there in order to be available for the towing whenever the towing began. At the moment that this collision occurred they were not thinking about, and had not begun to expect, an order to pick up ropes or lines.

In my view, this appeal must be dismissed.

BUCKNILL, L.J.: I agree and will add a few words on two points. Counsel for the shipowners suggested that the second part of cl. 3 of the Standard Towage Conditions applied to this case in that at the time of the damage the tug was rendering a service other than towing, namely, she was going in to Barry to tell the dock master that the ship was not going to dock on that tide. I think if the word "towing" there is to be construed in the light of cl. 1—and counsel admitted that that was so—it is important to notice that in cl. 1 the period is covered until the tug is safely clear of the vessel. In this case the tug was never safely clear of the vessel, and, if she was "towing" within the meaning of cl. 1 when she had come alongside and was in a position to comply with orders to proceed to pick up ropes, she was not clear of the vessel at the time the damage was done.

The other point I should like to say a word about is this. I fully appreciate, speaking for myself, the point counsel for the shipowners made that this must be to some extent treated as a bi-lateral arrangement, and if the master or the pilot had made it clear to the tug before she got into the position to receive orders that he was not ready to give orders, then the tug could not, by putting herself in a position to receive orders, have brought herself within cl. 1. That does not, however, cover the case where, as Somervell, L.J., suggested in argument, a ship leads the tug to believe that she is ready to give or take a towrope. I A think in this case the facts led the tugmaster to believe that the ship would be ready to give a rope, and, therefore, that argument does not apply here.

SOMERVELL, L.J. : I agree, and, in particular, I agree with what has just fallen from Bucknill, L.J. I would like to cite in that connection a sentence from the judgment of Lord Merriman, P., in *The Uranienborg* (1). He says (*ibid.*, 29) : B

> I think also that this phrase [he is referring to the conditions which we are considering in this case] has to be read as if there were two parties involved in the matter, and that until the moment has come at which orders may reasonably be expected to be given from the ship the tug cannot be said to be in a position to receive orders from the ship.

That expresses the view which I have taken after listening to the arguments on C this clause, and I think on the findings of fact as they apear in the county court judge's judgment—reading them as one is entitled to with the evidence—the tug did reasonably expect orders to be given from the ship, that is to say, orders in relation to towage, and in those circumstances it seems to me that the clause applies and that the county court judge was right in the conclusion to which he came.

Appeal dismissed with costs. D

Solicitors : *Bentley, Stokes & Lowless*, agents for *Alsop, Stevens & Collins Robinson*, Liverpool (for the defendants) ; *Ingledew, Brown, Bennison & Garrett*, agents for *Ingledew & Sons*, Cardiff (for the plaintiffs).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

E

DUKE OF WESTMINSTER *v.* SWINTON (ADAMS, THIRD PARTY, AND WILLIAMS, FOURTH PARTY).

[King's Bench Division (Denning, J.), January 15, 16, 1948]. F

Landlord and Tenant—Forfeiture—Relief—Conditional relief—Breach of covenant—House converted into flats—Impracticability of reinstatement—Measure of damages.

Premises were let by D. to S. on a long lease containing covenants not to use the premises for any trade, business, or profession, or otherwise than as a private dwelling-house, and not to make structural alterations without G D.'s consent, with a proviso for re-entry in the event of breach. S. sub-let the premises to A. who, in turn, sub-let them to W., the under-leases containing similar covenants and provisos for re-entry. Without obtaining the consent of or informing D., S., or A., W. converted the premises into six flats which were let to tenants. In an action by D. against S. for forfeiture for breach of covenant, A. and W. were brought in as third and fourth parties : H

Held : (i) having regard to the difficulty or impossibility of immediate eviction of the tenants of the flats or of immediate reconversion of the property and to the likelihood in the event of reconversion of the property being requisitioned by the local authority for housing homeless persons, S. and A., being no parties to the breach of covenant, should be relieved from forfeiture, subject only to a condition that the premises should be reinstated as a single dwelling-house in two years' time or such longer period as the court might allow.

(ii) W.'s under-lease should be forfeited, and the measure of damages for breach of covenant to be paid by W. to A. was the damage sustained by A., represented by the cost of reinstatement which A. would have to undertake in due course, less an allowance for the benefit of rents from the converted flats meanwhile, plus A.'s own costs of the action and those of S. and D. for which A. was liable.

Eyre v. *Rea* ([1947] 1 All E.R. 415), *explained.*

A [As to Relief against Forfeiture for Breach of Covenants other than for Payment of Rent, see HALSBURY, Hailsham Edn., Vol. 20, pp. 257-264, paras. 290-296; and for Cases, see DIGEST, Vol. 31, pp. 487-492, 494-496, Nos. *6354-6399*, *6413-6426*.

As to Damages for Breach of Covenant to Repair, see HALSBURY, Hailsham Edn., Vol. 20, pp. 219-222, paras. 239-242; and for Cases, see DIGEST, Vol. 31, pp. 337-342, Nos. *4808-4851*.]

B Cases referred to:

(1) *Day* v. *Waldron*, (1919), 88 L.J.K.B. 937; 120 L.T. 634; 31 Digest 158, *2910*.

(2) *Eyre* v. *Rea*, [1947] 1 All E.R. 415; [1947] K.B. 567; [1947] L.J.R. 1110.

(3) *Joyner* v. *Weeks*, [1891] 2 Q.B. 31; 60 L.J.Q.B. 510; 65 L.T. 16; 55 J.P. 725; 31 Digest 341, *4841*.

(4) *Ebbetts* v. *Conquest*, [1895] 2 Ch. 377; 64 L.J.Ch. 702; 73 L.T. 69 C.A.; *affd. sub nom.*, *Conquest* v. *Ebbetts*, [1896] A.C. 490, H.L.; 31 Digest 340, *4828*.

C Action for forfeiture for breach of covenant in a lease and for damages and mesne profits.

The Duke of Westminster, the landlord, let 40, Chester Square, Westminster (part of the Grosvenor estate), to the predecessors in title of the defendant, Brigadier Swinton, at a rent of £80 a year and on payment of a premium of £2,000 on a lease from 1924 to 1986. The lease provided (1) that the premises or any D part thereof should not be used for any art, trade, business, or profession whatsoever, but should be kept and used as a private dwelling-house only, and (2) that no alteration should be made in the construction, height, elevation, or architectural appearance of the premises or of any part thereof without the express previous written consent of the ground landlord for the time being or his solicitor. There was the usual proviso for re-entry in the case of a breach of these covenants. In 1937 the premises were sub-let by Brigadier Swinton to E one Adams at a rent of £200 a year on a 21 years' lease with similar covenants and proviso for re-entry to those in the head lease. From 1941 to 1946 the premises were unoccupied as a result of war conditions. During that time Brigadier Swinton paid the rent due on the head lease without receiving any rent from Mr. Adams, who was a prisoner of war for some years after 1940 and whose affairs, in January, 1946, were made the subject of a protection order under the Liabilities (War-time Adjustment) Acts. In 1946 Mr. Adams sub-F let the premises to one Williams, a member of a firm of builders and dealers in property, from Mar. 25, 1946, to Mar. 22, 1958 (the remainder of his term less three days), at a rent of £350 a year on a lease which also contained the same covenants and proviso for re-entry. At that time there was an expectation that the Westminster City Council might requisition the premises to provide housing accommodation, and on Apr. 3, 1946, the council served a notice of G requisition by putting a notice on the premises and notifying Mr. Williams' firm. The notice stated that, unless cause was shown within fourteen days, the requisition was to be effective. Mr. Williams' firm informed the council that one of the firm's partners required the house for his own occupation and for that of five other families, a statement which was untrue, since the partner never intended to live there and never did live there. As a result, the requisition notice was withdrawn. Without applying for permission to his own landlord H or the head landlord or consulting any of the mesne landlords or the head landlord or the surveyor of the Grosvenor estate, Williams then converted the premises into six flats. The conversion involved the construction of new walls or partitions (of wood), new bathrooms, new kitchens, new doorways or openings in inner and outer walls, pipes let through walls, air ventilation bricks inserted, etc. The flats were let to tenants. On learning what had been done, the Duke of Westminster brought an action against Brigadier Swinton for forfeiture of his lease, and Adams and Williams were brought in as third and fourth parties.

R. G. S. Bankes for the Duke of Westminster.
P. Colin Duncan for the defendant, Brigadier Swinton.
F. D. L. McIntyre for the third party, Adams.
Pearl for the fourth party, Williams.

DENNING, J. stated the facts and held that there was a breach of both covenants (*Day* v. *Waldron* (1)) which had not been waived and that the leases must all be declared forfeited and an order for possession be made unless he A granted relief, and continued: The question which I have to determine is whether I should grant relief, and if so, on what terms. I am going to deal with each case separately, the question being whether I should revive the lease or underlease which *prima facie* has been forfeited as from the date of the institution of the proceedings.

The lease to Brigadier Swinton had until 1986 to run. There has been a breach of it. Brigadier Swinton has been guilty of no improper conduct. On the B contrary, he has borne the burden of this rent year by year with no incomings, and then, without his knowledge or consent and without his being a party to it in any way, an under-lessee breaks these covenants. I am quite satisfied that he ought to have relief. But is there anything to debar me? Atkinson, J., in *Eyre* v. *Rea* (2) said recently that he knew of no case where relief has been given except on the basis of the breach being at once rectified. That cannot C be done here. This conversion cannot at once be rectified for several reasons. In the first place, the work could not be done without the licence of the local authority, and I do not know whether they would grant it. In the second place, there are six families in occupation. I do not know how difficult it is going to be to get them out without alternative accommodation being provided. Even if it were possible, I do not know that, as a matter of policy in these days of housing shortage, I ought to insist on their eviction, especially when it is plain D that, if this house was reinstated as one single dwelling-house, it would, in all probability, be left vacant, since, in these days, with the difficulty of getting staff and the few people who have the necessary income, it is very difficult to get a single tenant for a house of this kind. If it were left unoccupied as a single house for any length of time it would, in all probability, be requisitioned by the Westminster City Council to house families in need. That is what they would have done in this house but for the action of Mr. Williams. It would, therefore, E be but beating the air at this moment to compel the restoration of these premises into one single private dwelling-house. The conversion into flats, I have been told by a careful surveyor, has been done as well as many of the other conversions which the Westminster City Council have effected to houses which they have requisitioned in this very square. It seems to me that I ought not to impose a condition which would mean the turning out of this house of six families and its restoration as a private single dwelling-house and then, quite possibly, the F immediate requisitioning and again converting of it into accommodation for five or six families. Relief and the terms of granting it are questions of discretion for the judge, and each case has to be considered in the light of its own circumstances. Therefore, I am not going to make immediate reinstatement a condition of relief. What I have in my mind is to put the landlord in no worse a position than he would have been in if the premises had been requisitioned, as G they very nearly were. I have in mind that this house should be utilised for housing people for approximately the same length of time as the requisitioned houses will. The condition of relief which I am going to impose on Brigadier Swinton is, therefore, that within two years, or such further time as the court may allow, the premises shall be restored to their previous condition and that the user shall then revert to that of a private dwelling-house only.

As to the underlease between Brigadier Swinton and Mr. Adams, Mr. Adams H also has done nothing wrong. He was no party to this breach, and, therefore, he should have relief, but subject to the same condition as that mentioned in regard to Brigadier Swinton.

In the case of Mr. Williams I decline to grant relief. I cannot allow any person to flout the law or take it into his own hands, as I am satisfied Mr. Williams did. Otherwise, it would mean that any tenant might, without his landlord's consent, convert his house into flats and then claim relief and make a large profit out of the transaction. I decline to sanction any such lawlessness.

This was a deliberate breach. These premises would have been requisitioned, but for the falsehood told to the local authority, and those steps to avoid a requisition were thoroughly unjustified. There is no moral claim by Mr. Williams to relief at all. That underlease is, therefore, adjudged forfeited.

I now have to go back and deal with certain matters of costs and damages. As to terms of relief, in addition to those which I have mentioned, Brigadier Swinton must pay all the costs of the Duke of Westminster and Mr. Adams A must pay not only the costs of Brigadier Swinton, but also the costs which Brigadier Swinton has to pay to the Duke of Westminster. In addition, it must be remembered that Mr. Adams will be in the position of having a house which has been converted into flats. I am not insisting on reinstatement at this moment, or for some considerable time. Nor am I insisting that the premises should be used as a private dwelling-house now or for some considerable time. He has that benefit for the best part of two years and such further time as the B court may allow. Mr. Adams will thus have an income from these premises which will be available to meet his obligations. I propose to make it a condition of his relief, therefore, in addition to the terms that I have mentioned, that out of the income from these premises there are to be paid all necessary outgoings, then the current rent due to Brigadier Swinton, and then the arrears of rent due to him. That must be paid before anything goes to outside persons.

C There remains the claim for damages by Mr. Adams against Mr. Williams. The claim for mesne profits at £350 a year will be granted from the date up to which £350 a year has already been paid until the present date. My order for forfeiture and my judgment for possession will operate forthwith. That will not automatically affect the tenants actually in possession because no order affects people immediately in possession without their being heard. Whether they are taken on as tenants it is not for me to determine, but for the parties. D In all probability they are not protected by the Rent Acts because the premises were not lawfully sub-let to them.

As to damages for breaches of these covenants, the decision of ATKINSON, J., in *Eyre* v. *Rea* (2) must not be taken as a decision that in every breach of this kind the cost of reinstating the premises is the measure of damages. I am sure ATKINSON, J., did not mean that. In *Joyner* v. *Weeks* (3), the Court of Appeal held that on a breach of covenant to deliver up in repair at the end of the lease E the cost of repairs was the measure of damages in all cases, even though the money was not going to be used on repair and the premises were going to be pulled down next day. That, however, was never applied to cases of covenants to keep in repair during the term: see *Conquest* v. *Ebbetts* (4). The measure of damages for breach of covenant to keep in repair during the term is such sum as reasonably represents the damage which the covenantee has sustained F by the breach of covenant. It was to remedy *Joyner* v. *Weeks* (3) that s. 18 of the Landlord and Tenant Act, 1927, was passed. In cases which are not breaches of covenant to deliver up in repair, the law has always been and still is that there is no rigid rule that the measure of damages is the cost of reinstating the premises. It depends on the particular case. In *Eyre* v. *Rea* (2), no doubt, the cost was the proper measure because the right course was to reinstate the house at once, and that is what the landlords intended to do. The real G question in each case is: What damage has the plaintiff really suffered from the breach? I think I ought not to take the full amount of the cost of reinstatement. I ought to take into account the fact that work has been done on these premises of which Mr. Adams, for a time, will get some benefit, but that in due course, at an uncertain date, he will have to reinstate. He will have to put in a good deal of work and spend a good deal of money then. I have got to relate all these matters and see what the loss to Mr. Adams is. I H think, giving the best judgment I can to the matter, that the proper figure of damages which Mr. Adams should recover from Mr. Williams is the sum of £200. In addition, he will recover his own costs and the costs which he has to pay to Brigadier Swinton, both in respect of Brigadier Swinton's own claims and the costs which Brigadier Swinton in turn has to pay to the Duke of Westminster. For all those costs, Mr. Adams is entitled to judgment against Mr. Williams. If the provisions as to relief which I have mentioned are carried out, there will be no damage in addition suffered either by the Duke of Westminster or by Brigadier Swinton. On the other hand, with regard to the £200 for which I have given judgment for Mr. Adams, I propose that, as the premises have got to be reinstated at some time, the £200, when recovered, should be paid by Mr. Adams into a joint account so as to await the necessity of reinstatement and to be used for that purpose.

Judgment accordingly.

Solicitors: *Boodle, Hatfield & Co.* (for the Duke of Westminster); *Radcliffes & Co.* (for Brigadier Swinton); *A. J. Adams & Adams* (for Mr. Adams); *J. M. Isaacs & Co.* (for Mr. Williams).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

QUELCH *v.* COLLETT.

[King's Bench Division (Humphreys, Singleton and Birkett, JJ.), January 22, 1948.]

Street and Aerial Traffic—Insurance against third party risks—User of motor vehicle not covered by insurance policy—Extenuating circumstances—Owner honestly believing himself covered—Dismissal of charge under Probation of Offenders Act, 1907 (*c.* 17), *s.* 1 (1)—*Road Traffic Act,* 1930 (*c.* 43), *s.* 35.

The respondent was charged with driving a motor car on a road without there being in force in relation to the user of it by him a policy of insurance or security for third party risks. The car, which had been bought four days previously, had been advertised for sale as, and was, in fact, then "taxed and insured," and the vendor had undertaken to transfer the policy to the respondent, who honestly, but wrongly, assumed that he was covered by the policy at the time of the offence. It was admitted that it was no defence to the charge that the respondent thought he was covered by the policy and that that fact did not constitute a special reason why he should not be disqualified for holding a driving licence under s. 35 (2) of the Road Traffic Act, 1930. The justices dismissed the charge under s. 1 (1) of the Probation of Offenders Act, 1907:—

Held: the justices, having applied their minds to the question whether extenuating circumstances existed and acted on evidence before them, had properly exercised the discretion given them by s. 1 (1) in dealing with the case under that sub-section.

[As to Dismissal of Charges under the Probation of Offenders Act, 1907, s. 1 (1), see HALSBURY, Hailsham Edn., Vol. 21, p. 622, para. 1081; and for Cases, see DIGEST, Vol. 33, p. 364, Nos. *738-740.*]

Case referred to:

(1) *Blows* v. *Chapman*, [1947] 2 All E.R. 576.

Case Stated by Oxford justices.

At a court of summary jurisdiction sitting at Oxford, an information was preferred by the appellant under s. 35 of the Road Traffic Act, 1930, charging the respondent with using a motor car on a road called Warneford Lane, Oxford, on June 1, 1947, there not being in force in relation to the user of the vehicle by the respondent such a policy of insurance or such security in respect of third party risks as complied with the requirements of Part II of the Road Traffic Act, 1930. The justices found as facts that the respondent was suffering from a long standing injury to his foot which necessitated the use of a motor car for the purpose of travelling to and from his employment; that the car had been bought by the respondent on May 27, 1947; that it had been advertised for sale as being "taxed and insured"; that at that time there was, in fact, a policy of insurance in force in relation to the user of the car by the then owner; that the policy could have been transferred to the respondent on application by him to the insurers; that the vendor had undertaken to arrange for the transfer of the policy to the respondent; and that, as a result, the respondent honestly, but wrongly, assumed that he was covered by the policy at the time of the offence. The justices, being of the opinion that, "having regard to the health, character, and antecedents of the respondent and the extenuating circumstances under which the offence was committed, it was inexpedient to inflict any punishment under s. 35 of the Road Traffic Act, 1930," dismissed the information under s. 1 (1) of the Probation of Offenders

Act, 1907, and ordered the respondent to pay 4*s*. costs. The appellant appealed and the Divisional Court now dismissed the appeal.

King-Hamilton for the appellant.
G. G. Baker for the respondent.

HUMPHREYS, J.: The question raised by the justices is whether they had authority to deal with the offence committed by the respondent under A s. 1 (1) of the Probation of Offenders Act, 1907. It was admitted that it was no defence that the respondent thought he was covered by insurance and that it could not be argued that there were any special reasons for the justices to order that there should be no disqualification for holding a driving licence under Part I of the Road Traffic Act, 1930, but, as the Case says, "in the event of dismissal under the Probation of Offenders Act, 1907, the question of such disqualification would not arise."

B In giving their reasons for dismissing the information under s. 1 (1) of the Probation of Offenders Act, 1907, the justices have followed the precise words of that sub-section which reads as follows:

> Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged . . . or to the extenuating circumstances under C which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order . . . (i) dismissing the information or charge . . .

There are, of course, cases in which this court has said that certain offences created by statute ought never to be dealt with under the Probation of Offenders Act, 1907, because they are too serious to be so treated, but, so far as this par- D ticular offence is concerned, this court, consisting of LORD GODDARD, C.J., SINGLETON, J., and myself, said in terms, in *Blows* v. *Chapman* (1), that in a proper case it is an offence which may be dealt with under that Act. In that case the court was considering a different question, *viz.*, whether there were special reasons for not disqualifying the offender, but the court went out of its way to say that the justices could properly have dealt with the case under the E Probation of Offenders Act, 1907.

In my opinion, the justices in the present case have acted quite rightly in taking the view that they had jurisdiction to deal with the matter under the Probation of Offenders Act, 1907. There were obviously circumstances which they were entitled to regard as extenuating circumstances, including the peculiar facts of the case which led up to the commission of the offence, the respondent's physical disability, and so on. If the justices had said: "There are no extenu- F ating circumstances in this case, but we do not like the idea of disqualifying this man for a year, and so we will deal with the matter under the Probation of Offenders Act," they would have been wrong. At first sight it might have looked from the Case that that was their view, but I am satisfied that it was not. They applied their minds to the question whether there were extenuating circumstances, and found that there were such circumstances. That being so, I see no reason why they should not put in force the Probation of G Offenders Act as they did. In my opinion, therefore, this appeal ought to be dismissed.

SINGLETON, J.: I agree. This information was before the justices on Sept. 5, 1947. The Case Stated bears the date Dec. 11, 1947. Between those dates *Blows* v. *Chapman* (1) had been heard in this court. Both LORD GODDARD, C.J., and HUMPHREYS, J., expressed the view that that case might H have been dealt with under the Probation of Offenders Act. It may well be that, if that case had been heard earlier, this case would not have reached this court. The Case finds, and it was admitted, that there were no special circumstances here. The justices, having heard the whole of the case, were of the opinion that "having regard to the health, character and antecedents of the respondent and the extenuating circumstances under which the offence was committed," it could properly be dealt with under s. 1 (1) of the Probation of Offenders Act, 1907. For the reasons which my Lord has given, I think that they were entitled to take that course.

BIRKETT, J. : I am of the same opinion. The Probation of Offenders Act, 1907, s. 1 (1), gives a discretion to justices to dismiss an information which comes before them, although they think that the charge as laid is proved, if they are of opinion that extenuating circumstances exist which make it inexpedient to impose any punishment. That discretion must be judicially exercised by the justices and this court will be vigilant to see that it is so exercised. Where, however, materials exist on which the justices may properly exercise that judicial discretion and they have exercised it, this court will be equally vigilant to see that their considered view is made effective. In this case the justices took the course they did on evidence which was before them, and I see no reason for interfering with their decision. For the reasons given in the preceding judgments, I am of opinion that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *R. O. F. Hickman*, Town Clerk, Oxford (for the appellant) ; *Wigan & Co.*, agents for *Cole & Cole*, Oxford (for the respondent).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

Re COGHILL, DRURY *v.* BURGESS AND OTHERS.

[Chancery Division (Harman, J.), January 21, 1948.]

Wills—Construction—" I exonerate all people from the repayment of moneys owing to me at the time of my death "—Secured and unsecured debts owing to testatrix.

By a codicil to her will which contained bequests to a very large number of beneficiaries, the testatrix declared : " I exonerate all people from the repayment of moneys owing to me at the time of my death." The estate, which amounted to about £50,000, consisted partly of real estate and partly of stock exchange securities, and the debts owing to the testatrix at the time of her death (and amounting to about £9,500) consisted of (*a*) two unsecured debts, *i.e.*, loans to personal friends on promissory notes, and (*b*) secured debts, *i.e.*, loans secured by mortgage or charge :

Held : on the true construction of the codicil, the testatrix meant to forgive personal debts owing to her by friends, and not to give up securities for money, and, accordingly, only the unsecured debts were forgiven.

[As to Release of Debts Owing to Testator, see HALSBURY, Hailsham Edn., Vol. 34, p. 263, para. 312 ; and for Cases, see DIGEST, Vol. 44, p. 736, No. *5913*, and Supplement.]

Cases referred to :

(1) *Re Neville, Neville* v. *First Garden City, Ltd.*, [1925] Ch. 44 ; 94 L.J.Ch. 130 ; 132 L.T. 602 ; 44 Digest 736, *5913*.

(2) *Midland Bank Executor & Trustee Co., Ltd.* v. *Yarners Coffee, Ltd.*, [1937] 2 All E.R. 54 ; 156 L.T. 274 ; Digest Supp.

Adjourned Summons to determine what debts due to the testatrix at the time of her death were forgiven by a declaration in a codicil to her will : " I exonerate all people from the repayment of moneys owing to me at the time of my death." Harman, J., held that only unsecured debts, *i.e.*, loans to personal friends on promissory notes, were forgiven, and that secured debts were not. The facts appear in the judgment.

J. V. Nesbitt for the plaintiff.

J. A. Brightman, Richmount, K. J. T. Elphinstone, Boraston, Jopling, D. H. Cohen, Wigan, Burnett-Hall, McNabb, Lindner, J. A. Wolfe and *R. Lionel Edwards* for defendants.

HARMAN, J. : Katharine Mary Coghill made her will in 1941 and died in 1943. She appointed certain executors, one of whom is the plaintiff in this suit. [His Lordship then dealt with the provisions of the will, which contained bequests to a very large number of beneficiaries.] By an undated codicil to that will the testatrix declared:

> I exonerate all people from the repayment of moneys owing to me at the time of my death.

She left an estate amounting to some £50,000 gross which consisted, in part, of real estate and, in part, of what are usually called stock exchange securities, *i.e.*, bonds and mortgages in various public companies. There was also included in her estate what may, without prejudice to anything I shall say hereafter, be called debts, amounting to about £9,500, two of them due without security and the rest of them secured by mortgages or charges of a legal nature. The question I am asked to decide is what meaning is to be given to the words in the undated codicil:

> I exonerate all people from the repayment of moneys owing to me at the time of my death.

The will contains no direction to pay her debts, but I do not think anything turns on that. The will would appear to have been drawn up by the testatrix herself and not prepared for her with any professional assistance, and I may take notice of that fact. The question is what is the meaning of the language used.

The nature of the debts are enumerated in the summons and dealt with to some extent in the plaintiff's affidavit in support: (*a*) and (*b*) are loans to the defendants, Henry Clifford Lloyd and Millicent Lloyd, of £600, and to the defendant, Hilda Elizabeth Pritchard, of £200, of which £125 remained owing at the death of the testatrix. Those debts were due on note of hand alone, promissory notes, and were not in any way secured. It is not contested on behalf of those interested in the residue that these debts must have been forgiven by the codicil, and, consequently, when we come to consider the relief asked, these debts will be allowed as legacies, less the legacy duty payable on them. The rest of the loans, of which there are eight, are all secured by mortgage or charge. The circumstances do not all exactly coincide. For instance, the first one mentioned, the debt of the late Raymond Sainsbury, was a loan made to a personal friend of the testatrix. The plaintiff says that it was negotiated in the normal course of business as an investment by the solicitors of the testatrix. While that may be true in a sense, it is to some extent contradicted by an affidavit filed by Frederick Sainsbury, the personal representative of the mortgagor, who says that the loan was arranged between the testatrix and Raymond Sainsbury personally to help him buy a house, and that the arrangement for repayment was that it should be made by monthly instalments amounting to £13 a year. That is not the mortgage to which Mr. Raymond Sainsbury put his hand, and whatever arrangement was made between the testatrix and him would seem to have been overridden when he signed the mortgage deed which he did sign. The loan to the defendant, Richard Montague Wootton-Wootton, was a sum of £900 secured on a reversionary interest. After the death of the testatrix this sum was repaid to her executors by Mr. Wootton-Wootton in ignorance of the provision in the codicil, his solicitors only having inspected the probate of the will to see that the executors could give a good receipt for the money. He argues that he was within the class of persons whose debts were forgiven or exonerated and that he is entitled to have his money back. The rest of the loans can be classed together, since they are all debts with legal mortgages to secure them.

It is contended, on the one hand, that "debts" means all debts and "people," as used in the will, means all natural persons who were owing money to the testatrix. It is submitted to me that, whatever I may speculate about the testatrix's ideas, the language does not admit of any cutting down or frittering away. It is contended, on the other hand, that either the criterion is that there was some personal contact between the testatrix and the borrower, or that the line is to be drawn at the point where the debt is, or is not, a secured debt. In my judgment, I am not tied by any words of art in this case or by any principle, but must construe the words as the testatrix seems to me to have meant them. Two authorities were cited to me, but I do not think they really help me very much, except to show me what not to do. In *Re Neville, Neville* v. *First Garden City, Ltd.* (1) TOMLIN, J., found a direction in these words: "I forgive all debts owing to me." He felt able, by putting emphasis on the word "forgive," to limit the debts which were wiped out by those words to debts owed to the testator by persons with whom he had a personal relationship and whom he might, therefore, be supposed to wish to forgive. TOMLIN, J., said ([1925] Ch. 54):

> I think myself that on the true construction of the will and codicil it is quite plain as a matter of language that the testator regards investments as one thing and moneys owing to him in a personal capacity, if I may use that phrase, as a wholly different thing. I think when he uses the phrase, "I forgive all debts owing to me," he is not moved by emotion at the thought of railway companies who owe him the money lent on the security of debenture stock. What he has in his mind is that he may have lent some of his friends or acquaintances sums of money which he would not desire to recover from them. The word "forgive" seems to me to introduce a personal note into the matter. . . A

I only read that to show that it is open, as it always is, I think, to the court to mould the words used to fit the circumstances in which they are used. Because the words "debts" means one thing in one will, it does not necessarily mean the same thing in another will. In *Midland Bank Executor and Trustee Co., Ltd.* v. *Yarners Coffee, Ltd.* (2) FARWELL, J., had to deal with a provision in these words: B

> I forgive and release to any person indebted to me all sums owing to me by them except such sums as shall be secured to me by mortgages or legal charges. C

It is to be observed that the testator in that case deliberately excepted mortgage debts, and so the judge was not confronted with the difficulty which confronts me here. I do not feel that FARWELL, J., sought to apply, or supposed that he was applying, any principle to that case. He mentioned *Re Neville* (1) and pointed out ([1937] 2 All E.R. 58) that he had to consider the word "release" as well as "forgive," and, therefore, the considerations moving TOMLIN, J., did not apply. He also felt that the testator, who was owed £64,000 by his bank, did not mean to release the bank from repayment of that sum, because, as he thought, that was absurd. He guided himself by what he supposed that the testator must have meant, in the particular circumstances, by using those words. D

With that much guidance, I must turn back to this codicil. In my judgment, the testatrix, when she exonerated all people from the repayment of moneys owing to her, meant to forgive personal debts and did not mean to give up securities for money. Therefore, I am of opinion that she must have regarded the mortgage debts (which amounted in the aggregate to nearly £6,000) as investments of her estate, and that she did not mean, by a more or less casual phrase in the undated codicil, to release people to whom she owed no obligation and whom she did not, in fact, know. It is true that there is one debt which could be said to be due to a personal friend, but that is a debt which, although she may have arranged it in that way, was carried into operation by her solicitor by an ordinary formal deed, and it is clear that, whatever passed between the testatrix and that particular person, the transaction was put on a business footing and so remained. In my opinion, the dividing line seems to be between debts secured and debts unsecured, and the latter, but not the former, are forgiven by this codicil. E F G

Declaration accordingly. Costs of all parties, as between solicitor and client, out of the estate in due course of administration.

Solicitors: *Lowe & Co.* (for the plaintiff and certain defendants); *Theodore Goddard & Co.*, agents for *Wallen & Jenkins*, Blaina; *Garrard, Wolfe & Co.*; *Russell-Cooke & Co.*; *Daphnes*, agents for *Hartley & Hine*, Hitchin; *Allen & Son*; *Lewis & Lewis and Gisborne & Co.*, *Peacock & Goddard*, agents for *Buchanan & Llewellyn*, Bournemouth (for other defendants). H

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re WARING (*deceased*), WESTMINSTER BANK LTD. *v.* BURTON-BUTLER AND OTHERS.

[CHANCERY DIVISION (Jenkins, J.), January 21, 1948.]

Res judicata—Decision of Court of Appeal—Overruled by House of Lords in subsequent case—Right to reconsideration de novo.

By his will dated Feb. 11, 1939, a testator, who died on Aug. 3, 1940, *inter alia* gave an annuity of £100 per annum to L., and a similar annuity to H., both "free of income tax." On July 16, 1942, the Court of Appeal, on an appeal to which H. was a party, held that, for the purposes of the Finance Act, 1941, s. 25 (which provides for the reduction of tax-free annuities in years of assessment where the standard rate of income tax is 10*s.* in the £) a provision was "made" by a will as soon as the will was executed, and that, accordingly, the section applied to reduce the tax-free annuities bequeathed by the testator. Leave to appeal to the House of Lords was refused. L. was not a party to the proceedings and a representation order to bind her was not granted. On June 21, 1946, the House of Lords in a similar case—*Berkeley* v. *Berkeley* ([1946] 2 All E.R. 154)—overruled the decision reached by the Court of Appeal on H.'s appeal. H. and L. now applied to the court to determine whether, having regard to the decision of the House of Lords, their annuities ought to be paid in full.

HELD: (i) so far as H. was concerned, the matter was *res judicata*, and the reduction of the rate of tax by the Finance (No. 2) Act, 1945, s. 15, did not warrant *de novo* consideration thereof because, *uno flatu* with such reduction, s. 25 had been continued, as amended, by s. 20 of the Act of 1945.

(ii) L. was not bound by the decision of the Court of Appeal, and was, therefore, entitled, under the decision in *Berkeley* v. *Berkeley*, to claim retrospectively the full amount of her annuity.

[AS TO RES JUDICATA, see HALSBURY, Hailsham Edn., Vol. 13, pp. 410-419, paras. 465-472; and FOR CASES, see DIGEST, Vol. 21, pp. 156-158, Nos. *191-209.*]

Cases referred to:

(1) *Re Waring, Westminster Bank, Ltd.* v. *Awdry*, [1942] 2 All E.R. 250; [1942] Ch. 426; 111 L.J.Ch. 284; 167 L.T. 145; *revsg.*, [1942] 1 All E.R. 556; [1942] Ch. 309.

(2) *Berkeley* v. *Berkeley*, [1946] 2 All E.R. 154; [1946] A.C. 555; 115 L.J.Ch. 281; 175 L.T. 153; *revsg.*, S.C. *sub. nom., Re Berkeley, Borrer* v. *Berkeley*, [1945] Ch. 107; Digest Supp.

ADJOURNED SUMMONS to determine, *inter alia*, whether, having regard to (*a*) the order dated July 16, 1942, of the Court of Appeal in *Re Waring, Westminster Bank, Ltd.* v. *Awdry* (1); (*b*) the provisions of s. 20 of the Finance (No. 2) Act, 1945; and (*c*) the decision of the House of Lords in *Berkeley* v. *Berkeley* (2), tax-free annuities bequeathed by cl. 7 of the testator's will to the first two defendants ought to be paid in full or subject to such reduction as is provided for by the Finance Act, 1941, s. 25. JENKINS, J., held that the annuity bequeathed to L., who was not a party to the proceedings in *Re Waring* (1), should be paid in full, but that H.'s annuity was subject to reduction under s. 25. The facts appear in the judgment.

J. A. Wolfe for the plaintiffs (trustees of the will).
R. Cozens-Hardy Horne for the first and second defendants (tax-free annuitants).
E. Milner Holland for the third defendant.
J. V. Nesbitt for the fourth defendant.

JENKINS, J.: The testator, John Arkle Waring, made a will dated Feb. 11, 1939, and a first codicil dated Mar. 8, 1939, and also a second codicil dated Jan. 27, 1940, which, I think, is not material for the purpose of this case. The testator died on Aug. 3, 1940, and his will was proved on Nov. 11, 1940. It will be observed that his will and his first codicil were both dated before the beginning of the late war, but, on the other hand, the testator died after the outbreak of war, *i.e.*, after Sept. 3, 1939. By his will the testator gave a large number of annuities of which I think fifteen were given without any direction as to freedom from income tax, while two were given in this form:

> I bequeath the following annuities free of income tax and free of legacy and all other (if any) duties payable upon or by reason of my death: (1) to Mrs. Louie Burton-Butler of Ostend £100 per annum. (2) To Howard Bertram Burton-Butler of the United States of America £100 per annum. And I direct that the said annuities shall be paid free of all deductions whatsoever by equal quarterly payments the first whereof shall be made three months after my death.

The only other provision to which I need refer is the general residuary devise and bequest which directed the division of the ultimate residue—*i.e.*, after providing for all the legacies, annuities and so on—into shares, one of which was given absolutely to Sir George Henry Gater. By his first codicil, the testator empowered his trustees to set up an annuity fund and the provision was in these terms:

> I empower my trustees to set apart as soon as conveniently may be and invest in their names in any of the investments in which my residuary estate is authorised to be invested with power to vary investments a sum the income whereof when invested shall be sufficient at the time of investment to pay the annuities bequeathed by my said will and by this my codicil or any other codicil thereto and to pay the same accordingly with power to resort to the capital of the appropriated fund whenever the income shall be insufficient And until such sum shall be so appropriated I charge my residuary personal estate with the said annuities but after appropriation my residuary estate shall thereby be discharged from the said annuities.

The parties before the court are the executors, the two annuitants who were given tax-free annuities—Howard Bertram Burton-Butler and Louie Burton-Butler—Rose Emily Postlethwaite (who is one of the recipients of an annuity subject to tax), and, finally, Sir George Henry Gater as representing those interested in residue.

After the testator's death it was necessary to obtain the directions of the court as to the effect on the tax-free annuities given by the testator of the Finance Act, 1941, s. 25, which provides:

> Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than surtax, being a provision which—(*a*) is contained in . . . any will or codicil . . . and (*b*) was made before Sept. 3, 1939; and (*c*) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10*s.* in the £, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof.

The question with which the trustees were confronted was whether the Finance Act, 1941, s. 25, applied to the tax-free annuities and whether they ought, in setting up the annuity fund, to provide for those annuities at their face value or only at twenty twenty-ninths of that amount. A summons was issued to resolve:

> Whether in appropriating a fund sufficient by its income to satisfy such annuities . . . (ii) having regard to s. 25 of the Finance Act, 1941, such income [*i.e.*, the income of the appropriated fund] should be sufficient to pay twenty twenty-ninths of the gross amount of the annuity, income tax being taken into account at 10*s.* in the £ or at some other and if so what rate.

I should mention that of the tax-free annuitants the present defendant, Howard Bertram Burton-Butler, alone was a party to the application to the court of which I am now speaking. It was asked in those proceedings that a representation order should be made so as to bind Louie Burton-Butler, but that order was refused. Louie Burton-Butler was abroad, I believe actually in an enemy occupied country, but, at any rate, unavailable, and she could not be made a party. The matter came before Farwell, J., and he decided in *Re Waring, Westminster Bank, Ltd.* v. *Awdry* (1) ([1942] Ch. 309), that, for the purposes of s. 25 of the Finance Act, 1941, a provision contained in a will for the payment of an annuity was only made when it came into operation. On Apr. 15, 1942, he delivered a very short judgment, saying (*ibid.*, 310):

> The question for my determination is whether or not s. 25 of the Finance Act, 1941, applies to a will made before Sept. 3, 1939, by a testator who died after that date. It is not until the death of a testator that provisions contained in the will take effect, and, therefore, in my judgment, the provision with which I am concerned here was not "made" until after Sept. 3, 1939. Until the death of the testator the will was a document bearing date before Sept. 3, 1939, but it had no effect. Section 25 of the Finance Act, 1941, therefore does not apply.

Sir George Henry Gater, representing the residuary legatees, appealed from that decision, and, on July 16, 1942, the Court of Appeal reversed ([1942] 2 All E.R. 250) FARWELL, J., on this point, taking the view that a provision in a will was, for this purpose, made as soon as the will was executed, so that the position was that, if a testator made a will before Sept. 3, 1939, leaving a tax-free annuity, and died after that date, s. 25 of the Act of 1941 would be applicable, provided that in the meantime the provision had not been varied within the meaning of the section. The order made by the Court of Appeal was in these terms :

> Upon motion by way of appeal this day made unto this court by counsel for the defendant Sir George Henry Gater from so much of the order dated Apr. 15, 1942, as declared that s. 25 of the Finance Act, 1941, had no application to the annuities bequeathed free of tax by the will of the above named testator John Arkle Waring and accordingly that in appropriating a fund under the provisions of cl. 3 of the first codicil to the said will for the purpose of answering such annuities the plaintiffs ought to appropriate a fund the income of which at the date of appropriation was sufficient to pay the whole gross amount of such annuities income tax being taken into account at the standard rate in force at the date of such appropriation . . . This court doth order that the said order dated Apr. 15, 1942, be varied so far as it declares as aforesaid. And in lieu thereof this court doth declare that s. 25 of the Finance Act, 1941, applies to the said annuities and accordingly that in appropriating a fund under the provisions of cl. 3 of the first codicil to the said will for the purpose of answering such annuities the plaintiffs ought to appropriate a fund the income of which at the date of appropriation is sufficient to pay twenty twenty-ninths of the gross amount of such annuities income tax being taken into account at 10*s.* in the £.

There was a direction as to costs and leave to appeal to the House of Lords was refused.

The question with regard to the annuities having been thus determined by the Court of Appeal, the trustees acted accordingly, and, in appropriating a fund to answer the annuities pursuant to cl. 3 of the first codicil, they treated the two tax-free annuities as being each of twenty twenty-ninths of their nominal amount. It will be remembered that the provisions of s. 25 of the Finance Act, 1941, were limited so as to apply only so long as tax was at 10*s.* in the £. The Finance (No. 2) Act, 1945, reduced the tax to 9*s.* in the £, so that, if no provision had been made for the continuance of s. 25 of the Act of 1941, it would have ceased to have effect, but *uno flatu* with the reduction in the rate of tax, the Finance (No. 2) Act, 1945, enacted by s. 20 that :

> (1) The amendments of s. 25 of the Finance Act, 1941, specified in this section shall have effect for the purpose of rendering the said s. 25 (which provides for a reduction of tax-free annuities, etc., in years of assessment where the standard rate of income tax is 10*s.* in the £) applicable with modifications to all years of assessment for which the standard rate of income tax is over 5*s.* 6*d.* in the £.

Sub-section (2) provides for the substitution in sub-s. (1) of s. 25 of the words " exceeds 5*s.* 6*d.* " for the words " is 10*s.*" Sub-section (3) contains provisions substituting for the words " twenty twenty-ninths " in s. 25 the words " the appropriate fraction " which is defined by sub-s. (6) in such a way as to produce the result intended by the legislature, the fraction being appropriately varied according to the rate of tax for the time being in force.

The matter standing thus, another case concerning tax-free annuities—*Re Berkeley* (2)—went to the Court of Appeal, and thence to the House of Lords under the name of *Berkeley* v. *Berkeley* (2). In that case the Court of Appeal on the point now in question followed their own decision in the matter of the present testator's estate. In the House of Lords the decision of the Court of Appeal in *Re Berkeley* (2) was reversed and the decision of the Court of Appeal in the present case was overruled. The result clearly is that, if the question had to be decided *de novo* either here or in the Court of Appeal, either of those courts would be constrained, in view of the decision of the House of Lords in *Berkeley* v. *Berkeley* (2), to hold that the provision here of the tax-free annuities was, within the meaning of s. 25, made on Aug. 3, 1940, when the testator died, and not before, with the result that s. 25 of the Finance Act, 1941, did not apply and both annuities must be paid and provided for at their full amount. There is no doubt that that is the law as it stands today. The question before me, however, is not merely how the matter ought to be dealt with if it could be dealt with *de novo*, but the extent to which it can be dealt with *de novo* having regard to the judgment of the Court of Appeal applicable to this very estate. Two people are concerned, the two tax-free annuitants, of whom only one was, as I have said, before the court on the previous occasion, namely, Howard Burton-Butler. Notwithstanding the attractive argument to the contrary presented to me by counsel for these two annuitants, it seems to me clear beyond argument that on the well-recognised principle of *res judicata* he is bound by the previous decision. The decision was a decision in terms that the Finance Act, 1941, s. 25, applied to the two tax-free annuities—that is, a decision that those annuities must be provided for as annuities of twenty twenty-ninths of the full amount thereof so long as tax continued at 10*s.* in the £. It has been overruled, or, in other words, has been held by a higher tribunal to be wrong in law and not to be followed in other cases, but it is, nevertheless, a subsisting order which is binding on the parties to the proceedings in which it was made.

I was invited to say that the matter could be dealt with *de novo* as a question arising under the Finance Act, 1941, s. 25, as amended by the Finance (No. 2) Act, 1945, s. 20. Notwithstanding the sympathy I feel for Mr. Burton-Butler, I am unable to see my way to holding that that amendment (which, after all, provides for the continued existence of s. 25) has the result of destroying the effect of the decision of the Court of Appeal as a decision regarding the *quantum* of his annuity. I think that decision as to the applicability of s. 25 is a decision as to the applicability of that section not only in its original form but also in its amended form. I am, accordingly, constrained to hold that, so far as the first defendant is concerned, the *quantum* of his annuity must be treated as irretrievably fixed by the decision of the Court of Appeal. The second defendant, Mrs. Burton-Butler, is in a different position. She was not a party to the previous proceedings, and no representation order was made so as to bind her. In my judgment, therefore, the order made by the Court of Appeal on July 16, 1942, cannot affect her rights in any way, and she is entitled to claim retrospectively the full amount of her annuity calculated in accordance with the law as it is now known to be having regard to the decision of the House of Lords in *Berkeley* v. *Berkeley* (2).

For these reasons (anomalous as the result may appear to be), I think it necessarily follows that the question must be answered in the sense that the tax-free annuity bequeathed by cl. 7 of the testator's will to the first defendant ought to be paid subject to such reduction as is provided for by the section, and the tax-free annuity payable to the second defendant ought to be paid in full.

Order accordingly.

Solicitors: *Ouvry & Co.* (for the plaintiffs and three defendants); *Lee & Pembertons* (for the fourth defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

H. & G. SIMONDS, LTD. *v.* HEYWOOD.

[KING'S BENCH DIVISION (Lynskey, J.), January 15, 19, 1948.]

Landlord and Tenant—Notice to quit—Validity—Agreement for three months "and afterwards from year to year"—Tenancy determinable on three months' notice at any time.

Premises were let "from July 4, 1935, until Oct. 3, 1935, and afterwards from year to year (but subject to the determination of the tenancy hereby created as hereinafter mentioned) at the yearly rent of £40 payable by equal monthly instalments," with a proviso that "either of the said parties hereto shall be at liberty to put an end to and determine these presents at any time on or after Oct. 3, 1935, on giving to the other of them . . . three calendar months' previous notice thereof in writing without reference to the commencement of the said tenancy any law or usage to the contrary notwithstanding." Notice to quit was given by the landlord on July 3, 1947, to take effect on Oct. 6, 1947. In an action for possession it was argued for the tenant that the tenancy was for fifteen months certain and thereafter on the basis of a yearly tenancy, and that the provision for determination on three months' notice after Oct. 3, 1935, was inconsistent with and repugnant to the term of fifteen months and so was of no effect.

HELD: it was open to the parties to the agreement to contract for its determination on any notice that they saw fit, and the tenancy was determinable at any time after Oct. 3, 1935, on three months' notice by either party.

King v. *Eversfield* ([1897] 2 Q.B. 475; 77 L.T. 195), *applied.*
Mayo v. *Joyce* ([1920] 1 K.B. 824; 122 L.T. 777), *distinguished.*

[AS TO NOTICE TO QUIT UNDER A YEARLY TENANCY, see HALSBURY, Hailsham Edn., Vol. 20, pp. 130-132; and FOR CASES, see DIGEST, Vol. 31, pp. 432, 433, 437, 438, 440, Nos. *5771-5776*, *5817-5834*, *5858-5866*.]

Cases referred to:

(1) *Re Threlfall, Ex p. Queen's Benefit Building Society*, (1880), 16 Ch.D. 274; 44 L.T. 74; *sub nom. Re Threlfall, Ex p. Blakey*, 50 L.J.Ch. 318; 31 Digest 433, *5776*.

(2) *King* v. *Eversfield*, [1897] 2 Q.B. 475; 66 L.J.Q.B. 809; 77 L.T. 195; 61 J.P. 740; 31 Digest 51, *1987*.

(3) *Mayo* v. *Joyce*, [1920] 1 K.B. 824; 89 L.J.K.B. 561; 122 L.T. 777; 31 Digest 440, *5856*.

ACTION for possession of licensed premises, and mesne profits. LYNSKEY, J., held that an agreement that a tenancy for three months " and afterwards from year to year " should be determined on three months' notice given by either party at any time after the first three months was valid, and he granted the relief sought. The facts appear in the judgment.

Winn for the plaintiffs.
Montague Waters for the defendant.

LYNSKEY, J.: In this case H. & G. Simonds, Ltd., as landlords, claim possession of premises known as The Elm Tree Beer House, New Heston Road, Heston, Hounslow, Middlesex, from the tenant, Mr. William Heywood, together with mesne profits at the rate of £40 per annum from the date of the writ until judgment. The landlords are the successors in title to Ashby's Staines Brewery, Ltd., who, on June 20, 1935, entered into a tenancy agreement with the tenant. That tenancy agreement witnesseth:

> . . . that in consideration of the rent hereinafter reserved and the tenant's covenants hereinafter contained the company let and the tenant takes all that messuage or tenement and premises with appurtenances known as The Elm Tree situate at New Heston Road, Heston, Hounslow, in the county of Middlesex. And also all the company's fixtures and fittings in upon and about the said premises. To hold the same unto the tenant from July 4, 1935, until Oct. 3, 1935, and afterwards from year to year (but subject to the determination of the tenancy hereby created as hereinafter mentioned) at the yearly rent of £40 payable by equal monthly payments.

The agreement sets out a series of tenant's covenants whereby the tenant agrees to pay the rates, taxes, assessments, and other outgoings, and to keep the premises in good tenantable repair, and there are various other obligations which are of a stringent character. It is later provided:

> Provided further that either of the said parties hereto shall be at liberty to put an end to and determine these presents at any time on or after Oct. 3, 1935, on giving to the other of them or so far as the company are concerned by their leaving for the tenant on the said premises or some part thereof three calendar months' previous notice thereof in writing without reference to the commencement of the said tenancy any law or usage to the contrary notwithstanding.

Provision is made in case of breach of covenant by the tenant.

The tenant entered into possession under that agreement and is still in possession of the premises. On July 3, 1947, the agents for the landlords gave the tenant a notice to quit in these terms:

> We hereby give you notice to quit and deliver up possession of the premises known as The Elm Tree Beer House, Heston, in the county of Middlesex, which you hold as tenant under agreement dated June 20, 1935, and made between Ashby's Staines Brewery, Ltd., of the one part and the said William Heywood of the other part on Monday, Oct. 6, 1947.

Before me the receipt of that notice to quit was admitted, but the point taken by the tenant was that that it was bad as not having been given at a time when it was permitted to be given under the terms of the tenancy agreement. The argument for the tenant is that in the habendum to the tenancy agreement the premises are let for three months from July 4, 1935, until October 3, 1935, and afterwards from year to year, and so the tenancy, first, is for three months, followed by another term certain of twelve months at least. In other words, the tenant says that the agreement was for fifteen months certain, and that after Oct. 3, 1935, it was for a yearly tenancy, and the proviso allowing either party to determine the tenancy agreement after Oct. 3, 1935, is inconsistent with and repugnant to the grant contained in the habendum of a tenancy of fifteen months certain. It is argued that, as that proviso is repugnant to the grant in the habendum, it is void and of no effect, and is void, not merely so far as the first fifteen months is concerned, but for the whole period during which the tenancy agreement shall subsist. I am asked to say that the true interpretation of the agreement after Oct. 3, 1935, is that it is a yearly tenancy and can only be terminated by a six months' notice expiring on the anniversary of the day of the expiration of the first year of the annual tenancy, *viz.*, Oct. 2, in any year.

In the words of JAMES, L.J., in *Re Threlfall* (1) I am asked, not to construe a deed, but to contradict it entirely and to defeat the intention of the parties to it. That is how I regard the argument in this case. Apart from authority, I should have thought the terms of this agreement were clear. It provides for a three months' tenancy and for the tenancy to continue thereafter from year to year "but subject to the determination of the tenancy hereby created as hereinafter mentioned," and in clear and precise terms it provides that the tenancy can be terminated "at any time on or after Oct. 3, 1935, on giving to the other of them or so far as the company are concerned by their leaving for the tenant on the said premises or some part thereof three calendar months' previous notice thereof in writing without reference to the commencement of the said tenancy any law or usage to the contrary notwithstanding." I should have thought that was clear and unambiguous, and that the parties knew exactly what they were expressing. Authorities are helpful in showing how such agreements are approached by other courts at other times, but my task is to find out what the predecessors in title of these landlords and the tenant meant when they entered into this agreement. It is said I am bound by authority to hold that the parties meant something which they never intended to mean and are bound by a bond into which they never consciously entered. It is said that as this is a yearly tenancy any proviso which operates to enable one of the parties to determine the tenancy during the first year of that tenancy is repugnant and void. I am not satisfied, on the authorities, that such is the case. *Re Threlfall* (1) was a decision of the Court of Appeal arising under a mortgage deed. A mortgagor had attorned tenant to the mortgagees as a yearly tenant, and there was a proviso in the agreement that the mortgagees could terminate that tenancy at any time after Sept. 1, 1871, without giving previous notice of their intention so to do, and to enter and take possession of the building and premises. That was a case of a yearly tenancy which was determinable, according to its terms, without any notice at all, and it was argued that that was, not a yearly tenancy, but a tenancy at will, because it was terminable at the will of the landlord at any time. However, the Court of Appeal—and a strong Court of Appeal, consisting of JAMES, COTTON and LUSH, L.JJ.—unanimously held that it was an annual tenancy, although terminable at any time without notice, and COTTON, L.J., said (16 Ch.D. 281):

> We are asked to say that the tenancy, stated in this attornment clause to be a yearly tenancy, was in fact a tenancy at will. The ground on which we are asked to say this, is, that power was given to the mortgagee to determine the relation of landlord and tenant. But I know of no law or principle to prevent two persons agreeing that a yearly tenancy may be determined on whatever notice they like. There is freedom of contract in this respect. In one sense, indeed, there is a tenancy at the will of the landlord; that is, he is enabled to put an end to a yearly tenancy at a very short notice. All that the passage cited from COKE means, is, that if there is a demise with no term fixed between the parties except the will of the lessor, then it is implied by law to be also at the will of the tenant.

That statement, in my view, was not necessary to the decision in that case and is *obiter*, but that is not the view taken in a later case where this matter was considered, namely, *King* v. *Eversfield* (2), which is, again, a decision of the Court of Appeal.

The question there was whether an agreement amounted to a yearly tenancy so as to bring the tenant within the provisions of the Market Gardeners Compensation Act, 1895, and the Agricultural Holdings (England) Act, 1883. There was a written agreement made on Oct. 22, 1886, that a piece of land should be let to the tenant as from Sept. 29, 1886,

> . . . at the rent of £19 12*s.* 0*d.* a year payable quarterly on the four usual quarter-days for payment of rent in every year, and the tenant agrees to pay the said rent at the times aforesaid, and to use the said premises as garden ground only, and to manure, crop, and cultivate the same in a husbandlike manner, and it is hereby agreed that the tenancy may be determined by either party giving to the other three calendar A months' notice to quit, or of his intention of quitting, as the case might be, on any day of the year.

It was argued there that this was only a quarterly tenancy. It was said that the provision for notice which enabled it to be terminated by three months' notice at any time of the year prevented its being a yearly tenancy, but the Court of Appeal, consisting of LORD ESHER, M.R., and A. L. SMITH and RIGBY, L.JJ., took the contrary view. In his judgment, A. L. SMITH, L.J., said ([1897] B 2 Q.B. 479) :

> The question is whether, upon the true construction of the agreement taken as a whole, it creates a quarterly tenancy at a rent calculated at the rate of so much a year, with a provision for a three months' notice to quit, or a tenancy from year to year at a yearly rent with a provision for a three months' notice to quit. I think the latter is the true construction. In the case of *Re Threlfall* (1) COTTON, L.J., said (16 Ch.D. 281) : "I know of no law or principle to prevent two persons agreeing that C a yearly tenancy may be determined on whatever notice they like." I agree with the view there expressed, which is applicable to the present case. I think that the agreement of tenancy in this case constituted a yearly tenancy with a special term that it should be determinable by a three months' notice at any time.

In the same case RIGBY, L.J., said, referring to the case of *Re Threlfall* (1) (*ibid.*, 481) :

> D It was there laid down that the parties to a tenancy from year to year may agree to any terms they like with regard to the notice to quit. It was attempted to distinguish that case from the present on the ground that there a tenancy from year to year was expressly mentioned, but I do not think that constitutes any valid distinction. It is a clear authority that a stipulation for a three months' notice to quit is not inconsistent with a yearly tenancy.

Those two statements of the Court of Appeal have never been questioned, and, E so far as I know, have never been overruled.

The tenant here says that, although that be so, *Mayo* v. *Joyce* (3), a decision of the Divisional Court, is in his favour and binds me to hold that this clause of the proviso in the agreement before me is inconsistent with and repugnant to a yearly tenancy. In *Mayo* v. *Joyce* (3) there was an agreement that :

> The tenancy shall commence on Sept. 1, 1918, to continue from year to year until determined by three calendar months' notice to quit, which may be given on either F side and at any time irrespective of dates fixed hereunder for the payment of rent next hereinafter contained.

The agreement was made on Aug. 30, 1918, and on Apr. 29, 1919, the plaintiff gave the defendant notice to quit to expire on Aug. 2, 1919—in other words, in the first year of the tenancy. The point argued was that, on the construction of that agreement, the clause giving power to give notice to quit at any time meant G at any time after the first year of the tenancy. It was a decision on the construction of a particular agreement, and I do not read it as laying down any general proposition that, if the words "yearly tenancy" are used in a tenancy agreement, that operates in law to prevent the parties agreeing to terminate the tenancy within the first twelve months of the tenancy. I know of no principle, especially in view of the decisions in *Threlfall's* case (1) and *King* v. *Eversfield* (2), which prevents parties from entering into an agreement to terminate an H annual tenancy in the first year of the tenancy. On principle I should have thought it was quite proper. It is common form to have a term of ten years or a longer period set out in the habendum, with a provision later in the document enabling the agreement to be terminated by notice at the end of five years.

In *Mayo* v. *Joyce* (3), BAILHACHE, J., in his judgment said ([1920] 1 K.B. 827) :

> In the case of an ordinary yearly tenancy the notice must expire on the date of the commencement of the tenancy. This agreement provides that it may be given "at any time." Did the parties mean by that that the notice might be given on the day after the tenancy began ? I do not think so. In my opinion those words were

inserted for another purpose. The rent was payable on the usual quarter days, and if the agreement had been silent as to the time when the notice was to be given a question might have arisen whether the notice should be one expiring on a quarter day or on the date when the tenancy began. The parties did not want to have any dispute as to that, and therefore the agreement provides that the notice may be given at any time. In my view the parties intended that there should be a yearly tenancy, that is, a tenancy for one year certain, but which might continue longer. Whether it did continue for more than a year would depend on whether it was determined by notice, and they have provided that the notice shall be, not the ordinary six months' notice, but a three months' notice, and, further, it is to be a three months' notice expiring not necessarily on a quarter day or on the day of the commencement of the tenancy, but at any time.

It seems clear that BAILHACHE, J., and SANKEY, J., were dealing only with the particular words of that agreement, and were construing that agreement and were not laying down any general proposition of law or general canon of construction. If in the case before me the landlords had given notice to quit expiring during the first twelve months of the annual tenancy, there might have been more force in the argument for the tenant, but, I would still have been of the opinion I have already expressed. As it is, the notice to quit was not given until some years after the expiration of the first year of the annual tenancy and, in my view, the proviso clearly must apply to and authorise the notice given by the plaintiffs to the tenant on July 3, 1947. In these circumstances the plaintiffs are entitled to judgment for possession.

Judgment for possession with mesne profits and costs.

Solicitors: *Champion & Co.*, agents for *Turberville Smith & Co.*, Uxbridge, Middlesex (for the plaintiffs); *Joseph Lilly* (for the defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

S. KAPROW & CO., LTD. *v.* MACLELLAND & CO., LTD.

[COURT OF APPEAL (Tucker and Wrottesley, L.JJ.), January 13, 14, 22, 1948.]

Practice—Payment into court—Acceptance in error—Mistaken interpretation of pleadings—Power of court to grant relief.

The plaintiffs began an action against the defendants claiming damages for breach of contract. Later, they amended their statement of claim by adding after the claim for damages "or alternatively £7,600 as money had and received by the defendants to the use of the plaintiffs." This amendment was subsequently admitted by both parties to have been erroneously phrased, as the plaintiffs intended the claim for money had and received to be alternative to part only, and not to the whole, of the claim for damages. The defendants paid into court in respect of the alternative cause of action £7,600, and the plaintiffs accepted it in satisfaction thereof. On realising that, owing to their mistaken view of the meaning of the statement of claim as amended, they had elected to accept the sum paid into court in satisfaction of a claim which was alternative to the whole of their claim for damages, thus bringing an end to the entire proceedings, the plaintiffs, at the hearing of a summons by the defendants to stay the action, sought to restore the original position by repaying the money into court, with a view to amending their statement of claim and proceeding with the remainder of their claim for damages. The master made an order staying the action, but the judge in chambers, allowing the plaintiffs' appeal from the master, made an order for the repayment of the money into court, with liberty to the defendants to apply to take it out and to the plaintiffs to amend their statement of claim. It was contended on behalf of the defendants that the judge had no jurisdiction to make such an order, since the plaintiffs, by taking the money out of court, had made an irrevocable election to rely on one alternative ground of claim and the court had no power to allow them to revoke that election:—

HELD: in a proper case and on proper terms, the court may, in its discretion, relieve a party who comes quickly from the effect of his mistake or that of his legal advisers, and though an election, once made, cannot be revoked by a party of his own motion, there is no authority for limiting to a case where there has been no election the power of the court to grant relief in respect of a mistake to prevent a possible injustice, and the order of the judge was, therefore, rightly made.

Emery v. *Webster* (1853) (9 Exch. 242) and *Cannan* v. *Reynolds* (1855) (5 E. & B. 301), *applied*.

[AS TO PAYMENT INTO AND OUT OF COURT, see HALSBURY, Hailsham Edn., Vol. 26, pp. 62-64, paras. 100-107; and FOR CASES, see DIGEST, Practice, pp. 478-499, Nos. *1590-1735*.]

Cases referred to:

(1) *Emery* v. *Webster*, (1853), 9 Exch. 242; 2 C.L.R. 306; 23 L.J.Ex. 9; 22 L.T.O.S. 78; *affd. on appeal, sub nom., Webster* v. *Emery*, (1855), 10 Exch. 901; Digest Practice 108, *937*.

(2) *Cannan* v. *Reynolds*, (1855), 5 E. & B. 301; 3 C.L.R. 1400; 26 L.J.Q.B. 62; 25 L.T.O.S. 176; Digest Practice 160, *1423*.

(3) *Scarf* v. *Jardine*, (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 21 Digest 224, *577*.

(4) *Morel Brothers & Co.* v. *Westmorland (Earl)*, [1904] A.C. 11; 73 L.J.K.B. 93; 89 L.T. 702; *affg., Morel Brothers & Co.* v. *Westmorland (Earl)*, [1903] 1 K.B. 64; 72 L.J.K.B. 66; 87 L.T. 635; 21 Digest 224, *579*.

(5) *Jones* v. *Carter*, (1846), 15 M. & W. 718; 31 Digest 477, *6242*.

(6) *Evans* v. *Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; *sub nom., Bartlam* v. *Evans*, 157 L.T. 311; Digest Supp.

(7) *Derrick* v. *Williams*, [1939] 2 All E.R. 559; 160 L.T. 589; Digest Supp.

(8) *Lissenden* v. *Bosch (C.A.V.), Ltd.*, [1940] 1 All E.R. 425; [1940] A.C. 412; 109 L.J.K.B. 350; 162 L.T. 195; 33 B.W.C.C. 21; Digest Supp.

APPEAL by the defendants from an order of LYNSKEY, J., dated Nov. 28, 1947, for repayment by the plaintiffs of money into court, with liberty to the defendants to take the money out and to the plaintiffs to amend their statement of claim. The appeal was dismissed. The facts appear in the judgment of TUCKER, L.J.

Caplan for the plaintiffs.
H. C. Leon for the defendants.

Cur. adv. vult.

Jan. 22. The following judgments were read.

TUCKER, L.J.: This is an appeal from an order made by LYNSKEY, J., in chambers whereby he allowed the plaintiffs' appeal from the master and ordered the plaintiffs to repay into court the sum of £7,600, being as to £7,500 paid into court on Oct. 25, 1947, and as to £100 paid into court on Oct. 30, 1947, and that the defendants be at liberty to apply to take the said sum out of court if so advised. It was further ordered that the plaintiffs be at liberty to amend their statement of claim and that the costs incurred and thrown away by the amendment and the costs of any subsequent amendment be the defendants' in any event, and that the plaintiffs should pay the costs of the application to the master and of the appeal as between solicitor and client to be taxed. From that order the defendants appealed.

The circumstances in which that order came to be made are as follows. The plaintiffs started an action against the defendants claiming damages for breach of contract. The statement of claim as originally framed alleged an agreement of Apr. 8, 1947, the terms whereof were set out in a letter to the plaintiffs of that date by which the defendants agreed to sell and the plaintiffs agreed to purchase from the defendants 5,000 silk parachutes at a price of £8 4*s*. 0*d*. each. It was further alleged that it was an express term of the agreement that delivery of the whole of the said parachutes should be completed within ten days of Apr. 8, 1947. There was then alleged an alternative implied contract that the delivery of the whole of the said parachutes should be completed within a reasonable time, which was said to be not later than the end of April, 1947. Then it was further alleged that in respect of that agreement the plaintiffs had paid to the defendants the sum of £32,200. Paragraph 1 concluded: "At the time of the making of the said agreement the defendants well knew that the plaintiffs required the said parachutes for the purpose of re-sale." That is a summary of para. 1 of the statement of claim. Paragraphs 2, 3 and 4 were as follows:

2. The defendants have delivered to the plaintiffs 3,000 only of the said parachutes, but in breach of the agreement referred to in para. 1 hereof have failed to deliver to

> the plaintiffs within the time agreed or at all the balance of 2,000 of the said parachutes.
>
> 3. In the alternative, in breach of the agreement referred to in para. 1 hereof, the defendants by a letter from their solicitors dated Apr. 28, 1947, repudiated the said agreement by informing the plaintiffs that they were unable to deliver the balance of the said parachutes as agreed. The plaintiffs will refer to the said letter for its full terms.
>
> 4. By reason of the premises the plaintiffs have suffered damage including loss of profit upon the undelivered balance of the said parachutes at the rate of £9 0*s.* 0*d.* per parachute, and in the sum that they have paid to the defendants in respect of parachutes which the defendants have failed to deliver as agreed.

The statement of claim went on: " And the plaintiffs claim damages." That is how the statement of claim as delivered on June 25, 1947, stood.

A defence was delivered to which it is not necessary to refer, and then the following correspondence took place. I will read such portions of the letters as I think are material. On Aug. 22 the defendants' solicitors wrote a letter in which they said:

> We have advised our clients that technically the money paid by your clients to ours for the undelivered goods is irrecoverable by your clients, there having been no total but only a partial failure of consideration and your clients having wrongfully repudiated the contract. Nevertheless our clients have no wish to retain money for goods which they have not delivered and, while contesting their legal liability to do so, they have instructed us to return to you as a matter of grace but quite unconditionally the balance of the purchase price less a reasonable sum which they will retain against the costs of this action.

Then they said they were going to retain £250 in respect of costs and suggested that that sum should be paid into a bank in joint names. The plaintiffs' solicitors replied on Aug. 26 acknowledging that letter and saying:

> We are instructed by our clients to accept your cheque for £7,350 0*s.* 0*d.* and agree to the sum of £250 0*s.* 0*d.*[*] being placed in joint names pending the hearing of the action, upon the express understanding that our acceptance of these terms is without prejudice to any of the issues which we are raising in this action, and that the payment of £7,350 0*s.* 0*d.* is being accepted purely by way of mitigation of our client's damage.

On Aug. 28 the defendants' solicitors replied:

> The proposal to pay the sum of £7,350 was purely as a matter of grace and was to be quite unconditional. This being so, we cannot accept the suggestion made by you that the payment to your clients of this sum would be accepted by your clients by way of mitigation of your clients' alleged damage.

To that, on Sept. 5, the plaintiffs' solicitors replied:

> You have apparently misunderstood the purport of our letter of Aug. 22 which was not intended to impose any conditions with regard to the payment but only to make it quite clear (*a*) that our client's action would not abate upon the making of such payment, and (*b*) that our client would regard his damages as mitigated to the extent of such payment.

The parties got at loggerheads about this and nothing came of it. There was some " without prejudice " correspondence, we are told, and ultimately on Oct. 21, 1947, the plaintiffs' solicitors thought that they could overcome this dilemma by amending their statement of claim. They wrote:

> In order to save the necessity of issuing a summons for leave to amend the statement of claim in this action, we shall be greatly obliged if you will kindly let us know whether you are prepared to accept the enclosed amended statement of claim without applying to the court for such purpose.

The amendment which was suggested and to which the defendants agreed was as follows. At the end of para. 4, which I have already read, these words were added:

> In the alternative there has been a total failure of consideration with regard to the sum of £7,500 paid in respect of parachutes not delivered by the defendants to the plaintiffs and the said sum is money had and received by the defendants to the use of the plaintiffs.

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[*] NOTE: The sum of £7,600 consisting of the £7,350 here referred to plus the £250 for costs represented the difference between the £32,200 paid by the plaintiffs to the defendants and £24,600, the price at £8 4s. 0d. each of the 3,000 parachutes delivered.

Then in the prayer after the words "and the plaintiffs claim damages" were added the words: "or alternatively £7,500 as money had and received by the defendants to the use of the plaintiffs." The defendants agreed to that amendment being made without an order of the court. On Oct. 25 the defendants' solicitors wrote:

> As your clients' claim has now been amended so as to claim in the alternative £7,500 in respect of the undelivered parachutes, this amount is being paid by our clients into court forthwith with a denial of liability. Had not your claim been so amended our client would, of course, have been prepared to implement our letter of Aug. 22 last.

On the same day they sent a formal notice:

> We have today paid into court £7,500 in respect of the alternative cause of action. We send herewith notice of payment into court together with the receipt endorsed thereon, receipt of which kindly acknowledge.

On Oct. 28 the plaintiffs' solicitors replied:

> We thank you for your letter of the 25th instant enclosing notice of payment into court, service of which we accept by post. We should be greatly obliged if you would kindly treat this letter as a formal amendment of the figure to read £7,600 instead of £7,500.

That was agreed to and a further £100 was paid into court. In the concluding paragraph of the defendants' solicitors' letter of Oct. 30 they said:

> While you are, of course, entitled to take all this money out of court in accordance with the rules, if you wish to do so, we must make it plain that having regard to the pleadings we do not consent to your taking out the money in the manner proposed.

"The manner proposed" was indicated in the concluding paragraph of the letter of Oct. 28: "and if the additional £100 is paid into court making a total payment into court of £7,600 we have been instructed to accept the sum of £7,600 in settlement of that part of our clients' claim." On Oct. 31 the plaintiffs' solicitors wrote:

> We also beg to acknowledge notice of payment into court of a further £100 making a total payment into court of £7,600, and we enclose herewith notice of acceptance of this sum in satisfaction of the alternative cause of action in this matter.

Thereupon, on Nov. 5, the defendants' solicitors wrote:

> In our opinion, as the claim made by the plaintiffs was made in the alternative and as the full amount has been paid into court in respect of one alternative claim and accepted by the plaintiffs, they have elected to rely upon one alternative ground of claim and are not entitled to proceed with the other alternative claim. In our opinion, the action is now at an end except that your clients are entitled to tax and to be paid their costs up to the date of your notice of acceptance. We are accordingly issuing a summons to stay the action except for the purpose of taxation and payment of costs. If you agree with our view, it will be unnecessary to proceed with this summons and we will consent to an order for taxation.

The plaintiffs did not agree with that view and, accordingly, a summons was taken out to stay the action on the ground that the statement of claim disclosed two alternative causes of action, that money had been paid in in respect of one and taken out, and, therefore, the other came to an end. The master stayed the action.

On the hearing before the master and before the learned judge on appeal the plaintiffs, first of all, sought to justify what had been done, but they contended that, if they were wrong about that, they had been acting under a mistake. They had taken steps at the earliest opportunity, *viz.*, on the hearing of the summons to stay, to try and get the matter put right, and they asked to be allowed, on terms, to bring the money back into court and to restore the position as it originally was. It was stated in this court by counsel for the defendants that he did not desire to take any point that the plaintiffs had not taken out any cross-summons asking for relief and he agreed that they had raised this matter at the earliest opportunity. Nor did he desire to raise any question whether technically LYNSKEY, J., could have made this order on the summons to stay. The matter may, therefore, be treated, for all intents and purposes, as if the plaintiffs had taken out a cross-summons asking for relief as a result of the mistake that they had made. There is one further matter. Counsel for the defendants also does not seek to argue that LYNSKEY, J., improperly exercised his discretion, if he had any, in this matter at all. Counsel's whole

point is that there was no jurisdiction to make such an order, that there had
been an election and an irrevocable election, and the matter could not be re-opened in any form.

In my view, the language of para. 4 of the statement of claim after the amendment
of Oct. 21, 1947, was ambiguous. If, in the first four lines, instead of
claiming damages for loss of profit at the rate of £9 per parachute plus the sum
paid in respect of parachutes undelivered, the plaintiffs had substituted the
figure of £18,000 for the loss of profit and £7,600 for the sum paid for undelivered A
parachutes, it would have been clear that they were claiming a total sum by
way of damages amounting to £25,600 made up of these two figures. Then there
would have followed the amendment which says: "In the alternative there
has been a total failure of consideration with regard to the sum of £7,600."
It would then have been clear that the £7,600 claimed as on a total failure of
consideration was alternative to the same sum previously claimed as part of
the damages. Now, it is true that the first four lines of this paragraph do not B
contain the figures £18,000 and £7,600, but these sums are merely the result of
mathematical calculations based on the alleged loss of profit on 2,000 undelivered
parachutes and the amount paid in respect of undelivered parachutes as alleged in
paras. 1 and 2 of the statement of claim. The words, "loss of profit . . . at the rate
of £9 per parachute," are, therefore, equivalent to saying "loss of profit amounting
to £18,000," and the words "the sum that they have paid to the defendants
in respect of parachutes" are equivalent to "the sum of £7,600 paid in respect C
of parachutes." The amendment claiming the £7,600 alternatively as on a total
failure of consideration was, I have no doubt, intended as an alternative only
to "the sum that they have paid to the defendants in respect of parachutes
which the defendants have failed to deliver" or in other words "the same sum
previously claimed as part of the damages." Unfortunately, the omission
to insert the figure of £7,600 in the first four lines of the paragraph as being D
the sum paid in respect of undelivered parachutes made the language obscure
when the amendment was added, and the position was rendered worse, from
the plaintiffs' point of view, when the prayer was amended so as to read: "And
the plaintiffs claim damages or alternatively £7,600 as money had and received
by the defendants to the use of the plaintiffs." The prayer is unambiguous
and would naturally lead anyone to construe para. 4 as having the same meaning.
It is conceded that there has been a mistake. Counsel for the defendants E
was content to have the matter dealt with on that basis and without requiring
an affidavit on the matter. We were frankly informed by counsel for the plaintiffs
that he was a party to the mistake and was, of course, responsible for the language
used, and that the mistake which was made when the money was taken out of
court was a mistake with regard to the meaning of the statement of claim as
amended. I accept this explanation which is consistent with the correspondence.
It was not a mistake as to the rules of court or as to the effect of taking out of F
court money paid in respect of one of two alternative causes of action. The
mistake was as to the nature of the alternatives. The plaintiffs' advisers,
when they took the money out, thought they were electing between receiving
£7,600 as money paid for a consideration which had wholly failed and the
like sum as part of their claim for damages, whereas, owing to the language
of the amended prayer in their statement of claim, the true alternatives were G
£7,600 as money paid on a failure of consideration and £25,600 by way of
damages.

In these circumstances I feel some doubt whether there ever was a true
election by the plaintiffs. However this may be, no authority was cited to us
for the proposition that in such circumstances as these, even if there has been
an election, the court has no jurisdiction to remedy the results of an election
due to a *bona fide* mistake where the act of election consists of making use of H
some process of the machinery of the courts. On the contrary, *Emery* v. *Webster*
(1) is, I think, clear authority for the proposition that the court has jurisdiction
to make such an order as was made by Lynskey, J., in the present case. The
facts in that case are accurately set out in the headnote and are as follows
(9 Exch. 242):

> In an action for the breach of contract to employ the plaintiff as an actor for three
> years, at a weekly salary of £8, the declaration claimed general damages for the wrongful
> dismissal; but the plaintiff, in his particulars of demand, merely claimed £32 for

> four weeks' salary. The defendant paid £32 into court and the plaintiff's attorney, under the mistaken impression and belief that the plaintiff was entitled under that form of declaration to recover for four weeks' salary only, took the money out of court, and gave notice of taxation of costs, which were accordingly taxed and paid. But within a few days afterwards, the plaintiff's attorney, having discovered his mistake, obtained a judge's order to set aside the replication and all subsequent proceedings, with leave to the plaintiff, upon refunding the money so paid, and the costs, to amend his declaration and particulars of demand, with liberty to the defendant to plead *de novo*. It was deposed at the time of the application, that the money had been taken out of court wholly under a mistake; and it also appeared that the plaintiff, a short time previously, had been offered £100 by the defendant to settle the disputed claim:—*Held*, that, under the circumstances, the order was rightly made.

POLLOCK, C.B., in the course of his judgment, said (*ibid.*, 245):

> A certain course of proceeding was adopted, according to the rules of the court, which was followed by the result of judgment being obtained for a sum less in amount than that which the plaintiff meant from the first to demand, and for which he intended to proceed, the costs being thereupon taxed and paid. Shortly afterwards, the plaintiff, hearing perhaps of a decision in the House of Lords, according to which, after such a course as the one he had adopted, he would be precluded from proceeding for the ulterior damages to which he was fairly entitled, applied to the learned judge to set aside the proceedings; and at the same time he offered to pay all the costs, for permission to retrace his steps and to be placed in his original position; making out that the money had been accepted in satisfaction of the amount claimed in the declaration by reason of a mistake and blunder. Under these circumstances the learned judge made the order; and we think that the order was rightly made. At the time the rule *nisi* was moved for, the court expressed an opinion that the learned judge had jurisdiction to make the order; and, although Mr. *Wordsworth* now contends that he had not, it is unnecessary to expend time in giving any reason for that which has been already disposed of; for the only ground upon which the rule was granted was, whether my brother PARKE had exercised a sound discretion in the matter; and I am of opinion that he has. Many cases might be put in which the court would interfere. A case occurred, which I cannot find at this moment, where the plaintiff was the holder of a bill of exchange accepted by the defendant; and pending an arrangement for the settlement of the bill, and just before the money was about to be paid, the bill was delivered to the defendant's attorney, cancelled, by mistake, and the court ordered the bill to be delivered back again to the plaintiff. As a general rule, in matters connected with the administration of justice, where a mistake is discovered before any further step is taken, the court interferes to cure the mistake, taking care that the opposite party shall not be put to any expense in consequence of the application to correct the error. In the present case the application was made within a reasonable time: and as this is a fruitless attempt to set aside a judge's order, the rule will follow the ordinary course, and must be discharged with costs.

Cannan v. *Reynolds* (2) (5 E. & B. 301) is, I think, also in point. The headnote reads as follows:

> Plaintiffs having delivered a declaration against A and B, and another against A and C, with particulars of demand in each, A and B suffered judgment by default on Jan. 16, and paid the amount claimed in the particulars in that action. Afterwards A and C pleaded to the action. Plaintiffs, in the latter part of April, discovered that by mistake they had included in the particulars delivered to A and C items which ought to have been in the particulars delivered to A and B. On affidavit of these facts, and that A and B were aware of the mistake, and allowed judgment to go by default on purpose, the court (LORD CAMPBELL, C.J., COLERIDGE and CROMPTON, JJ.), in Trinity Term, made absolute a rule to set aside the judgment signed against A and B, and amend the particulars of demand, on plaintiffs paying all costs and refunding the money received. ERLE, J., doubting as to the jurisdiction to make such a rule.

It is to be observed in that case that the defendants were aware of the mistake but, none the less, I think it is an authority showing the jurisdiction of the court to make an order of this kind. LORD CAMPBELL, C.J., said (*ibid.*, 305):

> I am of opinion that this rule should be made absolute on terms. It cannot be disputed that it is in furtherance of justice: and we are all agreed that, if we have jurisdiction to make such an order under such circumstances, this is a fit case in which to exercise it. I do not think that the Common Law Procedure Act, 1852, gives us this jurisdiction; but I do think that we have a general equitable jurisdiction over our judgment. It is not disputed that a defendant may, after execution has been executed, apply to have the judgment set aside on terms of paying all costs and placing the plaintiff in the same situation as if there had been no mistake made, and that orders to that effect are constantly made; and it is not disputed that in cases of fraud the court might set aside any judgment at any time. In equity mistake affords

a ground for relief as well as fraud. It is suggested that such a jurisdiction as this will be liable to abuse: but I do not feel that to be a forcible argument, as the discretion of the court is a sufficient guarantee against abuse. In the present case no prejudice can arise to the defendant, and justice will be done by making the rule absolute. We are asked what are the limits of our jurisdiction, and whether we could do this at any time. I answer that lapse of time becomes after a season a bar, as soon as the court in its discretion sees that it has been such as must work prejudice.

Counsel for the defendants relied strongly on the well-known language of Lord Blackburn in *Scarf* v. *Jardine* (3) (7 App. Cas. 360, 361) as to the irrevocability of an election once made and communicated to another party, and on the decision in *Morel* v. *Westmorland* (4), but neither of these cases is, in my view, any authority as to the jurisdiction of the court to make such an order as has been made in the present action where there has been a *bona fide* mistake in the user of the legal machinery. For these reasons I think this appeal fails.

WROTTESLEY, L.J.: I agree that the judge's order should stand. Read as a whole and including the prayer, the amended statement of claim must have indicated to the persons intended to read it that the plaintiffs claimed one of two things—either damages for the broken contract or the sum of £7,600 as money had and received by the defendants to the use of the plaintiffs on a total failure of consideration, but not both. It is true that the damages included two items—loss of profit, which can be calculated at £18,000, and loss of the sum paid for undelivered parachutes, the amount of which is not specified, but can be calculated with care in the amended statement of claim as probably being £7,600. But even here the amended statement of claim was inaccurate, and the amount claimed for parachutes paid for but not delivered was at first £7,500. When, therefore, in spite of a veiled warning in a letter from the defendants' solicitors, the plaintiffs chose to take out of court the £7,600 which the defendants had paid in to meet one of the two alternatives, *viz.*, the amount claimed in the statement of claim as money had and received, it is not surprising to find the defendants applying to stay the action. It then transpired that the plaintiffs' counsel had misapprehended the meaning of the statement of claim in its amended form. What he had intended was to claim part only of the damages, *viz.*, the amount paid for parachutes not delivered, either as damages or as money had and received to the plaintiffs' use, and there is no doubt that such money would be recoverable under either head. Accordingly, the master was asked, on the hearing of the summons to stay, doubtless on suitable terms, to permit the statement of claim to be amended so as to correspond with counsel's intentions, and to permit the action to proceed as to the rest of the claim. He refused, and on appeal the judge made the order referred to by Tucker, L.J., and appealed against by the defendants. Unless the court intervenes and relieves the plaintiffs from the position they are in under their pleading, they will be deprived of the opportunity of putting forward their claim for loss of profit. There is, I think, no doubt that in a proper case and on proper terms the court may, in its discretion, relieve a party who comes quickly from the effect of his, or his legal advisers', mistake, and this applies whether he is plaintiff or defendant: see, *e.g.*, *Emery* v. *Webster* (1), *Cannan* v. *Reynolds* (2). In passing, the language of the judgment in *Emery* v. *Webster* (1) is authority for an order to pay costs as between solicitor and client as a condition of leave to proceed. In his discretion the learned judge granted relief, and on terms that no one challenges. Indeed, the only point taken before us by the defendants' counsel is that there was an election when the plaintiffs chose to take this money out of court in the face of their own pleading which described the count for money had and received as alternative to that for damages, and he goes on to claim that an election is something which is so final and irrevocable that the court cannot give relief. There is no authority for thus limiting the power of the court to grant relief in respect of a mistake to prevent a possible injustice, but counsel rests on the emphatic language of Lord Blackburn in *Scarf* v. *Jardine* (3) (7 App. Cas. 362), where Lord Blackburn describes the election in that case—to issue a writ against one of two sets of defendants, who could only be liable in the alternative—as final and irrevocable. The whole point of an election is, of course, that a party chooses one of two roads, and, having done so by some unequivocal act, cannot retrace his steps and pursue the other road. The alternatives may be between two parties or between two causes of action.

It has been suggested here that, since what was done arose out of a mistaken view as to a most important result which would flow from it, this was no true election. I am not prepared, on the facts of this case, to go so far as that, especially in view of the following observations of LORD BLACKBURN (*ibid.*, 360):

> I may also refer to the case of *Jones* v. *Carter* (5) as most neatly stating the point. The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

This passage envisages that a man may by an unequivocal act be taken to have made an election "whether he intended it or not." But I find it unnecessary to decide this question, for I think that the fact that there was an election would not deprive the court of its power to intervene and grant relief. The language used in *Scarf* v. *Jardine* (3) and that used in *Morel* v. *Westmorland* (4) is directed to showing that a party cannot of his own motion revoke an election once made, nor even, possibly, by agreement with his opponent, if the interests of third parties are involved, but that is not to say that an election is more final or more irrevocable than, for instance, a judgment, or a judgment which has been enforced, which does not involve an election.

Appeal dismissed. The defendants' costs ordered to be costs in the cause.

Solicitors: *William Foux & Co.* (for the plaintiffs); *Herbert Oppenheimer, Nathan & Vandyk* (for the defendants).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law,*]

Re BEVAN (*deceased*), BEVAN *v.* HOULDSWORTH.

[COURT OF APPEAL (Lord Greene, M.R., Asquith, L.J., and Harman. J.), January 23, 26, 1948.]

Administration—Administration pendente lite -Practice of Probate Division—Follows practice of Chancery Division in appointing receivers.

It is the settled practice of the Probate Division, in the matter of the appointment of an administrator *pendente lite*, to follow the practice of the Chancery Division in the matter of the appointment of a receiver.

The plaintiff in a probate action propounded a will and sought probate of it, subject to the excision of benefits to certain beneficiaries. The estate, which was valued at £96,000, consisted largely of securities (the interest and dividends on which would have to be collected), real estate (in respect of which it was necessary to collect the rents), and personal chattels which had to be safeguarded by the employment of a caretaker:—

HELD: having regard to the size and nature of the estate and the rents, etc., which had to be collected, it was a case in which a Chancery Court would have appointed a receiver, and, therefore, an administrator *pendente lite* should be appointed.

Practice laid down in Bellew v. *Bellew* (1865) (4 Sw. & Tr. 58; 13 L.T. 247), *applied.*

Horrell v. *Witts* (1866) (L.R. 1 P & D. 103; 14 L.T. 137), *distinguished.*

[AS TO ADMINISTRATION *pendente lite*, see HALSBURY, Hailsham Edn., Vol. 14, pp. 270-272, paras. 478-481; and FOR CASES, see DIGEST, Vol. 23, pp. 200-205, Nos. *2354-2419.*]

Cases referred to:

(1) *Bellew* v. *Bellew*, (1865), 4 Sw. & Tr. 58; 34 L.J.P.M. & A. 125; 13 L.T. 247; 23 Digest 202, *2372.*

(2) *Horrell* v. *Witts and Plumley*, (1866), L.R. 1 P. & D. 103; 35 L.J.P. & M. 55; *sub nom., Harrell* v. *Wilts and Humbley*, 14 L.T. 137; 23 Digest 202, *2382.*

(3) *Re Oakes, Oakes* v. *Porcheron*, [1917] 1 Ch. 230; 86 L.J.Ch. 303; 115 L.T. 913; 39 Digest 26, *309.*

Appeal by the plaintiff from an order of Willmer, J., dated Dec. 17, 1947, refusing to make a grant of administration *pendente lite*. The appeal was allowed. The facts appear in the judgment of Lord Greene, M.R.

Simon for the plaintiff (executor of a will dated Aug. 12, 1938).

Fairweather for three defendants (executors of two later wills).

Sir Norman Touche for the fourth defendant, (a beneficiary under the will of 1938).

LORD GREENE, M.R. : This is an appeal by the plaintiff in a probate action who propounds a will dated Aug. 12, 1938, and seeks probate of it subject to the excision from it of provisions in favour of certain beneficiaries. The defenddants other than one of the persons whom the plaintiff wishes to exclude from the earlier will are executors named in two later wills dated Sept. 18, 1942, and Feb. 18, 1947. The plaintiff applied to the Probate Division for the appointment of an administrator *pendente lite*. The estate is estimated in the affidavit sworn on his behalf to be of the value of £90,000 so far as personal estate, and £6,000 so far as the real estate, is concerned. It was, therefore, a substantial estate, including, as the affidavit says, securities, the interest and dividends on which have to be collected, real estate in respect of which it is necessary to collect the rents, and personal chattels which have to be safeguarded by the employment of a caretaker. That is the sort of estate in respect of which the Chancery Division would, in my opinion, have appointed a receiver *pendente lite* if an administration suit had been begun. The defendants named as executors in the later wills are not in a position to collect and invest the interest and dividends nor to enforce the claims of the estate, for, if it is known that a probate action is pending, debtors are very careful about paying money to executors who may prove to have no title.

As I have said, the case is one in which a plaintiff in the Chancery Division would have been entitled to obtain a receiver. When I say " entitled " I do not forget that appointments of receivers are within the discretion of the court, but everyone knows that there are certain classes of case in which the court invariably gives that type of relief. In a clear case where the plaintiff has what, for practical purposes, one might call a right to a receiver, this court will always interfere if the trial judge has not acted in accordance with the invariable practice of the Chancery Division. In the present case the learned judge took the view that no circumstances had been shown which would call for the appointment of an administrator *pendente lite*. I cannot help thinking that he had not sufficiently in mind the difficulties which would otherwise occur in collecting and safeguarding the assets of the estate. I am not saying that there is jeopardy in the sense that somebody is likely to make away with money. The position is that the fruits of the estate cannot be properly collected.

What is the position ? For a very long time—indeed from shortly after the passing of the Court of Probate Act, 1857, which gives power to the court to appoint an administrator *pendente lite*—it has been the settled practice of the Probate Division to follow the practice of the Chancery Division in the matter of appointing a receiver *pendente lite*. If it were not so, the result would be unseemly racings to go to one court or the other and the possibility of conflict between the two courts, the Probate Court refusing an administration *pendente lite* and the unsuccessful applicant immediately going to the Chancery Division and getting a receiver appointed. It was to avoid that happening that this practice was instituted as long ago as 1865. I might refer to the decision of Sir J. P. Wilde, in *Bellew* v. *Bellew* (1), a probate action where the deceased possessed no real estate, but had an unexpired term of a lease and cash and bonds of various kinds, an estate of £24,000 in value. The plaintiff and several of the parties cited applied in the Chancery Division for the appointment of a receiver. The defendants moved the Court of Probate for an administrator *pendente lite*. Sir J. P. Wilde gave a judgment in which he pointed out that in the Probate Court an application for the appointment of an administrator required some special circumstances to be shown. He said (4 Sw. & Tr. 61) :

> I take it, therefore, that it is plain that the practice of the Ecclesiastical Courts and of this court [*i.e.*, the Court of Probate] has been only to grant administration *pendente lite* in cases where necessity for the grant is made out.

He went on to say that the proper thing to do was to go to the Chancery Court in that case, and he refused the application to himself because there was pending an earlier application to the Court of Chancery which had ample jurisdiction to deal with the matter. He said:

> It would be improper to depart in this case from the practice hitherto followed in this court, and I therefore refuse to appoint an administrator *pendente lite*. I have taken some pains to ascertain whether the rule of the Court of Chancery with regard
> A to the appointment of a receiver is wider than the rule of this court with regard to the appointment of an administrator *pendente lite*, and I think that it is. The rule of the Court of Chancery appears to be, that wherever there is a *bona fide* suit pending, the court will appoint a receiver quite irrespective of the condition of the estate, or of the person who has the actual possession of it, on the ground that while the suit is pending there is no one legally entitled to receive or to hold the assets, or to give discharges. I wish to give notice that I shall in future assimilate the practice of this court to that of the Court of Chancery, and that I shall grant administration *pendente lite* wherever
> B the Court of Chancery would appoint a receiver; for I do not think it right that a party suing in this court should be put to the inconvenience of making an application to the Court of Chancery when it is in the power of this court to assist him.

There the practice for the future was laid down by SIR J. P. WILDE, and it is a practice which has been followed since.

Counsel for the first three defendants referred to *Horrell* v. *Witts* (2),
C in which SIR J. P. WILDE said (L.R. 1 P. & D. 104) that the rule he laid down in *Bellew* v. *Bellew* (1) was not applicable to all cases. In *Horrell* v. *Witts* (2) the deceased had been in partnership and the surviving partner was in a perfectly good position to carry on the business, collecting assets and so on. Therefore, the sort of difficulty which arose in *Bellew* v. *Bellew* (1) did not arise there because there was somebody who could collect the assets which appear to have consisted entirely of the deceased's share in the business. As SIR J.
D P. WILDE said (L.R. 1 P. & D. 104):

> The only result of making a grant of administration *pendente lite* now would be the appointment of some person to wrangle with the surviving partner as to the management of the farm.

In a very special case like that different considerations may apply. *Re Oakes* (3), a decision of NEVILLE, J., was not cited to us, but it was a case in which one
E of the next of kin started proceedings in the Chancery Division against an executor named in the will asking for the appointment of a receiver pending the appointment of a legal personal representative. The defendant thereupon started an action in the Probate Court for probate in solemn form. When the motion came before NEVILLE, J., the defendant opposed the appointment of a receiver on the ground that it was wholly unnecessary, it being the usual
F practice in the Probate Court to appoint a receiver or administrator *pendente lite*. The facts were not in dispute and the estate was not in jeopardy. NEVILLE, J., appointed a receiver, the application for that appointment being earlier in point of time. It was argued by the defendant, who was opposing the motion, that he was prepared to do his duty as executor, that in the probate proceedings all necessary steps would be taken (including the appointment of a receiver *pendente lite*) to protect the estate, that there was no necessity for the appoint-
G ment of a receiver by the Chancery Division and no urgency in the matter, and that such an appointment would be an unnecessary expense to the estate. NEVILLE, J., said ([1917] 1 Ch. 232):

> It matters little or nothing whether a receiver is appointed by this court or whether a receiver or an administrator *pendente lite* is appointed by the Probate Court. I should think in a case like the present it is better, where it is possible, to apply in the Probate Court and not to apply to this court. All the courts now are practically
> H worked together, and it is of no practical importance whether the person in charge of the estate is called a receiver or an administrator *pendente lite* . . . It now appears that the facts were really not in dispute, and the interval between the date when the motion was brought on in the first instance and the adjourned hearing was utilized by the respondent in starting fresh proceedings in the Probate Court with the view of getting a receiver or an administrator *pendente lite* appointed by that court instead of a receiver in Chancery. As I said before, it matters little which is done, but it matters much that costs should not be unnecessarily occasioned by scrambles of this kind as to who is to have the interim management of the estate until it is known who is the person entitled to representation. Therefore, it appears to me to be my duty

to appoint a receiver in order to discourage any attempt of this kind to go behind proceedings in one branch of the court by commencing proceedings in another branch so as to oust the person who originally applied for the protection of the court.

That case shows how closely the practice of the two Divisions of the High Court had been assimilated. In my opinion, the learned judge was in error in not following that practice, and, accordingly, it is for us to decide whether, in our discretion, we ought to appoint an administrator *pendente lite.* About that I feel no hesitation. The principles on which the Court of Chancery would have appointed a receiver are clearly illustrated in this case. The size of the estate, its nature, the fact that rents have to be collected, are all things to which the Court of Chancery would have paid attention, and the court would unquestionably have appointed a receiver. Therefore, it is a case which calls for the appointment of an administrator, that being the appropriate relief in the Probate Division.

The only question which arises is who is to be appointed. There are two nominees proposed by the plaintiff, but they are objected to by the defendants. It, therefore, seems to me that, in accordance with the usual practice, the actual persons to be appointed should be determined on a reference to the registrar. The appeal will be allowed, and the matter of the appointment of the administrator referred to the registrar.

ASQUITH, L.J. : I agree.

HARMAN, J. : I agree.

Appeal allowed. Costs of all parties to be costs in the suit.

Solicitors : *Theodore Goddard & Co.* (for the plaintiff) ; *Edwards & Sons* (for the first three defendants) ; *L. Bingham & Co.* (for the fourth defendant).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

CONTRACT DISCOUNT CORPORATION LTD. *v.* FURLONG AND OTHERS.

[Court of Appeal (Lord Greene, M.R., Asquith, L.J., and Harman, J.), January 22, 1948.]

Practice—Judgment—Summary judgment—Leave to defend—Qualified admission —" £10,000 or thereabouts "—Condition on which leave granted.

A manufacturing company contracted with the plaintiffs that, if the plaintiffs purchased goods from the company, the company would sell the goods to purchasers as agents for the plaintiffs to whom it would forward the invoices. It was further agreed that on receipt of the invoices the plaintiffs would pay 80 per cent. of the invoice price to the company, the balance being paid later, subject to a small discount, and that the company would collect the purchase price from, and guarantee punctual payment by, the ultimate purchasers. The plaintiffs claimed £19,811 from the company as being either received by it from purchasers or as being due and unpaid by such purchasers, and they applied for summary judgment under R.S.C., Ord. XIV. Two of the defendants, directors of the company, stated in a joint affidavit : " We admit that we are indebted to the plaintiffs, but we say that, to the best of our knowledge, information and belief, such amount will be found, upon full investigation, to be £10,000 or thereabouts." The master refused leave to defend. On appeal, the judge varied the order by giving liberty to defend as to the whole claim, subject to payment into court of £10,000, and, in default of such payment, the plaintiffs were to have liberty to sign judgment for that sum and the defendants liberty to defend as to the residue of the claim. On appeal to the Court of Appeal,

Held : the defendants' admission was qualified by the words " or thereabouts " and might be read as " £10,000, with a reasonable margin," for which an allowance ought to be made, and the order would be varied by substituting £8,000 for £10,000 wherever £10,000 occurred.

[As to Summary Judgment under R.S.C., Ord. XIV, see HALSBURY, Hailsham Edn., Vol. 19, pp. 225-231, paras. 527-534 ; and for Cases, see DIGEST, Practice, pp. 283-289, Nos. *164-223.*]

APPEAL by the defendants from an order of CASSELS, J., made in chambers on Dec. 5, 1947, varying an order of the master, who, on the application of the plaintiffs for summary judgment under R.S.C., Ord. XIV, had refused the defendants leave to defend. The Court of Appeal now varied the order of CASSELS, J. The facts appear in the judgment of LORD GREENE, M.R.

W. Summerfield for the defendants.
H. G. Robertson for the plaintiffs.

LORD GREENE, M.R. : The plaintiffs sue the defendants, two of whom are appellants before this court, on a guarantee. They claim the sum of £19,811 11*s.* 2*d.*, being the difference between the gross sum of £29,638 19*s.* 0*d.*, and a sum of £9,827 7*s.* 10*d.*, admitted by the plaintiffs to be held by them to the credit of a manufacturing company who were the principal debtors, the defendants being guarantors and sued as such.

The manufacturing company (controlled by one of the defendants, the two appellants being its active directors) is a private company. It made a contract with the plaintiffs, the material provisions of which were that the plaintiffs should purchase goods from the manufacturing company, the manufacturing company were to sell goods to purchasers as agents for the plaintiffs (the goods being, in fact, the same goods by reason of the machinery provided for the carrying out of this scheme of head contracts and sub-contracts), and the company, having made on behalf of the plaintiffs contracts with purchasers, were to forward invoices to the plaintiffs. The forwarding of an invoice was to bring about a contract of sale of the quantity of goods mentioned in the invoice at the invoice price by the manufacturing company to the plaintiffs, and the plaintiffs were then to pay the manufacturing company 80 per cent. of the invoice value. The other 20 per cent. was to be kept in hand and ultimately paid over, subject to a small discount. The company undertook to collect from the ultimate purchasers the amounts due and to pay them over to the plaintiffs. It is in respect of the guarantee in those latter obligations that the present action is brought. To put it in a nutshell, I quote the statement of claim which sums up the whole relevant matter :

> (2) By the said agreement Robson-Hight Engineering Co., Ltd., agreed amongst other things to collect the price of goods sold on behalf of the plaintiffs and guaranteed to the plaintiffs punctual payment thereof by the purchasers. (3) In pursuance of such agreement Robson-Hight Engineering Co., Ltd., on behalf of the plaintiffs sold goods to the undermentioned purchasers at the price set opposite their respective names and payment of such price has been received by Robson-Hight Engineering Co., Ltd., or alternatively is due and remains unpaid by such purchasers.

There are set out a number of purchasers with the appropriate figures against their names, totalling the figure that I have mentioned, £29,638 odd. On that statement of claim the plaintiffs applied for summary judgment. MASTER BAKER, before whom the application came, refused to give leave to defend. The result was that the plaintiffs could sign judgment for the whole amount of the claim. Two of the defendants (the two present appellants) appealed to CASSELS, J., who varied the order of the master by giving liberty to defend as to the whole of the claim, subject to payment into court of £10,000. If that sum were not paid in, the plaintiffs were to have liberty to sign judgment for that sum against the two present appellants who were to have liberty to defend as to the residue of the claim.

Looking at the nature of this claim, one can say this. First, the claim is not against principal debtors, but against guarantors who in the ordinary case might or might not know the state of the account between the principal debtor and the creditor which they had guaranteed, but this was a case where one would expect the guarantors, in view of their position in the company, to know, if not in detail, at any rate with very close approximation, what the state of the account was. They were the active directors. It was they who would have been concerned in making the contracts with the ultimate purchasers, and it would be they who would be responsible for carrying out the manufacturing company's agreement to hand over to the plaintiffs any sum they collected from the purchasers. The next point to be remembered is that the liability of the defendants under the guarantee would be conditioned and ascertained by reference to more than one matter in respect of which the plaintiffs themselves are accounting parties. The plaintiffs at one stage departed, and, no doubt, justifiably departed, from the terms of the agreement under which the manufacturing company were to collect the debts from the purchasers, and the plaintiffs collected debts direct. We are told that the collections so made are included in the credit given in the statement of claim. The amount owing to the plaintiffs can really only be ascertained on the taking of an account bringing in *contra* items in respect of which the plaintiffs themselves are accounting parties. If the defendants had been in a position to swear: "We admit that we are under a liability, but we do not know what it is. We have not got the materials. We do not know the state of the accounts in the books of the plaintiffs, and the company's books are not now available," I should have thought that in a case of this kind, relating to a claim of this character, and depending, as it must, on matters of account, that would have justified, and, indeed, led, the court to give unconditional leave to defend. In a case which is essentially a matter of account, where the amount can only be ascertained from the plaintiffs' own accounts, it seems to me that it would be improper to deprive the defendants of their *prima facie* right to challenge the items in the account and insist on strict proof of them. That is why I mentioned particularly the fact which is, I think, important in this case, that these defendants are guarantors and not principal debtors. They are entitled to know the state of the account as between the plaintiffs and the principal debtors which they guaranteed. If there had been a denial of liability or a challenging of the account, with an admission, possibly, of the kind I have mentioned, but a refusal to admit the amount and a demand to have it checked by the ordinary accounting process, the proper order to make might very well have been an order for judgment for such an amount as should be found due on the taking of an account. The effect of that would have been to give summary judgment, but to leave the amount unspecified until the account was taken and certified. Judgment could then have been signed and execution issued.

The appellants, however, in their affidavit, make an admission. Had it been what I may call a clean admission: "We admit that £10,000 is owing, but we dispute the balance," the order of the judge, I should have thought, would have been perfectly proper. I do not accept the proposition that in a case involving an account it would be improper to give summary judgment under R.S.C., Ord. XIV, where a definite sum is admitted by the defendant, because that would mean that in respect of that sum he puts up no defence. That would not, of course, mean that the account could, so to speak, be started at the £10,000 point, because one could only ascertain the actual balance by taking the account *ab initio* on both sides. In taking it, the £10,000 which, *ex hypothesi*, would have been paid in those circumstances, would have been credited to the defendants so that their ultimate liability would be only in respect of the ascertained balance, but that is not the case here. The admission is not quite a clean admission. In para. 3 of their joint affidavit the appellants say: "We admit that we are indebted to the plaintiffs, but we say that, to the best of our knowledge, information and belief, such amount will be found, upon full investigation, to be £10,000 or thereabouts." That cannot be treated as a denial or a challenge of the whole liability, nor, I think, can it be treated as a clean admission of a liability of £10,000. It seems to me that the proper reading of that is between those two extremes. Before us an affidavit was put in by the defendants' accountants. Having made such investigation as they could, they, rather half-heartedly it may be thought, reduced to a certain extent the figure of £10,000 beyond the reduction of that figure which is implicit in the language of para. 3 of the defendants' affidavit. The accountant says:

> From the data incorporated by me in the said preliminary report together with knowledge of the said financial matters derived by me as auditor and accountant as aforementioned I have formed the opinion that the said indebtedness of the defendants to the plaintiffs as at the date of the issue of the said writ may well have been less than the sum of £10,000 or thereabouts referred to in the defendants' said affidavit. Such indebtedness should since that time have been diminished by the amounts collected by the said receiver and manager . . .

I do not attach very much importance to that last paragraph, but he does say that he cannot arrive at an accurate figure without an opportunity of consulting certain books which, at present, at any rate, are not available for his inspection.

Taking those two statements together, I cannot read them as in any sense a total denial of liability. These defendants are admitting liability of a figure of approximately £10,000—not £10,000 exactly, but something which these business people who are directors of the principal debtor company, with knowledge of the transactions, fix at approximately £10,000. What, then, is the court to do ? It seems to me that it would be unjust to the plaintiffs to deny them a right to summary judgment up to a proper amount. On the other hand, it would be unjust to the defendants to deprive them of what appears to be their *prima facie* right in a matter involving accounts of this kind, as between creditor and guarantor, to challenge the items in the account and to put the plaintiffs to proof of them. The court must make up its mind what this admission ought to be read as being worth. As I say, it would not be right to take the figure at the full £10,000 because the admission does not precisely specify that sum. The defendants are entitled to an allowance by way of margin. In my opinion, the proper course, and one which is just to both parties, is to vary the order of the judge by substituting £8,000 for £10,000.

ASQUITH, L.J. : I agree. If there had been no admission by the defendants in their affidavit in opposition, I do not think that the order appealed from could have been supported, but an account would have had to be directed as to the whole sum. If, on the other hand, there had been an unqualified admission that £10,000, neither more or less, was due and owing, then an order such as was made would have been unassailable. The position, as my Lord has pointed out, in this case falls between these *termini*. The question is whether the qualifying words "or thereabouts," which follow the words "£10,000," make any difference and, if so, how much difference and whether that should be reflected in the order. I think that it would be wrong, in face of this qualified, but very substantial, admission, to give unconditional leave to defend. I agree with my Lord, and for his reasons, that it would be reasonable to read for "£10,000" "£10,000 with a reasonable margin," which one might fix at £2,000, that is to say, to read the words in the appellants' affidavit as an admission that not less than £8,000 is due. I think that the judge's order should, as my Lord suggests, be varied by substituting £8,000 for £10,000 wherever £10,000 occurs.

HARMAN, J.: I agree and would only add that when it is said that the defendants shall be at liberty to defend the action as to the residue of the plaintiffs' claim that, of course, does not mean, as my Lord has already explained, that the account will not have to be taken *ab initio*. If the judgment is fruitful, the defendants will have credit for the amount by which it is fruitful when the account is taken.

Order accordingly. Costs here and below to be costs in the cause.

Solicitors : *Alfred Hurner* (for the defendants) ; *Sidney Pearlman* (for the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BRITISH LAUNDERERS' RESEARCH ASSOCIATION *v.* CENTRAL MIDDLESEX ASSESSMENT COMMITTEE AND HENDON RATING AUTHORITY.

[KING'S BENCH DIVISION (Humphreys, Singleton and Birkett, JJ.), January 20, 21, 29, 1948.]

Rates and Rating—Exemptions—Scientific, literary and art societies—Laundries research association—Advice and assistance given to members—Scientific Societies Act, 1843 (c. 36), *s.* 1.

The British Launderers' Research Association was established for the promotion of research and other scientific work and also, *inter alia*, "to encourage and improve the education of persons engaged . . . in the laundering industry" and "to disseminate information by giving advice and by the appointment of advisory officers." The courses of instruction included the training of young men in how to run a laundry. There was a system of regular visits to the laundries of members with a view to investigating problems, a fee of £5 5*s*. a day, plus expenses, being charged, producing a revenue, with other fees for advice, of £359, and this had been extended to "development visits" made without charge to discuss with the member how he might make fuller use of the association and by direct observation of the processes and methods in use at his laundry to offer advice and assistance :—

Held : the giving to members of advice, assistance, instruction, and training was not merely ancillary or incidental to the scientific purposes for which the association was established, but was a separate purpose of the association of a commercial nature, and, therefore, the association was not "instituted for purposes of science . . . exclusively," within A the meaning of s. 1 of the Scientific Societies Act, 1843, and was not exempt from rates.

Per Humphreys, J. : To bring itself within the exemption the society must have one purpose only, *viz.*, the purpose of promoting science. An institution which also contemplates some other, though altogether subsidiary, object cannot claim the benefit of the exemption, but, if the society B is proved to have been instituted for the purpose of science exclusively, the society will not lose its right to exemption merely because, in the attainment of that object, it is found convenient or useful to do acts or take steps which will benefit the members of the society in the pursuit of their trade or industry.

Principles enunciated in Inland Revenue Comrs. v. *Forrest*, (1890) (15 App. Cas. 334; 63 L.T. 36), *applied.* C

[As to the Exemption of Scientific, Literary and Art Societies from Rates, see HALSBURY, Hailsham Edn., Vol. 21, pp. 11-15, paras. 25-30 ; and for Cases, see DIGEST, Vol. 38, pp. 493-499, Nos. *485-540*.]

Cases referred to :

(1) *Inland Revenue Comrs.* v. *Forrest*, (1890), 15 App. Cas. 334 ; 60 L.J.Q.B. 281 ; 63 L.T. 36 ; 54 J.P. 772 ; H.L. ; *affg.*, S.C., *sub nom.*, *Re Duty on Estate of Civil Engineers Institution*, (1888), 20 Q.B.D. 621, C.A. ; 38 Digest 496, *503*. D

(2) *Institution of Civil Engineers* v. *Inland Revenue Comrs.*, [1932] 1 K.B. 149 ; 100 L.J.K.B. 705 ; 145 L.T. 553 ; 16 Tax Cas. 158 ; Digest Supp.

(3) *Jenner Institute of Preventive Medicine* v. *St. George's Hanover Square Assessment Committee and Surveyor of Taxes*, (1900), 69 L.J.Q.B. 814 ; 83 L.T. 344 ; Ryde & K. Rat. App. 242 ; 38 Digest 497, *513*.

(4) *School of Oriental and African Studies* v. *Westminster City Rating Authority*, (1940) 2 All E.R. 537 ; Digest Supp.

(5) *R.* v. *Cockburn*, (1852), 16 Q.B. 480 ; 18 L.T.O.S. 302 ; *sub nom.*, *R.* v. *St. Martin-in-the-Fields* (*Churchwardens and Overseers*), 21 L.J.M.C. 53 ; 16 J.P. 198 ; 38 Digest 495, *495*. E

Case Stated by Middlesex quarter sessions.

On Nov. 9, 1946, the British Launderers' Research Association made a proposal for the amendment of the valuation list for the borough of Hendon in respect of a hereditament owned and occupied by it described as "Site, laundry, and premises, research laundry," assessed at £360 rateable value (no gross value). F The ground of the proposal was that the association was entitled to exemption from rates under the Scientific Societies Act, 1843, s. 1, as being a "society instituted for the purposes of science . . . exclusively." On Dec. 11, 1946, the Central Middlesex Assessment Committee heard the proposal and decided that the valuation list should be amended by altering the description of the hereditament to read "Research laboratories, experimental laundry, site and G premises" and by inserting a gross value of £436, but otherwise the committee refused to give the association the relief sought. The association appealed to quarter sessions. The assessment committee and the rating authority for the borough of Hendon both gave notice of their intention to appear as respondents to the appeal, but only Hendon Rating Authority appeared at the hearing. Quarter sessions heard the appeal on Mar. 20, 1947, and held (*a*) that the association was a society instituted for the purposes of science H exclusively and occupied the hereditament for carrying those purposes into effect, the purposes of the society being exclusively scientific and any other purposes for which it was instituted or the hereditament was occupied, in particular the tuition of students, being incidental to the main purpose, and (*b*) that the association was supported wholly or in part by voluntary contributions. Accordingly, quarter sessions held that the association was entitled to exemption from rates and allowed the appeal. The rating authority now appealed to the Divisional Court, who allowed the appeal.

Fitzgerald, K.C., and *Ramsay Willis* for Hendon Rating Authority.
Rowe, K.C., and *W. L. Roots* for the association.
Jan. 29. The following judgments were read. *Cur. adv. vult.*

HUMPHREYS, J.: This appeal by way of Case Stated from a decision of the appeals committee of the quarter sessions of Middlesex raises the question whether the British Launderers' Research Association, a company limited by guarantee, is entitled to exemption from rates under the terms of s. 1 of the Scientific Societies Act, 1843, which provides as follows:

> No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister-at-law or lord advocate, as hereinafter mentioned.

It was admitted for the purposes of argument in this court that the last two requirements are fulfilled in the case of the association, and it is not disputed that the association, as its name implies, is one instituted for purposes of science. Although it is not admitted that the association is supported wholly or in part by voluntary contributions, it is agreed that the point cannot be argued in this court. The argument has been confined to the question: Is the association one established for the purposes of science exclusively? The argument for the rating authority was to the effect that the association has a dual purpose, one being the promotion of science by research and other means, the other being the advancement of the interests of its members who are engaged in the trade or industry of laundering.

The activities of a large number of societies have been examined by the courts in cases which have arisen under this section, and it has been judicially stated that the decisions of the various courts are, in some instances at least, completely irreconcilable. I have no desire to add to the confusion, nor do I think that the question of exemption from rates in the case of society A can be conveniently decided by reference to the decision of a court in the case of society B, unless, indeed, the evidence in the two cases shows that the objects and activities of the two societies are identical. I do not, therefore, propose to examine either the facts or the decisions in the various cases to which we have been referred except for the purpose of ascertaining the principles to be applied by this court to the facts of the case in question.

I find those principles for the most part enunciated in the speeches in the House of Lords of LORD WATSON and LORD MACNAGHTEN in *Inland Revenue Comrs.* v. *Forrest* (1). I accept those opinions as stating correctly the law of the land in spite of the criticisms applied to them, and, particularly, to that of LORD MACNAGHTEN by the Court of Appeal in *Institution of Civil Engineers* v. *Inland Revenue Comrs.* (2). I think the law to be applied to the facts of the present case may be summarised as follows:—(i) To bring itself within the exemption the society must have one purpose only, *viz.*, the purpose of promoting science. An institution which also contemplates some other, though altogether subsidiary, object cannot claim the benefit of the exemption. (ii) If the society is proved to have been instituted for the purpose of science exclusively, the society will not lose its right to exemption merely because, in the attainment of that object, it is found convenient or useful to do acts or take steps which will benefit the members of the society in the pursuit of their trade or industry.

Applying those principles to this association, I find that there is a very close connection between it and the trade or industry of laundering. The objects for which the association is established as set out in the memorandum of association include the promotion of research and other scientific work and further:

> . . . to encourage and improve the education of persons engaged, or likely to be engaged, in the laundering industry, to publish and circulate literary matter treating of and bearing upon the laundry and cleaning trades, to establish and maintain libraries and collections of literature and other information relating to the said trades, to disseminate information by giving advice and by the appointment of advisory officers; further to encourage and make known the nature and merits of inventions and designs

which may seem capable of being used by members of the association or others for any of the purposes of the trades or industries.

Turning to the brochure issued by the association, I find that, apart from research, there is a regular system of visiting the laundries of members with a view to investigating what are termed problems, by which I understand are meant troubles, at those laundries. For such visits a fee of £5 5*s*. 0*d*. per day is charged, plus expenses, " these services being regarded as particular to the member concerned " to quote the language of the brochure. These advantages A are said to be well recognised, and the service has been extended to development visits made without charge with a view to discussing with the member how he may make fuller use of the association and by direct observation of the processes and methods in use to offer advice and assistance, and it is stated that arrangements have been made by which each member's laundry will be visited every two years. The courses of instruction for students appear to me to include the training of young men in how to run a laundry with success. While appre- B ciating the useful and valuable work which I do not doubt is being done by the association, it has, in my judgment, a dual purpose, or rather two purposes, one being the promotion of science, the other the giving of advice and assistance to members of the laundry trade as to the carrying on of their business. I do not think it can rightly be said that the commercial side of the association's activities is merely ancillary to or incidental to the scientific purpose for which the association was established. It forms, in my opinion, a separate and C independent purpose of the association for which, though only partly, the association was instituted and for the carrying into effect of which the buildings in respect of which the rate was levied are occupied, though, again, only in part. If I may borrow the language used by Channell, J., in *Jenner Institute* v. *St. George's Assessment Committee* (3) (69 L.J.Q.B. 819) I would say :

> Although one of the objects of this society is the promotion of science, another, D and probably the chief of them, is to give to individuals the practical benefits of science. It therefore seems to me that it is not a society instituted for purposes of science exclusively within the meaning of s. 1 of the Scientific Societies Act, 1843.

I am, therefore, of opinion that the exemption from rates does not attach to the association if it is open to this court so to find.

Counsel for the association took the point that quarter sessions had found as a fact that the purposes of the association are exclusively scientific. I do E not agree that they have so found, the language of the Case merely indicating in my view, that such was the opinion formed by quarter sessions, but, in any event, while in a sense the question raised by the section is always a question of fact, I think the mass of authorities show that, once the facts are found, the question whether the particular society is entitled to exemption has always been treated as a matter of law. Hence the statement in this Case which F poses the question for the opinion of the court as being whether quarter sessions came to a correct determination in point of law. For these reasons I would allow the appeal of the rating authority.

SINGLETON, J. : In the year 1920 a number of launderers joined together to form a company limited by guarantee and not having a capital divided into shares. The company was given the name of " British Launderers' G Research Association," and it is the occupiers of a hereditament within the borough of Hendon formerly described as " Site, laundry and premises, research laundry," but now as " Research laboratories, experimental laundry, site and premises." It seems to have been assumed until recently that the association, or rather the hereditament occupied by the association, was exempt from rating, but towards the end of 1946 a question was raised which led to a decision of the assessment committee that the hereditament should be inserted in the H valuation list at £436 gross. The association appealed to quarter sessions who held that :

> . . . the purposes of the association are exclusively scientific, and that any other purpose for which the association was instituted, or the said hereditament occupied, in particular the tuition of students, was incidental to the main purpose . . .

and that the association ought not to be assessed or rated and was not liable to pay rates on the said hereditament by reason of s. 1 of the Scientific Societies Act, 1843 (the other requirements of the section having been complied with so far as we are concerned). A Case was stated for the opinion of this court, and the whole question for our decision is whether, on the facts as found by quarter sessions, the association is entitled to the relief claimed.

Section 1 of the Act of 1843, in so far as material, provides that :

> No person . . . shall be assessed or rated . . . or liable to pay . . . rates . . . in respect of any land, houses, or buildings . . . belonging to any society instituted for purposes of science, literature, or the fine arts exclusively . . . and occupied by it for the transaction of its business, and for carrying into effect its purposes . . .

In looking for the purposes for which an association of this kind was instituted, one naturally turns first to the memorandum of association. TUCKER, J., in *School of Oriental and African Studies* v. *Westminster City Rating Authority* (4) ([1940] 2 All E.R. 542), pointed out that the court was entitled to look, not only at the precise words of the charter, but also at all the surrounding circumstances and the history connected with the institution of the school. Of course, the memorandum of association might be drawn in wider terms than necessary, but, unless there is any suggestion of that kind, it is probably the best guide to the purposes for which a company was formed or an association such as this was instituted. It cannot be questioned that the primary objects for which this association was established were to promote research and other scientific work in connection with the laundry and cleaning trades or industries. That appears in the forefront of the objects clause in the memorandum. On the other hand, the objects extend far beyond that. Towards the end of the clause there are the words :

> . . . and to encourage and improve the education of persons who are engaged, or are likely to be engaged, in the said industries.

That would appear to be providing for the teaching of people engaged in industry, or likely to be so engaged. Later, there is included among the objects :

> . . . and to disseminate [information] by means of the reading of papers, delivery of lectures, giving of advice, the appointment of advisory officers or otherwise.

Subsequent paragraphs of the clause are wide and would appear to verge on commercialism.

It is not without interest to look at the activities of the association as set out in the Case. I do not propose to read them, but I may mention in passing that one paragraph deals with courses held by the association for potential entrants into the laundry industry, and another deals with visits by experts to the laundries of members of the association. It is said that these activities are incidental to the association's scientific work. There may be something to be said for that in regard to the disseminating of knowledge, and, perhaps, though more doubtfully, in regard to the courses of instruction for those engaged, or about to be engaged, in the industry, but what is the position in regard to the item in the revenue account : " Technical advice fees at the laboratories, at members' laundries, and for government departments, £359 odd " ? I assume that it is covered by the memorandum. It was put to us as the disseminating of knowledge by means of the giving of advice, the appointment of advisory officers, or otherwise. The brochure exhibited to the Case shows the nature of the services for which a charge is made. They are called " development visits." I quote :

> These services are regarded as particular to the member concerned and for this reason a fee of five guineas per day plus expenses is charged. The advantages of periodical visits to members' laundries are well recognised and the special service outlined above has been extended to development visits which are made without charge by a member of the research staff who is conversant with practical laundry work. This section of the work has a direct appeal to owners of laundries, and has proved to be very popular. Arrangements have been made by which each member's laundry will be so visited every two years.

This part of the association's activities does not seem to me to be scientific research (as it was put to us) or incidental thereto, and, if it be right to say that the association was instituted for this purpose in part, then it cannot be said to have been instituted for the purposes of science exclusively. It appears to me that the association indulges in commercial activities, and it is claimed that those activities are within the objects stated in the memorandum of association. I recognise that the question is to be determined by " the purposes for which the association was instituted." Visits paid to members' laundries are not for the purpose of science, but are rather of an industrial or commercial nature.

I do not propose to refer to many of the authorities which were cited to us. I should be content to refer to the words of the statute, which are clear, and to say that, unless it is shown that the purposes for which this association was instituted are purposes of science exclusively, the association cannot claim the benefits of s. 1 of the Act of 1843, and I agree with the submission of counsel A
for the rating authority that it is for the association to establish this. In *R.* v. *Cockburn* (5) LORD CAMPBELL, C.J., said (16 Q.B. 490):

> Purposes of science are undoubtedly comprised within the scope of the institution thus described and explained; but are the purposes so described and explained *exclusively* scientific? We are bound to look to all the purposes for which the society is professedly founded, and to which, without a breach of trust, its funds may be applied.

Those words cover this case, as does the decision. I would refer to the words B
of LORD WATSON and LORD MACNAGHTEN in *Inland Revenue Comrs.* v. *Forrest* (1) (15 App. Cas. 347, 348, 352). The importance of the word "exclusively" is emphasised by its appearance both in the preamble and in s. 1 of the Act, and I see no reason for not giving it its ordinary and natural meaning. In my opinion, this appeal should be allowed, and the decision of the assessment committee restored. In view of the argument addressed to us on *Institution of Civil Engineers* v. *Inland Revenue Comrs.* (2) I think it right to add that the C
purposes (or activities) to which I have referred cannot be said to be merely incidental and subsidiary, though I doubt whether it would be of help to the association if it could be so described, having regard to the terms of the statute.

BIRKETT, J.: I am of the same opinion, and for the same reasons. Section (1) of the Act of 1843 confers a considerable benefit on those who can bring themselves within its provisions. The exemption from liability to pay D
rates is based, no doubt, on the ground that a society instituted for the purposes of science exclusively, as was the contention in this case, is making a contribution to the general welfare of the whole community which justifies its exemption. It is quite clear, therefore, that the section must be strictly fulfilled in all its requirements, and a candidate for exemption must show he is plainly within its terms. As LORD MACNAGHTEN said in *Inland Revenue Comrs.* v. *Forrest* (1) (15 App. Cas. 352): E

> The Act of 1843 was in relief of existing liability to local rates. Exemption from local rates involves an additional burden on a limited area. It means a tax on immediate neighbours, some of whom may be little better than actual paupers. A privilege so invidious was naturally confined within narrow limits. It was confined to societies established exclusively for the purposes of science, literature, or the fine arts. The word "exclusively," as LORD CAMPBELL observes in one of the earlier cases [*i.e.*, *R.* v. *Cockburn and Others* (5)] is "anxiously introduced, both into the preamble and the F
> enactment."

A little later on (*ibid.*, 353), LORD MACNAGHTEN says:

> So that to bring itself within the exemption a society must have no purpose besides those specified in the Act, and must also, in some degree, partake of the character of a charitable institution.

The preamble and the words of the section require it to be shown that the G
purpose of the society, in the present case the purpose of science, is the exclusive purpose without the admission of any other purpose, however laudable or desirable that other purpose might be. The controversial question in the present case has been whether the purpose of the association is exclusively scientific. It is said by the one side that the purpose is exclusively scientific and that any other purposes are purely incidental to the exclusive purpose, and on the other side it is said that the facts show that there is a dual purpose, H
the research purpose and the commercial purpose, and the commercial purpose is not merely incidental, but is an independent and collateral purpose. The documents of importance, at least of major importance, in the case are three in number. The memorandum of association, the brochure, and the syllabus of instructions for students, all of which were exhibited to this Case. Those have already been dealt with in the judgments which have been delivered, and I need not refer to them in detail, or, indeed, further. It seems to me to be quite clear that one of the purposes of the association is to give advice,

assistance, instruction and training to members of the laundry trade in order to make the members commercially more efficient. This is no doubt a most excellent thing to do, but it is quite impossible, in my judgment, to say that a society that does this as a specific purpose is at the same time a society "instituted for the purposes of science exclusively." I think the activities that I have mentioned are a separate and independent purpose of the society. I agree in the judgments already delivered and would allow this appeal.

Appeal allowed with costs.

Solicitors: *Leonard Worden*, Town Clerk, Hendon (for the rating authority); *Callingham, Griffith & Bate* (for the association).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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of LORD GODDARD, C.J., at
applied. GARDNER *v.*
[1952] 2 All E.R. 306.

HARDING *v.* PRICE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Singleton, JJ.), January 14, 30, 1948.]

Street and Aerial Traffic—Accident—Failure to report—Driver ignorant of accident—Road Traffic Act, 1930 (*c.* 43), *s.* 22 (2).

The trailer of a vehicle known as a mechanical horse, while being driven along a road, collided with a stationary car and damaged it. Owing to the noise made by the vehicle the driver was unaware that the accident had happened and so he did not report it to a police station or to a police constable as required by s. 22 (2) of the Road Traffic Act, 1930.

HELD: the driver was not guilty of an offence under the sub-section.

[AS TO THE DUTY TO REPORT A ROAD ACCIDENT, see HALSBURY, Hailsham Edn., Vol. 31, pp. 675-676; and FOR CASES, see DIGEST SUPP.

FOR THE ROAD TRAFFIC ACT, 1930, s. 22 (2), see HALSBURY'S STATUTES, Vol. 23, p. 627.]

Cases referred to:

(1) *R.* v. *Banks*, (1794), 1 Esp. 143.
(2) *Fowler* v. *Padget*, (1798), 7 Term Rep. 509; 4 Digest 12, *10*.
(3) *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918; 64 L.J.M.C. 218; 72 L.T. 839; 59 J.P. 440; 14 Digest 38, *80*.
(4) *Brend* v. *Wood*, (1946), 175 L.T. 306; 110 J.P. 317; Digest Supp.
(5) *Nichols* v. *Hall*, (1873), L.R. 8 C.P. 322; 42 L.J.M.C. 105; 28 L.T. 473; 37 J.P. 424; 14 Digest 35, *59*.
(6) *R.* v. *Sleep*, (1861), Le. and Ca. 44; 30 L.J.M.C. 170; 4 L.T. 525; 25 J.P. 532; 7 Jur. N.S. 979; 14 Digest 32, *33*.
(7) *Hearne* v. *Garton*, (1859), 2 E. & E. 66; 28 L.J.M.C. 216; 33 L.T.O.S. 256; 23 J.P. 693; 14 Digest 36, *69*.
(8) *Pearks, Gunston & Tee, Ltd.* v. *Ward*, *Hennen* v. *Southern Counties Dairies Co.*, [1902] 2 K.B. 1; 71 L.J.K.B. 656; 87 L.T. 51; 66 J.P. 774; 14 Digest 40, *102*.
(9) *Cundy* v. *Le Cocq*, (1884), 13 Q.B.D. 207; 53 L.J.M.C. 125; 51 L.T. 265; 48 J.P. 599; 30 Digest 86, *667*.

CASE STATED by Swansea justices.

An information was preferred by the respondent, a police inspector, under the Road Traffic Act, 1930, s. 22, against the appellant, charging him with failing to report a road accident at a police station or to a police constable as soon as reasonably practicable and in any case within 24 hours of its occurring, the respondent being the driver of a motor lorry owing to the presence of which on the road the accident occurred causing damage to another vehicle. The information was heard on Aug. 18, 1947, when the court found the appellant guilty and fined him 20*s.* and ordered him to pay 12*s.* 6*d.* costs. The court allowed his appeal. The facts appear in the judgment of LORD GODDARD, C.J.

Collard for the appellant.

Lloyd-Jones for the respondent.

Cur. adv. vult.

Jan. 30. The following judgments were read.

LORD GODDARD, C.J.: From the facts found by the justices it appears that the appellant was driving a vehicle known as a mechanical horse to which a large trailer was attached. The trailer collided in some way, probably by brushing against it, with a stationary car, which was damaged, and the justices found that the reason the appellant did not report the matter was that he did not know that an accident had happened. In view of this finding it was submitted that the appellant was entitled to be acquitted, but the justices held that, having regard to s. 22 (2) of the Road Traffic Act, 1930, the omission of any reference to intent or guilty knowledge therein, the greater precision of modern statutes, and the public evil of the offence disclosed in the information when compared with the smallness of the penalty prescribed by law therefor, the legislature did not intend guilty knowledge or *mens rea* to be essential to the offence. A question of this nature, no doubt, presents difficulties to a bench of lay magistrates, and that this court, after hearing a more extensive argument and a more copious citation of authority than was probably addressed to the court below, has come to a different conclusion is no reflection on the careful consideration the justices gave to the case or the clear and concise reasons they gave for their decision.

For the prosecution it was and is contended that an absolute duty to report has been imposed by the statute, and that, in consequence, a person must drive so carefully that he must know if an accident has happened, or, at least, that it is no defence to prove that he did not. In support of this it is pointed out that, in the corresponding section of the Motor Car Act, 1903, repealed and replaced by the section of the Act of 1930 which we are now considering, it was provided that, if any person knowingly acted in contravention of the section he should be guilty of an offence, while in the present sub-section the word "knowingly" is omitted. This, however, is by no means conclusive, for it has been pointed out in more than one case that the effect of omitting such words as "knowingly" or "wilfully" may be only to alter the burden of proof: see, for instance, *per* Lord Kenyon in *R.* v. *Banks* (1) and *Fowler* v. *Padget* (2), and *per* Day, J., in *Sherras* v. *De Rutzen* (3). While, therefore, under the Act of 1903 it was necessary for the prosecution to prove that the defendant knew of the accident, it is now no longer necessary to prove knowledge, but it does not follow that the defendant may not prove lack of knowledge as a defence. The general rule applicable to criminal cases is *actus non facit reum nisi mens sit rea*, and I venture to repeat what I said in *Brend* v. *Wood* (4) (175 L.T. 307):

> It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

In these days when offences are multiplied by various regulations and orders to an extent which makes it difficult for the most law-abiding subjects in some way or at some time to avoid offending against the law, it is more important than ever to adhere to this principle. The presumption is always liable to be displaced either by the words of the statute or by the subject-matter with which it deals: *per* R. S. Wright, J., in *Sherras* v. *De Rutzen* (3), where, in a judgment, characteristic of his wide and accurate knowledge of case law, he classified the various exceptions that are to be found to this rule. Among other cases which he cited, and of which it must be assumed the court approved, was *Nichols* v. *Hall* (5), and, in my opinion, that case, a decision of the Court of Common Pleas, is really decisive of the present. The defendant in that case was charged with failing to give notice to a police constable that some animals of his were infected with a contagious disease, contrary to an order made under the Contagious Diseases (Animals) Act, 1869. It was found that the defendant did not know that the animals were infected, and the court held for that reason that he could not be convicted. Keating, J., said (L.R. 8 C.P. 326):

> I cannot understand how, on any reasonable construction of these words, it can be said that a man can neglect to give notice with all practicable speed without knowledge of the fact of which he is to give notice.

If, apart from authority, one seeks to find a principle applicable to this matter it may be thus stated. If a statute contains an absolute prohibition against the doing of some act, as a general rule *mens rea* is not a constituent of the offence, but there is all the difference between prohibiting an act and imposing a duty to do something on the happening of a certain event. Unless a man knows that the event has happened, how can he carry out the duty imposed ? If the duty be to report, he cannot report something of which he has no knowledge. That is the *ratio decidendi* of *Nichols* v. *Hall* (5), and, in my opinion, it is applicable to and decisive of the present case. Any other view would lead to calling on a man to do the impossible.

I should, however, add that the authorities show that, even where the statute imposes what is apparently an absolute prohibition, an absence of guilty knowledge may in some cases be a defence ; *Sherras* v. *De Rutzen* (3) is one instance, *R.* v. *Sleep* (6) and *Hearne* v. *Garton* (7) are others. Such cases depend on the wording and purpose of the particular statute, and it is unnecessary to consider them in detail.

In deciding whether *mens rea* is excluded as a necessary constituent of a crime, it is, in my opinion, always necessary to consider whether the offence consists in doing a prohibited act or in failing to perform a duty which only arises if a particular state of affairs exists. It must not be thought that this decision provides an easy defence to motorists who fail to report an accident. The number of cases in which a motor car driver is ignorant that he has been involved in an accident must be small. Where he, in fact, has no knowledge, it may well be, though I do not mean it was so in the present case, that the appropriate charge would be driving without proper care and attention. The appeal will be allowed with costs, and the conviction is quashed.

HUMPHREYS, J. : I agree in the result proposed. The conclusion to which I have arrived is that the offence created by s. 22 (2) of the Road Traffic Act, 1930, falls within the general rule that absence of that knowledge or state of mind known to lawyers as *mens rea* affords a defence to a criminal charge. Much has been written and said on the subject and the cases are numerous and not always easy to reconcile, but it is well-established law that there are many exceptions to the rule. In the absence of any such words as " permit," " suffer," or " knowingly " from the statement of the offence, knowledge is *prima facie* not a necessary ingredient of the offence, and to decide whether the offence created in the particular case allows of the operation of the general rule referred to it is necessary to consider both the language and the object of the Act in question. The class of offence with which we are here concerned is not, of course, what may be called major crimes, but that type of breach of the requirements of a statute often referred to as quasi-criminal offences : see *Pearks Gunston & Tee, Ltd.* v. *Ward* (8) in the judgment of CHANNELL, J. An illuminating judgment of STEPHEN, J., is to be found in *Cundy* v. *Le Cocq* (9), which established one great class of exceptions to the rule in those cases where the statute contains an absolute prohibition against the doing of some act and ignorance of the true facts, even if founded on reasonable grounds, affords no defence, though it may obviously be relevant on the question of penalty.

I do not think much assistance is to be derived from an examination of decisions on different language in other statutes, but, confining myself to the statute in question here, I find many instances of offences created to which the absence of *mens rea* or knowledge of the true facts would, in my judgment, afford no answer. I would instance s. 3, the use on the road of a vehicle not complying with regulations as to construction, etc. ; s. 4, driving without holding a licence ; s. 9, a person under 17 years of age driving a motor car ; s. 10, driving at a speed exceeding the maximum permitted ; s. 14, driving on a footway ; s. 15, driving while under the influence of drink ; and there are many others. Coming to s. 22 there is a marked difference of language. I think there is, however, an absolute duty to stop imposed by sub-s. (1), and an absolute duty to report to the police in the circumstances envisaged in sub-s. (2), if, in fact, there has been an accident causing damage.

In my opinion, therefore, there was in the present case a *prima facie* case against the appellant which he was rightly called on to answer. He seems to have persuaded the justices that the contraption which he was driving made such a noise that he was unaware of the extensive damage which he had, in fact, caused to the stationary car passed by him on his near side. He is entitled to the benefit of that finding, and on it he is morally guiltless. On the whole, I do not think the protection of the public, which is the object of the statute, or the language of the section itself requires that there should be a conviction in spite of the absence of *mens rea*. His offence was an omission to do his duty rather than the doing of a prohibited act. I have arrived at this conclusion without giving any effect to the alteration in the law in 1930 effected by the omission of the word "knowingly" from s. 22 which otherwise replaces s. 6 of the Motor Car Act, 1903. The effect of the change, in my view, was to remove the offence from the category of those involving *scienter* and to render it one not requiring any proof of knowledge, leaving untouched the question whether proof of absence of knowledge on the part of the defendant affords in law a defence.

SINGLETON, J.: The appellant, the driver of a motor lorry, was convicted under s. 22 of the Road Traffic Act, 1930, of failing to report an accident whereby damage was caused to another vehicle, which occurred owing to the presence on the road of the vehicle which the appellant was driving. The justices find that the appellant did not know that an accident had occurred and they give reasons for that finding. In such circumstances I do not think that there ought to be a conviction. During the argument I was impressed by the fact that the word "knowingly" does not appear in s. 22, whereas in a somewhat similar section of the Motor Car Act, 1903 (s. 6) an offence was committed if a person "knowingly acts in contravention of this section." On consideration I feel that it is right to adopt the words of DAY, J., in *Sherras* v. *De Rutzen* (3) ([1895] 1 Q.B. 921) as applicable, and that the only effect is to shift the burden of proof. Under the 1903 Act it was necessary for the prosecution to prove knowledge; under the 1930 Act they are not required to do so. In the same case R. S. WRIGHT, J., having instanced certain classes of exceptions from the general rule, added (*ibid.*, 922):

> But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of someone whom he has put in his place to act for him . . . in order to constitute an offence.

The justices have found that there was no guilty knowledge on the part of the appellant. He did not know that there had been an accident. We are not dealing with a prohibited act, but with the case of a man who is called on to do something, namely, to report an accident. How can he do that if he does not know that an accident has happened? There are two possible ways of construing s. 22, and, in my view, the court ought not to adopt one which would mean that a person is called on to do the impossible or suffer conviction if he fails to do it when there is another equally reasonable construction which avoids that position arising. I am of opinion that the appeal should be allowed, and the conviction quashed.

Appeal allowed with costs.

Solicitors: *Mills, Lockyer & Co.*, agents for *William Jones, Davies & Penri Williams*, Swansea (for the appellant); *Kenneth Brown, Baker, Baker*, agents for *T. B. Bowen*, town clerk, Swansea (for the respondent).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re BROCKBANK (*deceased*), WARD *v.* BATES.

[CHANCERY DIVISION (Vaisey, J.), January 23, 27, 1948.]

Trusts and Trustees—Appointment of new trustees—Concurrence of continuing trustee—Refusal to concur—Enforcement by beneficiaries of concurrence—Trustee Act, 1925 (*c.* 19), *s.* 36 (1) (*b*).

A testator, who died in 1926, by his will and the codicil thereto appointed B. and K. to be his executors and trustees and directed them in the events A which happened to pay the income of his residuary estate to his wife for her life or until her remarriage and thereafter to hold the residue for his five children in equal shares absolutely. There was no express power of appointing new trustees. By a deed dated Dec. 20, 1940, K. retired from the trusteeship and W. was appointed in his place. W. wished to retire from the trusts, and the beneficiaries unanimously desired that a B bank be appointed as sole trustee in the place of W. and B. B. refused to concur in making the appointment. In an application by the beneficiaries and W. for an order directing B. to concur or, alternatively, appointing the bank to be sole trustee.

HELD: the beneficiaries could not control the exercise of the power of appointing new trustees conferred on a continuing trustee by the Trustee Act, 1925, s. 36 (1) (*b*), and, therefore, no order would be made.

C [AS TO APPOINTMENT OF NEW TRUSTEES UNDER STATUTE, see HALSBURY, Hailsham Edn., Vol. 33, pp. 171-176, paras. 296-307; and FOR CASES, see DIGEST, Vol. 43, pp. 680-682, Nos. *1106-1123*.]

Cases referred to:

(1) *Re Gadd, Eastwood* v. *Clark*, (1883), 23 Ch.D. 134; 52 L.J.Ch. 396; 48 L.T. 395; 31 W.R. 417; 43 Digest 674, *1041*.

(2) *Re Higginbottom*, [1892] 3 Ch. 132; 62 L.J.Ch. 74; 67 L.T. 190; 3 R. 23; D 43 Digest 681, *1109*.

ADJOURNED SUMMONS for an order directing a trustee to concur with his co-trustee in appointing a trust corporation to be sole trustee of a will, or, alternatively, for an order appointing the corporation to be sole trustee. The order was refused. The facts appear in the judgment.

Geoffrey Cross for the plaintiffs (the co-trustee and the beneficiaries).

E *D. B. Buckley* for the defendant (the other trustee).

VAISEY, J.: The testator, Joseph Robert Brockbank, made his will on Sept. 7, 1923, and thereby appointed his wife, Eleanor Brockbank, and the defendant, Alfred Bates, who is a solicitor, as the executors and trustees thereof. The trusts of the testator's residuary estate are, in the events which have happened, for the payment of the income to Mrs. Eleanor Brockbank until F her death or remarriage and thereafter to hold the residue for his five children in equal shares absolutely. The will contains a power enabling a professional trustee to charge for his services. By a codicil, dated Jan. 26, 1926, the testator revoked the appointment of the said Eleanor Brockbank as executrix and trustee, and appointed his son-in-law, Robert Clifton Knight, as executor and trustee in her place. Neither the will nor the codicil contain any express power of appointing new trustees, and such power is, therefore, exercisable G under the Trustee Act, 1925, s. 36, by the surviving or continuing trustee. The testator died on Feb. 4, 1926, and his will was proved by the defendant and Robert Clifton Knight.

By a deed, dated Dec. 20, 1940, Robert Clifton Knight retired from the trusteeship and Edgar Ernest Ward was appointed a new trustee of the will in his place to act with the defendant. The plaintiffs in this summons are the said Edgar Ernest Ward, the testator's widow, who is now 83 years of age, and all H the five children, while the defendant is Alfred Bates, the other trustee. It has been stated that the plaintiff, Ward, desires to retire, but the case is not put forward as one in which two trustees have failed to agree on the appointment of a successor to one of them. It has been urged throughout that the defendant has no right even to be consulted in the matter. The summons asks that the defendant be directed to concur with the plaintiff, Ward, in appointing Lloyds Bank, Ltd., to be sole trustee of the will in their place, and to transfer the trust property to Lloyds Bank, Ltd., on the other plaintiffs (the widow and children) agreeing to allow it to make its usual charges, or, alternatively, the court is asked to appoint the said bank to be sole trustee of the will. The only other relief asked is that provision should be made for the costs of the application, and, if and so far as is necessary, the trusts should be carried into execution by the court.

The two alternative grounds of relief are sought to be justified by the following argument. It is said that where all the beneficiaries concur, they may force a trustee to retire or compel his removal, and they can direct trustees who have the power to nominate their successors to appoint as such successors such person or persons or corporation as may be indicated by the beneficiaries, and it is suggested that they, the trustees, have no option but to comply. I do not follow this. The power of nominating a new trustee is a discretionary power, and, in my opinion, it can no longer exist as such if it has become one the exercise of which can be dictated by others. It is said that the beneficiaries could direct the trustees to transfer the trust property either to themselves absolutely or to any other person or persons or corporation upon trusts identical with or corresponding to the trusts of the testator's will. I agree, provided that the trustees are adequately protected against any possible claim for future death duties and are fully indemnified as regards their costs, charges and expenses. The result of such a transaction (that is to say a transaction which involves the repetition of the former trusts), however, would be to establish a new settlement, with (as it seems to me) two consequences which would be to the disadvantage of the beneficiaries. First, it would probably attract an *ad valorem* stamp duty, and, secondly, the benefit of the exemption from estate duty given by the Finance Act, 1894, s. 5 (2), and the Finance Act, 1914, s. 14 (*a*), on the death of the widow as a surviving spouse would be lost. It seems to me that the beneficiaries must choose between two alternatives. Either they must keep the trusts of the will on foot, in which case those trusts must continue to be executed by trustees duly appointed either pursuant to the original instrument or pursuant to the powers under the Trustee Act, 1925, s. 36, and not by trustees arbitrarily selected by themselves, or they must, by mutual agreement, extinguish and put an end to the trusts, with the consequences which I have just indicated.

The claim of the beneficiaries to control the exercise of the defendant's fiduciary power of making an appointment of a trustee is, in my judgment, untenable. The court itself regards such a power as deserving of the greatest respect and as one with which it will not interfere, as is shown by *Re Gadd* (1), of which it will suffice if I read the headnote (23 Ch.D. 134):

> A decree for the administration of the trusts of a will directed " that some proper person be appointed " a trustee of the will in the place of a deceased trustee. The power of appointing new trustees was given by the will to the surviving trustee, who was the defendant. The plaintiff took out a summons to have A.B. appointed trustee, and the defendant a summons to have C.D. appointed. The summonses were adjourned into court, and Bacon, V.-C., appointed the nominee of the plaintiff. *Held*, on appeal, that the decree did not take away from the defendant the power of appointing new trustees, though after decree he could only exercise it subject to the supervision of the court; that if he nominated a fit and proper person such person must be appointed, and the court would not appoint some one else on the ground that such other person was in the opinion of the court more eligible, and that if he nominated a person whom the court did not approve the court would not itself make the choice, but would call on him to make a fresh nomination:—*Held*, therefore, that the appointment of A.B. must be discharged.

This point is emphasised in *Re Higginbottom* (2), of which I will also read the headnote ([1892] 3 Ch. 132):

> The court has no jurisdiction, under the Trustee Acts, to appoint new trustees of a will against the wishes of an existing sole trustee desirous of exercising his statutory power of appointing new trustees under s. 31 of the Conveyancing and Law of Property Act, 1881, [which corresponds with s. 36 of the Trustee Act, 1925] even though the application to the court is made by a majority of the beneficiaries, and the existing trustee has himself no beneficial interest.

Kekewich, J., in his judgment, says (*ibid.*, 135.)

> The non-interference by the court with the legal power of appointment of new trustees is established by several cases.

He cites *Re Gadd* (1) and other authorities.

If the court, as a matter of practice and principle, refuses to interfere with the legal power to appoint new trustees, it is, in my judgment, *a fortiori* true that the beneficiaries cannot do so. As I have said, they can put an end to the trust if they like. Nobody doubts that, but they are not entitled to arrogate to themselves a power of which the court itself disclaims possession and to change trustees whenever they think fit at their whim or fancy. It seems to follow from counsel's argument for the plaintiffs that, whenever beneficiaries A choose to say that they do not like their trustee, they can order him to retire and appoint anyone they like to succeed him. That seems to show a complete disregard of the true position. So long as the trust subsists, it must be executed by persons duly, properly, and regularly appointed to the office. No doubt, in many cases trustees would gladly exercise their powers of appointment so as to accord with the wishes of their beneficiaries, whether unanimous or not, but here the defendant was approached in a manner which was the very reverse B of conciliatory. He was, not asked, but told, to do what the beneficiaries wanted, and, though I need not refer to the correspondence in detail, it was, in my judgment, couched in terms which were both peremptory and provocative and he was threatened with an application for the payment of costs by himself personally. No case whatever is made out for depriving the defendant of his statutory power and still less is any case made out for removing him from the trusteeship, as asked by the originating summons. The summons C does not ask in the alternative that Bates should remain as trustee with the nominee of the plaintiffs ; it asks that he should be displaced in favour of another sole trustee. Although it has been suggested at the Bar that the plaintiffs did not really mean to procure the removal of the defendant from the trusteeship, but meant only to procure the appointment of the bank as trustee with him, that is in flat contradiction of what I find in the originating summons.

D I make no order on the summons except to direct the costs of all parties to be taxed, as between solicitor and client, and to be paid out of the residue of the estate. I reserve general liberty to apply.

Order accordingly.

Solicitors : *Burton Yeates & Hart*, agents for *Johnson & Co.*, Birmingham (for the plaintiffs) ; *Hiscott, Troughton & Page*, agents for *Bannister, Bates & Son*, Morecambe and Heysham (for the defendant).

E [*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

R. *v.* SOANES.

F [COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Birkett, JJ.), February 2, 1948.]

Criminal Law—Trial—Plea—Plea of guilty of lesser offence—Acceptance—Duty of prosecutor.

Where nothing appears on the depositions which can be said to reduce a crime from the more serious offence charged to some lesser offence G for which a verdict may be returned, it is the duty of counsel for the Crown to present the offence charged in the indictment and to leave it to the jury, if they see fit in the exercise of their prerogative, to find the lesser verdict.

A day or two after her discharge from hospital where, after a normal confinement, she had given birth to a child, the prisoner killed the child and threw it into a canal. There was nothing to suggest that she was not H in possession of all her faculties. At her trial for murder, her counsel informed the judge that she was willing to plead guilty to the lesser offence of infanticide, and counsel for the Crown expressed his willingness to accept that plea. The judge, however, refused to accept the plea on the ground that there was no indication on the depositions that the circumstances existed which must exist before a verdict of infanticide can be returned. The jury returned a verdict of infanticide :—

HELD : the judge was right in insisting on the prisoner being tried for murder.

[As to Plea and Verdict of Guilty of Lesser Offence, see HALSBURY, Hailsham Edn., Vol. 9, pp. 155, 175, paras. 213, 254; and for Cases, see DIGEST, Vol. 14, pp. 317-324, Nos. *3330-3397*.]

Application for leave to appeal against sentence.

The applicant, Dorothy Clara Soanes, was convicted before Singleton, J., at Hertford Assizes of infanticide. Her application was now refused. The facts appear in the judgment of the court delivered by Lord Goddard, C.J.

No counsel appeared.

LORD GODDARD, C.J.: The applicant was charged with the murder of her infant child, but was convicted of infanticide only, and Singleton, J., sentenced her to three years' penal servitude.

The case was of a very grave character, and, if the jury had returned a verdict of murder, it would not have been possible for this court to substitute a verdict of infanticide. After a normal confinement, the applicant gave birth to the child in hospital, where she stayed for 24 days. She is 25 years of age, and has already had two illegitimate children. She worked as a nurse at a home for blind babies. The evidence shows that when she was discharged from hospital, having had the advantage of staying there much longer than patients stay as a rule, she was perfectly normal. Indeed, from first to last there is nothing to suggest that she was otherwise than normal and in possession of all her faculties. Not more than two days after her discharge from the hospital, and probably on the day afterwards, she killed the child by fracturing its skull in two places and then throwing it into a canal. She does not deny that she killed it. It is impossible to say that the learned judge was not fully justified in passing a substantial sentence of imprisonment on a woman who thus, with, apparently, no excuse, deliberately killed her child. In fact, he was bound to do so. The jury, in the exercise of their undoubted prerogative, refused to find the applicant guilty of murder and returned a verdict of infanticide although it is difficult to see on what evidence they could find that the balance of the applicant's mind was disturbed at the time as the result of her confinement.

The important part of the case is this. The learned judge has expressed the hope that this court may state their view on what happened here and what ought to happen in similar cases. When the applicant had been given in charge of the jury, her counsel informed the judge that she was willing to plead guilty to infanticide, and counsel for the Crown expressed his willingness to accept that plea. The judge refused to accept it, and said that the charge was one of murder and that charge must be tried, although, of course, it would be for the jury to say whether the verdict should be guilty of murder or guilty of infanticide. The judge's reason for refusing to accept a plea of infanticide was that he could find no indication on the depositions that the circumstances existed which must exist before a verdict of infanticide, as distinct from one of murder, can be returned. While it is impossible to lay down a hard and fast rule in any class of case as to when a plea for a lesser offence should be accepted by counsel for the Crown—and it must always be in the discretion of the judge whether he will accept it—in the opinion of the court, where nothing appears on the depositions which can be said to reduce the crime from the more serious offence charged to some lesser offence for which, under statute, a verdict may be returned, the duty of counsel for the Crown would be to present the offence charged in the indictment, leaving it as a matter for the jury, if they see fit in the exercise of their undoubted prerogative, to find the lesser verdict. In this case we think that the learned judge was not only right, but, indeed, bound, to insist on the applicant being tried for murder. There was nothing disclosed on the depositions which would have justified a reduction of the charge from murder to infanticide, and, accordingly, this application is refused.

Application refused.

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

ROBINSON *v.* TAYLOR.

[KING'S BENCH DIVISION (Humphreys, Singleton and Birkett, JJ.), January 21, 22, 1948.]

Rates and Rating—Rateable occupation—Liability for rates—Dwelling-house—Owner occupier removed to mental institution—Order of master in lunacy authorising wife to occupy house rent free on payment of rates—Wife not party to order, but continuing to occupy house with knowledge thereof.

The owner and occupier of a house became insane in 1944 and was removed to a mental institution, but his wife continued to reside in the house. On Apr. 3, 1946, a master in lunacy made an order appointing the county public assistance officer receiver of the husband's estate and declaring (*inter alia*) that the wife should be allowed the use and occupation, rent free, of the house and furniture, but that she was to pay the rates and taxes out of her own money. The order was made without notice to the wife and she objected to some of its terms, but continued to live in the house. In the rate for the year ending Mar. 31, 1947, the husband was rated as the occupier of the house, but on Apr. 15, 1947, the rating authority amended the rate by adding the wife as joint occupier with the husband, and in the rate made on Apr. 28, 1947, for the year ending Mar. 31, 1948, the husband and wife were rated as joint occupiers :—

HELD : although the order of the master in lunacy was not binding on the wife, since she was no party to it, her occupation of the dwelling-house after the date of the order must be regarded as rateable occupation, because she continued to occupy the house in the knowledge that the husband was not in occupation and was not to be treated as in occupation.

[AS TO RATEABLE OCCUPATION, see HALSBURY, Hailsham Edn., Vol. 27, pp. 351-353, para. 782 ; and FOR CASES, see DIGEST, Vol. 38, pp. 426, 427, Nos. *10-26*.

AS TO AMENDMENT OF THE RATE, see HALSBURY, Hailsham Edn., Vol. 27, pp. 512, 513, para. 952.]

Cases referred to :

(1) *Borwick* v. *Southwark Corpn.*, [1909] 1 K.B. 78 ; 78 L.J.K.B. 121 ; 99 L.T. 841 ; 73 J.P. 38 ; 38 Digest 426, *16*.

(2) *Westminster Corpn.* v. *Southern Ry. Co., Railway Assessment Authority & Smith & Son, Ltd., Westminster Corpn., & Kent Valuation Committee* v. *Southern Ry. Co., Railway Assessment Authority & Pullman Car Co., Ltd.*, [1936] 2 All E.R. 322 ; [1936] A.C. 511 ; 105 L.J.K.B. 537 ; 80 Sol. Jo. 671 ; 34 L.G.R. 313 ; 24 Ry. & Can. Tr. Cas. 189, *sub nom., Re Southern Ry. Co.'s Appeals*, 155 L.T. 33 ; 100 J.P. 327 ; Digest Supp.

(3) *R.* v. *Melladew*, [1907] 1 K.B. 192 ; 76 L.J.K.B. 262 ; 96 L.T. 189 ; 71 J.P. 125 ; 38 Digest 426, *15*.

(4) *Allan* v. *Liverpool, Inman* v. *Kirkdale*, (1874), L.R. 9 Q.B. 180 ; 43 L.J.M.C. 69 ; 30 L.T. 93 ; 38 J.P. 261 ; 38 Digest 445, *155*.

CASE STATED by Lincoln (Parts of Lindsey) justices.

On Apr. 29, 1946, the rating authority for the borough of Scunthorpe made a rate for the year ending Mar. 31, 1947, and thereby rated the respondent's husband as the occupier of a dwelling-house owned by him. On Apr. 15, 1947, they amended the rate by inserting the name of the respondent as joint occupier with her husband, and on Apr. 28, 1947, in a rate for the year ending Mar. 31, 1948, they rated the respondent and her husband as joint occupiers of the house. The husband had been removed to a mental institution in 1944, but the respondent had continued to reside in the house. An order of a master in lunacy was made on Apr. 3, 1946, by which the respondent was allowed the use and occupation of the house rent free, but was to pay the rates out of her own money. The respondent was not a party to the order and had objected to some of its terms, but she continued to live in the house. The rating authority applied for payment of the rates due, and, on the respondent's failure to pay them, a complaint was preferred against her by the appellant on behalf of the rating authority that she, being duly rated and assessed in respect of £18 12*s.* 2*d.* rates for the years ending Mar. 31, 1947, and Mar. 31, 1948, had not paid such sum or any part thereof. The justices dismissed the complaint on Oct. 1, 1947. The appellant appealed and the Divisional Court now allowed the appeal. The facts appear in the judgment of HUMPHREYS, J.

Squibb for the appellant.

E. K. Lane for the respondent, Mrs. Taylor.

HUMPHREYS, J.: This is a Case stated by justices of the peace in and for the Parts of Lindsey in the county of Lincoln, and it raises the question whether the respondent, a married woman, whose husband is a certified lunatic, is liable to pay the rates of the premises where she is living. The justices dismissed the summons for rates issued for the rating authority. Mr. Taylor, the husband of the respondent, was for years the rated occupier of the dwelling-house, No. 77, Cole Street, Scunthorpe, of which he also was the owner in fee. He lived there with his wife, the present respondent. In 1944 Mr. Taylor became insane, was certified as such, and was removed to a mental institution where he has remained to the present time. From 1944 to April, 1946, the respondent continued to reside in her husband's house and used his furniture, apparently without objection by anyone. On Apr. 3, 1946, a master in lunacy made an order in the matter of Mr. Taylor. The order recites that Mr. Matthews, public assistance officer to the county council of Lincoln, Parts of Lindsey, be appointed receiver of the estate of the lunatic, and it gives him directions as to the payment by him of certain sums of money and authorises the receipt by him of money payable to or given to Mr. Taylor. It also purports, by para. 5, to declare as follows:

> Annie Taylor, the wife of the patient, is to be allowed the use and occupation rent free of the patient's freehold house known as 77, Cole Street, Scunthorpe, Lincolnshire, and the use of the patient's furniture and household effects therein, but she is out of her own money to pay the mortgage repayments, rates, and taxes (including repairs) in respect of the said house and she is to keep the house and furniture and effects fully insured.

The Case finds that no notice was given to the respondent that any such order was proposed to be made, and she was not heard in objection, and there is no doubt that she would have objected to the terms of that order if she had known of it. In the view of the justices, the order has no effect so far as the respondent's position is concerned and cannot be effective against her as she had no notice of it when it was proposed to be made and has continually objected to some of its terms. Originally, the rate book contained only the name of Mr. Taylor, but on Apr. 15, 1947, the rate for the year ending Mar. 31, 1947, was amended by the rating authority. In my opinion, there was power to amend it pursuant to the Rating and Valuation Act, 1925, s. 5 (1)—so as to make the husband and wife the joint occupiers of the dwelling-house. On Apr. 28, 1947, a rate was made for the year ended Mar. 31, 1948, and that rate was assessed on Mr. Taylor and his wife, the respondent, "as joint occupiers" of the dwelling-house. Application was duly made for a sum of money due as rates, but it was not paid. A summons was, therefore, taken out against the respondent, applying for a distress warrant, but the summons was dismissed by the justices.

It was contended for the rating authority that the husband and wife were joint occupiers of the dwelling-house, and, therefore, "that the respondent was properly rated in respect thereof as one of two joint occupiers." If it is correct that they are joint rateable occupiers of the premises, each of them is liable for the whole rate. Therefore, if the respondent is properly described as jointly liable with her husband, she is liable to pay this rate. It is further contended that the wife of a lunatic residing in her husband's house is not in the position of a caretaker or other servant. There is no doubt that the respondent was in occupation, and had been in occupation ever since 1944, of the house which was her husband's house. She had been living in it long before that, but had not been in rateable occupation until her husband was taken away. Since then she had continued to be in actual physical occupation of the premises, in whatever capacity one may describe that occupation. It was argued that, as she was the actual occupier of the premises, she must be the properly rateable occupier, unless she were found to be in a different position, for some reason or other, from any other person, male or female, who might be found to be occupying the premises. The fact that she is the wife of the owner can make no difference in this case (it was said) unless she is occupying these premises in the capacity of the occupier's wife. It is not contended that there is power—and it has never been the practice in rating—to make the wife responsible for the rates where the husband is himself the rated occupier, and, therefore, responsible for the rates, but it is said here that, from 1944, the respondent was living in the house no longer, as she had been before that date, as the wife of the owner and occupier, but was there in the same capacity as any other person would have been if he had been living there jointly with the owner, as his lodger or in any other capacity, up to the time of the owner's departure. Such a person, if he continued to occupy, would have become in course of time—not necessarily at once, but as soon as it was found that he was permanently in occupation of the premises—liable to pay the rates, and he would have been properly A described as the rated occupier if he were so rated. On behalf of the respondent it was contended that she was not in rateable occupation of this dwelling-house and that the person in rateable occupation was her husband through his receiver. Both before the justices and here, counsel for the respondent admitted, which is manifest, that somebody must be responsible for the rates, since the premises are occupied and the rates are properly levied on somebody in respect of that hereditament. He maintained that the respondent's husband B is responsible, and, if he is not responsible because of his mental condition, the receiver of his estate must be taken to be responsible.

This argument raises a question as to the position of the receiver of the estate of a lunatic. We have had no argument as to the legal position of such a person, but I am clearly of opinion that, under such an order as was made here, the receiver does not become responsible to pay sums of money except those he is authorised to pay by the order. No doubt, if a lunatic had a large C estate, the receiver would be ordered to pay all outgoings necessary to keep up the property, but, if there is no estate, the receiver is not required to make payments out of his own pocket. It is to be observed that the receiver is the public assistance officer to the appropriate county council, and, therefore, we may assume that the estate of Mr. Taylor was negligible in amount. The next contention of the respondent is that she was in occupation as the wife of Mr. D Taylor, and was in no different position from that of a caretaker or other servant residing in his master's house. Whether the respondent was in occupation is entirely a question of fact, as was observed by BIGHAM, J., in *Borwick* v. *Southwark Corpn.* (1), where he says ([1909] 1 K.B. 84) :

> Cases of this kind depend much more on fact than on law. Whether a man "occupies" or not is in each case a question of intention to be ascertained with reference to the particular circumstances, and if there are facts which one way or the other E can reasonably support the conclusion at which the justices arrive, I do not think this court should interfere with that conclusion. It is a finding of fact.

But BIGHAM, J., did not say—and, indeed, in my opinion, it would be impossible to say—that the question whether a person, who is found as a fact to be in occupation, is in rateable occupation, is not a question of law. In my opinion, this question is clearly one of law. I think it useful to refer to a F few observations made by LORD RUSSELL OF KILLOWEN on this matter in *Westminster Corpn.* v. *Southern Ry. Co.* (2). That case deals with very different questions from those that arise in the present appeal, but LORD RUSSELL OF KILLOWEN said ([1936] 2 All E.R. 326) :

> In the next place I would make a few general observations upon rateable occupation. Subject to special enactments, people are rated as occupiers of land, land being under- G stood as including not only the surface of the earth but all strata above or below. The occupier, not the land, is rateable; but, the occupier is rateable in respect of the land which he occupies. Occupation, however, is not synonymous with legal possession : the owner of an empty house has the legal possession, but he is not in rateable occupation. Rateable occupation, however, must include actual possession, and it must have some degree of permanence : a mere temporary holding of land will not constitute rateable occupation.

H It was for that reason that I observed and emphasised that the respondent had been living in these premises from 1944, when her husband was removed to the institution, certainly until 1947, and there was, therefore, a considerable degree of permanence about that occupation. LORD RUSSELL OF KILLOWEN went on to say (*ibid.*) : "Where there is no rival claimant to the occupancy, no difficulty can arise . . ." I think that means, not that there must be someone who wishes to put forward a rival claim, but that no difficulty can arise where there is no other person who can be put forward as being the person to be rated. LORD RUSSELL continued :

> . . . but in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact, *viz.*, whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate ; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in the premises in question, and in regard to the purpose of the occupation of those premises.

Counsel for the appellant has rightly conceded that the order of the master in lunacy can have no effect on the respondent's legal position and cannot make her liable to pay rates if she is not otherwise liable to pay them, since the master had no power to order her to do so. Quite apart from the terms of the order, however, the conclusion at which I have arrived is that the respondent's position is precisely the same as would be that of any other person who is found to be, for a period of, at least, two years, in sole occupation of a dwelling-house and there is no one else who can be said to be in occupation, and, therefore, she is the occupier. It is the occupier of a dwelling-house who is properly rated as the occupier of that dwelling-house. I think that the contentions which prevailed before the justices wrongly prevailed, and that there is no justification for our holding that the rates in question ought to be paid by Mr. Taylor, and certainly no justification for holding that the receiver of his estate, whose rights and duties are strictly controlled by the terms of the order and do not include such a matter as this, is responsible for their payment. Somebody must be responsible for the rates, and I think it should be the respondent, who has the advantage of the occupation of the house and the use of the furniture. For these reasons, therefore, I would allow this appeal.

SINGLETON, J. : I am of the same opinion. Everyone knows that the occupier is the person to be rated. The difficulty frequently arises of determining who is the occupier. That is largely a question of fact. The difficulty was appreciated in this case by the rating authority who amended the rate on Apr. 15, 1947, and thereafter the names of both the husband and wife appear in the book as joint occupiers of this dwelling-house. The justices have expressed the opinion that the contentions of the respondent were correct. One of those contentions was that the respondent was not in rateable occupation of the dwelling-house. The matter is dealt with shortly, and, if I may say so, accurately, in RYDE ON RATING, 8th ed., pp. 14-16. The passage ends in this way :

> The rule may, perhaps, be expressed by saying that to constitute a person the "occupier" of land, he must have "a *de facto* possession, that is to say, actual physical prehension of the particular portion of the soil, to the substantial exclusion of all other persons from participating in the enjoyment of it."

On the facts found in this case, the husband was certified in 1944 and removed to a mental institution. The house belonged to him and the respondent remained in the house. On Apr. 3, 1946, an order was made by the master in lunacy dealing with these premises. That order, it is rightly said, is not binding on the wife, because she was no party to it, but it does seem to me to have some bearing on this matter. The submission of counsel for the appellant is that, from the time that the husband was certified, the respondent was in rateable occupation. He does not rely on the order of Apr. 3, 1946, though he says that it is an element to be borne in mind. I think his submission is right. The respondent, at least from the date of the order of Apr. 3, 1946, was well aware of the position. It is right to say that the respondent objected to certain parts of that order, but she has not objected to living in the house. She has lived there before and since the order was made. I take the view that the terms of the order appointing the receiver ought to be regarded as something in the nature of a disclaimer of any occupation by the husband immediately before the order, if there were any such occupation. The respondent remained in the house and has been in physical possession of it since 1944. The material time for us to consider is Apr. 28, 1947, the date on which the rate for the year ending Mar. 31, 1948, was made. The respondent then was in physical possession. She remained in possession under the order of the master in lunacy. In *R.* v. *Melladew* (3) COLLINS, M.R., in dealing with the question of rateable occupation, said ([1907] 1 K.B. 201) :

> It is, I think, clear from a comparison of many authorities that the intention of the alleged occupier in respect to the hereditament is a governing factor in determining

the question whether rateable occupancy has been established. For instance, the physical presence, actual or constructive, of the alleged occupant upon the hereditament may be consistent with the position of licensee or lodger as well as with that of an occupier in the sense required to establish rateability. "In order to ascertain this," says BLACKBURN, J. [L.R. 9 Q.B. 192] in *Allan* v. *Liverpool*, *Inman* v. *Kirkdale* (4), "we must see what was the intention of the parties."

Applying that passage to this case, let us see what was the intention of the parties, or, in the words of LORD RUSSELL OF KILLOWEN in the *Westminster* case (2), A let us see whether or not there was any rival occupancy in some person who to some extent might have occupancy rights over the premises. I am clear in my mind that from the date of the order of the master in lunacy there was no rival claimant in any sense. Indeed, there had not been before that. Furthermore, I think it was the intention of the respondent to remain in occupation after that order was made and after she knew, from para. 5 of the order, that the husband was not in occupation and was not to be treated as being in occu- B pation. It seems to me that the justices should, on these facts, have arrived at the conclusion that the respondent was in rateable occupation, and I agree that the appeal ought to be allowed.

BIRKETT, J.: I am of the same opinion. At first sight it appeared that this case was somewhat complicated because of the rather tragic circumstances which surround it, but I think ultimately the question to be determined C is one of some simplicity. It really comes to this: What, in fact, was the nature of the occupation of the respondent in respect of which it is alleged that she is liable to rates? On one view, she is not liable, inasmuch as she occupies the position of a mere servant or agent or caretaker, and the real responsibility for the rates lies elsewhere. On the other view, the occupation is of such a nature that it makes the liability to rates consequent on it. The second, I think, is the true view.

D All the other matters relating to the power of the rating authority to make the requisite amendment, the power of the master, and the limitations on the powers of the master have been so fully dealt with that I need add nothing save to say that I concur in the judgments already delivered.

Appeal allowed, with costs. Case remitted to the justices with the opinion of the court thereon.

E Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. P. Errington*, Town Clerk, Scunthorpe (for the appellant); and for *William Bains*, Brigg and Scunthorpe (for the respondent).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

LOWENTHAL AND OTHERS *v.* ATTORNEY-GENERAL.

F [CHANCERY DIVISION (Romer, J.), January 28, 29, 1948.]

Aliens—Enemy alien—Deprivation of nationality by decree of enemy state—Recognition of statelessness—Patents—Extension—"Subject of a foreign state"—Patents and Designs Acts, 1907 *to* 1946, *s.* 18 (6).

The personal plaintiffs were Jews of German origin who left Germany in 1933 and 1934 owing to the political situation and came to England G where they received permission permanently to reside. In 1933 they promoted the formation of the plaintiff company in which they held all the issued share capital equally. In 1941, by a decree of the German government, both were deprived of their status and rights as German nationals. In 1944, the company applied by summons under the Patents and Designs Acts, 1907 to 1946, s. 18, for an order extending a patent owned by it. Section 18 as amended provides: "(6) Where, by reason of hostilities H between His Majesty and any foreign state, the patentee as such has suffered loss or damage . . . an application under this section may be made by originating summons . . . and the court in considering its decision may have regard solely to the loss or damage so suffered by the patentee: Provided that this sub-section shall not apply if the patentee is a subject of such foreign state as aforesaid, or is a company the business whereof is managed or controlled by such subjects or is carried on wholly or mainly for the benefit or on behalf of such subjects, notwithstanding that the company may be registered within His Majesty's dominions."

Held: a change of status in its nationals brought about by decree of a foreign enemy state in wartime was one which the courts would not recognise, and, therefore, the personal plaintiffs remained "subject(s) of such foreign state" within the proviso to s. 18 (6).

R. v. *Home Secretary, Ex p. L.* ([1945] K.B. 7), *applied.*

(As to Rights, etc., of Alien Enemies, see HALSBURY, Hailsham Edn., Vol. 1, pp. 455-462, paras. 771-780; and for Cases, see DIGEST, Vol. 2, pp. 147-154, Nos. *203-249.*]

Cases referred to:

(1) *R.* v. *Home Secretary, Ex p. L.*, [1945] K.B. 7; 114 L.K.J.B. 229; Digest Supp.

(2) *R.* v. *Lynch*, [1903] 1 K.B. 444; 72 L.J.K.B. 167; 88 L.T. 26; 67 J.P. 41; 2 Digest 191, *533.*

(3) *R.* v. *Knockaloe Camp (Commandant), Ex p. Forman*, (1917), 87 L.J.K.B. 43; 117 L.T. 627; 82 J.P. 41; 2 Digest 198, *563.*

(4) *R.* v. *Vine Street Police Station Superintendent, Ex p. Liebmann*, [1916] 1 K.B. 268; 85 L.J.K.B. 210; 113 L.T. 971; 80 J.P. 49; 2 Digest 141, *162.*

Action for declarations that since Nov. 25, 1941, (the date of a German decree) the personal plaintiffs had been stateless persons, and, as regards the plaintiff company, that since that date it had not been a company the business of which was managed, controlled, or carried on wholly or mainly for the benefit of subjects of a foreign state between which and His Majesty hostilities existed. The declarations were refused. The facts appear in the judgment.

Sir Valentine Holmes, K.C., and *James Mould* for the plaintiffs.

The Attorney-General (*Sir Hartley Shawcross, K.C.*) and *Danckwerts* for the defendant.

ROMER, J.: This action is brought by Julius Lowenthal and Alex Weissberger and a company called Colibri Lighters, Ltd., a company in which all the issued shares are held by the personal plaintiffs. It is brought against the Attorney-General to obtain from this court declarations that the individual plaintiffs and the plaintiff company have, since Nov. 25, 1941, so far as the individual plaintiffs are concerned, been stateless persons, and, so far as the plaintiff company is concerned, has not since the same date been a company the business of which is managed, controlled, or carried on wholly or mainly for the benefit of subjects of a foreign state between which and His Majesty hostilities exist or existed. The true object of the action is to obtain a declaration which will enable the plaintiffs to proceed with an application, which the plaintiff company made by summons on Apr. 28, 1944, under s. 18 of the Patents and Designs Acts, 1907 to 1946, to obtain extension of a patent which belongs to the plaintiff company.

The facts are not in dispute. The statement of claim alleges that the plaintiff, Julius Lowenthal, was born at Hosbach, Bavaria, on Dec. 3, 1892. Both his parents were of the Jewish faith, and he himself has been throughout his life and still is of the Jewish faith. On May 7, 1933, he came to England from Germany, bringing with him his wife and two sons. He left Germany as the result of political conditions then prevailing in that country, and came to England with the intention of residing permanently here. On Oct. 26, 1937, the British Home Office granted to him a permit permanently to reside in England. In December, 1938, he lodged at the Home Office an application for naturalization as a British subject, and he is now a naturalized British subject, the certificate having been granted on May 4, 1946. He resides in England. The plaintiff, Alex Weissberger, was born at Frankfurt-am-Main, in Germany, on Oct. 30, 1902. Both his parents were of the Jewish faith, and he himself has been throughout his life and still is of the Jewish faith. In August, 1934, he came to England from Switzerland, whither he had gone from Germany as the result of political conditions there. He brought with him from Switzerland his wife and child, intending to reside permanently in this country, and purchased a house at Edgware, where his family now reside. He also was granted a permit to reside in England. In August, 1939, he lodged with the Home Office an application for naturalization, and that application was granted on July 24, 1946. He served in the army during the war and he resides at Edgware. In 1933 both the individual plaintiffs promoted the formation of the plaintiff company. The company was incorporated on June 2, 1933, with a nominal capital of £1,000, which has since been increased to £10,000 divided into 10,000 shares of £1 each. The whole of the capital issued by the company is held by the two individual plaintiffs equally.

On Nov. 25, 1941, there was enacted by the German government a decree which provided:

> (1) A Jew who has his ordinary residence outside Germany cannot be a German national. There is an ordinary residence outside Germany if a Jew is staying in a foreign country under such circumstances which show that there he is staying not only temporarily. (2) A Jew is losing German nationality (*a*) If he has his ordinary residence in a foreign A country at the date of this order coming into force. (*b*) If, after that date he takes his ordinary residence in a foreign country then at such time when he transfers his ordinary residence into a foreign country.

Further provisions are directed to the expropriation of the property of Jews who lose their German nationality. The statement of claim goes on to say that the decree was never revoked or altered by the German government down to B the date of the surrender of that government to the United Nations, and the Swiss Legation in London, acting as the power protecting the interest of German nationals in England, refused, on instructions from the German government, to deal with matters of former German nationals of Jewish faith residing in England. By reason of the decree of the German government of Nov. 25, 1941, both the individual plaintiffs ceased, under German law, to be of German nationality for all purposes, and no rights as German nationals whatsoever C remained to them thereafter. No law enacted by the German government since the said date has in any way altered the position of the individual plaintiffs as hereinbefore mentioned. The defence virtually admits the relevant allegations in the statement of claim, but, so far as the permit to land in England is concerned, the facts appear to be that permits were granted subject to a time condition which later was cancelled.

D On Apr. 28, 1944, the plaintiff company applied by summons under s. 18 of the Patents and Designs Acts, for an order extending a patent which belonged to them. An objection emerged in the course of the hearing, founded upon s. 18 (6) which provides:

> Where, by reason of hostilities between His Majesty and any foreign state, the patentee as such has suffered loss or damage (including loss of opportunity of dealing in or developing his invention owing to his having been engaged in work of national E importance connected with such hostilities) an application under this section may be made by originating summons instead of by petition, and the court in considering its decision may have regard solely to the loss or damage so suffered by the patentee: Provided that this sub-section shall not apply if the patentee is a subject of such foreign state as aforesaid, or is a company the business whereof is managed or controlled by such subjects or is carried on wholly or mainly for the benefit or on behalf of such subjects, notwithstanding that the company may be registered within His Majesty's dominions.

F The submissions made before me by the plaintiffs were, first, that our courts recognise the status of statelessness; secondly, that the question of nationality of a foreigner must be determined by the municipal law of the country to which he belongs or is alleged to belong; and, thirdly, that, by the decree of 1941, the individual plaintiffs, by the municipal law of Germany, ceased to be nationals of Germany and became stateless. It was said that, as a result of those three G propositions, if they are established, the individual plaintiffs and the plaintiff company ceased to be subject to the disqualification imposed by s. 18 (6) of the Patents and Designs Acts, 1907 to 1946. The ATTORNEY-GENERAL conceded, and, indeed, it is well established by authority, that our courts do recognize the status of statelessness, and he further conceded that, as from Nov. 25, 1941, the individual plaintiffs did, as a matter of German municipal law, lose their German nationality. He also admits that the German municipal law recognises H the status of statelessness. His submission was, in substance, that it would be contrary to public policy to recognise the power of a foreign state to relieve its nationals in time of war from disabilities attaching to them here under our law, and he contended that the plaintiffs must still be recognised as being in the same position, for the purpose of disabilities imposed by our law, as if the decree had never been passed. He says that it would be inconsistent in time of war to regard a person as subject to some disabilities, but not to others, and that all the disqualifications or disabilities remain, it being for the Parliament of this country alone to remove them if it thinks proper so to do.

It seems to me that, so far as this court at all events is concerned, the matter is concluded against the plaintiffs by a judgment of the Divisional Court on this very same decree in *R.* v. *Home Secretary, Ex p. L.* (1). The headnote of that case is ([1945] K.B. 7) :

> The courts of this country will not in time of war recognize any change of nationality brought about by a decree of an enemy state, which purports to turn any of its subjects into a stateless person or a subject of a neutral state. Therefore an alien enemy, who in consequence of such decree has become a stateless person, still retains, in law, his enemy status, and if interned in this country cannot move for a writ of *habeas corpus*. A

The facts are stated as follows (*ibid.*, 8) :

> The applicants were at one time Austrian nationals, but became German nationals in consequence of a German decree of July 3, 1938, the effect of which was recognized by His Majesty's Government, and therefore, when war broke out they became enemy aliens as subjects of Germany. In the course of the war, in 1941, a decree [which was the decree in question in the present case] was made in Germany under which a Jew who had his ordinary residence outside Germany could not be a German national ; and a Jew was regarded as having his ordinary residence outside Germany if he sojourned outside Germany in circumstances which made it clear that his sojourn there was not merely transitory. The decree went on to provide that a Jew lost German nationality on the coming into force of the decree if on that date he had his ordinary residence outside Germany. The applicants, who were Jews within the meaning of the decree, left Austria to go to France in 1938, and they remained in France until 1941, when they were minded to go to South America. They went by a ship which sailed to South America via the Port-of-Spain in Trinidad. When the ship reached the Port-of-Spain an order of detention, the lawfulness of which was disputed by the applicants, was made in respect of them and they were brought to the United Kingdom, where they had since been interned. In these circumstances they applied for a writ of *habeas corpus*, on the ground that the order for their detention was not lawfully made. The point, however, was raised whether as alien enemies it was not open to them to make this application, or whether owing to the German decree of 1941 they had ceased to be alien enemies. B C D

It appears from a note to the report that the case was heard in *camera* and was reported with the leave of the court, the facts being taken from the judgment. It was submitted to me that the report was not altogether satisfactory, that the case was not very fully reported and that some of the observations in it were *obiter*. The main judgment was delivered by LORD CALDECOTE, C.J., and it was concurred in by the other two members of the court, HUMPHREYS and WROTTESLEY, JJ. LORD CALDECOTE, C.J.'s judgment is (*ibid.*) : E

> It is conceded that the applicants were enemy aliens when the war broke out, and it is not disputed by counsel for the applicants that an interned enemy alien is not in a position to apply for a writ of *habeas corpus*. If effect must be given to the German decree, so as to deprive these people of their German nationality and to make them stateless, they would, of course, no longer be enemy aliens and they would not come under the disabilities which fall on enemy aliens. The point that arises is one which, for reasons which are not far to seek, has never been made the subject of express decision. Reference, however, may be made to R. v. *Lynch* (2) where a man was charged with high treason and he had sought to divest himself of his British nationality, and to become the subject of an enemy state. WILLS, J.—and this is the only part of the judgment in that case to which I think it useful to refer—with characteristic cogency said ([1903] 1 K.B. 459) : " It is sufficient for me to say that throughout the argument I have never been able to comprehend how an act of treason could give any sort of rights, or could exempt a person from criminal responsibility for subsequent acts of treason. If Mr. Shee's argument were sound, an army might, if each member of it were individually to accept letters of naturalization from the enemy, desert in the hour of battle without rendering any of its members liable to the penalties of treason." The facts in *Lynch's* case (2) were the converse of the facts in this case, but it illustrates the necessity for caution in treating of changes of nationality. In *R.* v. *Knockaloe Camp* (*Commandant*) (3), AVORY, J., said (87 L.J.K.B. 46), referring to *Liebmann's* case (4) : " The applicant was born in Germany in 1868, lived there until 1889, when he came to England, where he stayed until 1915. In 1890 he obtained a document purporting to discharge him from German nationality, but he took no steps to naturalize himself in this country. He protested against his internment on the ground that he had ceased to be of German nationality. His application for exemption from internment was refused, and he was therefore placed in the same position as was the present applicant when his exemption was cancelled. Both the judges in the Divisional Court expressly held that Liebmann was an alien enemy, and was therefore not entitled F G H

to apply for a writ of *habeas corpus*. That decision has been approved by the Court of Appeal." I read that not because the authority is needed, it being conceded that an enemy alien is not in a position to apply for a writ of *habeas corpus*, but to illustrate the proposition which Mr. Brown, on behalf of the applicants, asks us to accept. It is that an enemy alien can throw off his disability by relying on a German law which, in time of war, purported to change his status from that of an enemy alien to that of a stateless person. My reply is that such changes of nationality are not recognised for very obvious reasons. If such changes were to be permitted in time of war enemy agents might acquire facilities which could be used in a way very much to the prejudice of this country. It was pointed out in *Liebmann*'s case (4) that war is waged nowadays not merely by armies in the field, but by agents in the heart of the enemy country, and to recognize changes of nationality in time of war, which might operate to the prejudice of this country, is to do something which, even if it is necessary to put it on the grounds of public policy, ought not to be done. I have, therefore, no hesitation in saying that the change of nationality relied upon by the applicants as entitling them to make this application is one which these courts will not recognize. That being so it is not necessary to go into the circumstances which have been detailed to us as to the detention of the applicants at the Port-of-Spain in Trinidad. Whatever may be the rights or the wrongs of the question that has been raised, there is an impediment at the very outset of the applicants' motion, namely, that they being enemy aliens, and retaining their status of enemy aliens notwithstanding the German decree, are not in a position to apply for a writ. I think, therefore, that the motion should be refused.

The case of the personal plaintiffs before me is founded on the contention that, whereas before the date of the decree of 1941 they were admittedly German nationals, that decree stripped them of that nationality and rendered them stateless, in which case it could not be said of them thereafter that they were subject to the disabilities imposed by s. 18 (6) of the Patents and Designs Acts. It seems to me that that was substantially the case of the applicants in *Ex p.* L. (1). They, too, had formerly been German nationals and had been interned as such. Their claim to freedom was advanced on the view that the decree under consideration had, by removing the nationality itself, removed the disabilities which that nationality entailed. The court, accordingly, had to enquire whether the decree had removed the disabilities under which they suffered, namely, restrictions on their freedom, by destroying the nationality which had attracted them. The result of the enquiry was negative, for the reasons which were stated by LORD CALDECOTE, C.J. I am unable to regard any of the observations in his judgment as *obiter*. Even if they were, I should not be justified in departing from them unless, which is far from being the case, I were convinced of their inaccuracy. I, accordingly, propose to apply the observations of the LORD CHIEF JUSTICE in that case, and there are only two remarks which I should like to make. The first is that it would be a curious anomaly if, by reason of foreign legislation, an individual were, on grounds of enemy status, to be subject to some disqualifications affecting enemy aliens here but concurrently free from others. The second is that it is a reasonable conception that such disqualifications should be removed, if they are removed at all, by the Parliament of this country, and not by the government of a foreign state, and *a fortiori* a foreign hostile state. For these reasons it appears to me that I have no alternative but to dismiss the claim which the plaintiffs have brought founded on a change of nationality brought about by the decree of 1941.

The learned ATTORNEY-GENERAL was further prepared to contend, if necessary, that, having regard to the nature of the decree when regarded as a whole, it was of a penal character and such as would not be recognised or enforced by the courts of this country in so far as its operation was sought to be extended to this country as distinct from the country in which it originated, but, having regard to the views which I have formed on the other part of the case and which I have expressed, it becomes unnecessary for me to consider that aspect of the matter, and I refrain from doing so.

Judgment for defendant. The defendant agreed to pay the plaintiff's taxed costs.

Solicitors: *Macdonald & Stacey* (for the plaintiffs); *Treasury Solicitor* (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re MOON'S WILL TRUSTS. FOALE *v.* GILLIANS.

[Chancery Division (Roxburgh, J.), January 27, 1948.]

Charities—Charitable bequest—“ Mission work ”—Gift to named church for “ mission work ” in district—Bequest to take effect on death of life tenant—Church demolished and district laid waste by enemy action after death of testator—Date of ascertainment of practicability.

By his will, dated July 10, 1927, a testator, who died on Aug. 27, 1928, directed that, after the death of his wife, his trustees should out of the residue of his estate pay certain legacies including “ £3,000 to the trustees of the Gloucester Street Wesleyan Methodist Church at Devonport on trust to invest the same in some government security and to apply the income thereof to mission work in the district served by the said Gloucester Street Wesleyan Methodist Church including particularly John street and Moon Street.” The widow died on Nov. 7, 1944. The district in which the church was situate suffered great damage by enemy action during the war. The church was demolished in 1941 and had not been rebuilt, and the houses in John Street and Moon Street had been destroyed or greatly damaged and most were uninhabited. There was a proposal on foot that the Admiralty should take over the district under a scheme for the extension of Devonport Dockyard, and that proposal, if carried out, would render impracticable the rebuilding of the church and the performance of mission work in the area.

Held : (i) having regard to the context of the will and to the evidence of the “ mission work ” carried on by the Wesleyan Methodist Church, the term “ mission work ” as used in the will meant “ Christian mission work,” and the gift was, therefore, charitable.

Re How, How v. *How* ([1930] 1 Ch. 66 ; 142 L.T. 86), *Re Kenny, Clode* v. *Andrews* (1907) (97 L.T. 130), and *Re Rees, Jones* v. *Evans* ([1920] 2 Ch. 59 ; 123 L.T. 567), *applied.*

(ii) although the legacy was a future legacy, the question whether or not the charitable purpose lapsed for impracticability had to be ascertained at the moment when the charity trustees became absolutely entitled to the legacy, *i.e.*, at the moment of the testator's death, and not at the moment when it became payable.

Re Slevin, Slevin v. *Hepburn* ([1891] 2 Ch. 236 ; 64 L.T. 311), *applied.*

[As to Trusts for Religious Purposes, see HALSBURY, Hailsham Edn., Vol. 4, pp. 187-191, paras. 257-264 ; and for Cases, see DIGEST, Vol. 8, pp. 248-254, Nos. *74-160*.]

Cases referred to :

(1) *Re How, How* v. *How*, [1930] 1 Ch. 66 ; 99 L.J.Ch. 1 ; 142 L.T. 86 ; Digest Supp.
(2) *Re Kenny, Clode v. Andrews*, (1907), 97 L.T. 130 ; 8 Digest 292, *702*.
(3) *Re Rees, Jones* v. *Evans*, [1920] 2 Ch. 59 ; 89 L.J.Ch. 382 ; 123 L.T. 567 ; Digest Supp.
(4) *Re Slevin, Slevin* v. *Hepburn*, [1891] 2 Ch. 236 ; 60 L.J.Ch. 439 ; 64 L.T. 311 ; 39 W.R. 578 ; 8 Digest 346, *1404*.

Adjourned Summons to determine whether a legacy payable after the death of the tenant for life to the trustees of the Gloucester Street Wesleyan Methodist Church, Devonport, was a valid charitable bequest or whether it failed or had become impracticable. Roxburgh, J., held that the gift was charitable, that the proper time to test the question of impracticability was the date of the testator's death, and that, in the circumstances obtaining at that date, the charitable purpose was not impracticable. The facts appear in the judgment.

Sir Norman Touche for the plaintiff (the executor and trustee under the will).
Charles R. Russell for the chairman of the trustees of the church.
Hillaby for all other legatees except the church.
Danckwerts for the Attorney-General.

ROXBURGH, J.: The testator, William Joseph Moon, made his will on July 10, 1928, and died on Aug. 27, 1928. His widow, Blanche, survived him and died on Nov. 7, 1944. By cl. 7 of his will, the testator gave certain properties after the death of his wife to certain beneficiaries, and continued, in cl. 8:

> My trustees shall out of the then residue of my estate pay the following legacies namely, (*a*) £3,000 to the trustees of the Gloucester Street Wesleyan Methodist Church at Devonport aforesaid Upon trust to invest the same in some government security and to apply the income thereof to mission work in the district served by the said Gloucester Street Wesleyan Methodist Church including particularly John Street and Moon Street and I hereby declare that Benjamin Bartlett . . . who is one of the trustees of the said church shall be the responsible person to receive the income of the said trust fund during his life and to see to the application thereof in the manner hereby expressed.

The testator gave a number of other legacies. His residuary estate will not be sufficient to answer all the legacies in full, and, accordingly, the present contest is between the trustees of the Gloucester Street Wesleyan Methodist Church, on the one hand, and the other legatees, on the other.

In his affidavit the executor under the will states:

> The district in which the said Gloucester Street Wesleyan Methodist Church was situate has suffered great damage caused by enemy action during the war. The said church was completely demolished by enemy action in 1941 and has not been rebuilt. The buildings in John Street and Moon Street which are referred to in cl. No. 8 (*a*) of the said will have been destroyed or greatly damaged by enemy action and these streets which contained a very poor type of dwelling-house before the war are now practically uninhabited. There have been statements in the local newspapers to the effect that an area which includes the district in which the site of the said church and John Street and Moon Street are situated is to be taken over by the Admiralty under a scheme for the extension of Devonport dockyard. The carrying into effect of the said scheme would render the rebuilding of the said church and the said streets impracticable. The defendant, the Rev. John Lewis Gillians, is the chairman of the trustees of the said church. I am informed by the said defendant and believe that there are eighteen trustees of the said church including the said defendant and that the funds of the said church are administered by the said trustees who are responsible for any property of the said church. I am also informed by the said defendant and believe that the congregation of the said church was not confined to the district in which the said church was situate and came partly from the Stoke district which did not suffer so much damage by enemy action and is not included in the said scheme for the extension of Devonport dockyard. Benjamin Bartlett . . . died some years ago.

Mr. Hodgess, an associate of the Royal Institute of British Architects, has sworn two affidavits. He has exhibited plans which show exactly which of the buildings in the relevant area were, at the date of his affidavits, which is now some little time past, totally destroyed or uninhabited, on the one hand, and occupied, on the other hand. He has also given some indication, by reference to a plan, of the Admiralty's intentions in connection with the proposed extension of the dockyard. There seems no doubt that there is a proposal on foot to acquire a substantial part of the relevant area, but nothing yet has been finally settled about its future although the evidence does show plainly that certain proposals, if carried out, would affect both the prospects of the rebuilding of the church and also those of mission work in the area.

Counsel for the legatees other than the church has put his case on three grounds. First, he says that, looking at the will in conjunction with such evidence of surrounding circumstances as is admissible, the application of the income which the testator has directed is not charitable, and, therefore, is void for uncertainty. His next point is that, whatever may be the true construction of the will, I ought to consider the practicability of the testator's direction as matters stand now and not as they stood at the date of the testator's death. His third point is that, considering it at the present date, I ought to hold that the direction cannot be carried out and that there is, therefore, an initial failure of the charitable gift.

There is some clue to the nature of the missionary work in the context of the gift. I am referring, not to the character of the trustees, because, in view of a number of decisions in the House of Lords, that is a dangerous course to pursue, but to the description of the mission work as " work in the district served by the said Gloucester Street Wesleyan Methodist Church." There is nothing else in the will itself that throws any light on that work. I consider, however, that I am entitled to have regard, as surrounding circumstances, to some of the facts stated in the affidavit of the defendant, Mr. Gillians. He states :

> The normal understanding and meaning of "mission work" in the Methodist Church in connection with a particular church or congregation is the encouragement and spreading of the practice and beliefs of the Methodist Church by the holding of meetings and services (outdoors or indoors) in the area served by the church or from which the congregation of the church is normally drawn. Such meetings and services are held or conducted by the minister or by lay agents or by groups of church members. Ancillary to the mission work is commonly to be found the visiting of the sick and infirm and others in their private houses. Sometimes in the more extended sense of the phrase it is used to include activities more of the nature of social welfare, care of the sick, distribution of winter blankets, etc., but its primary meaning and use is as I have stated. Up to the year 1922 mission work based on the Gloucester Street Church and congregation was carried on, involving the holding of evangelistic meetings in the open air in the neighbourhood with a portable pulpit and harmonium. So far as I can find out, no such open air mission work has been carried on since 1922. In the Methodist Church there is no strict division into areas analogous to parishes and members of congregations often live some distance from the church they attend and do not attend the nearest Methodist church. The former members of the Gloucester Street Church congregation now attend various other Methodist churches. The future of the Gloucester Street Church neighbourhood is uncertain as appears from the evidence relating to the dockyard and other town planning schemes. It is uncertain also what will be done with the compensation money when received by the central Methodist authorities in respect of the destruction of the said church.

I reject altogether that evidence in so far as that defendant seeks to tell me what is the normal understanding and meaning of the phrase "mission work." I think that, having regard to *Re How* (1), it is my duty to interpret those words. On the other hand, I admit that evidence in so far as it is a statement of the mission work carried on by the Methodist Church in the district or area in question in Devonport. There is one curious lacuna in the evidence. I do not think it is anywhere stated that the testator was himself a Wesleyan Methodist, but I propose to assume that he was, and I propose also to assume that he knew in general terms what missionary work—or mission work, for I do not think there is any real distinction between those two phrases—was carried out in the town in which he lived by the religious denomination of which he was a member.

That being so, it appears to me that the present case is covered by authority which is binding on me. I must refer to three cases on this point. In *Re Kenny* (2) the testatrix directed her trustees to pay trust moneys to M. [Dr. Maclean] to be applied by him "for such missionary object or objects at home, abroad, or in the colonies as he shall in his absolute discretion select." Warrington, J., delivered the following judgment (97 L.T. 130) :

> It is suggested that the words of the gift are too vague, as the words "missionary objects" are not necessarily confined to Christian missions. But there is a widely spread use of the word "missionary" as one engaged in the work of religious, and particularly Christian, missions. I think that I am entitled to consider who Dr. Maclean was, and that he was engaged for many years in the work of Christian missions, and that he and his work were known to the testatrix. I think that the testatrix used the word "missionary" in its ordinary and popular sense, and I hold that the gift was a valid charitable gift.

In *Re Rees* (3) the testatrix bequeathed her residuary estate "for missionary purposes" to one George Jeffrys. In his judgment, Sargant, J., said ([1920] 2 Ch. 61) :

> The expression "missionary purposes" is ambiguous, and may comprise objects which are not charitable ; and a gift for such purposes is liable to be void for uncertainty in the absence of sufficient indication that the expression refers to missionary work in the narrower or popular sense. But in *Re Kenny* (2) it was held that although the term "for missionary purposes" was in itself ambiguous, it might be narrowed by evidence of surrounding circumstances tending to show that the testator used the expression in the popular sense of Christian missionary work. The admission of such evidence seems to me to be reasonable and sensible ; and in the case now before me the evidence tendered as to the missionary work carried on by George Jeffrys, and the knowledge of the testatrix of that work and as to the

desire she had expressed to aid him in that work after her death, as she had been doing in her lifetime, make the case even stronger than *Re Kenny* (2).

MAUGHAM, J., in *Re How* (1) refers to *Re Kenny* (2) and to *Re Rees* (3). As regards *Re Kenny* (2) he says ([1930] 1 Ch. 69):

> That seems to be a case in which the court was being informed that the person who was to administer the fund was engaged in missions and was known to the testatrix. In the second of these two cases [*i.e., Re Rees* (3)] . . . the evidence was thus admitted to show that the testator used the words "missionary purposes" in the popular sense of Christian missionary work.

Those three cases have, so far as I know, never been doubted in any court. It seems to me that, if I were driven to it, I should find enough in the context in the will now before me to show that this testator used the phase "mission work" as meaning Christian mission work, *i.e.*, mission work such as was carried on by the Wesleyan Methodist Church, but the evidence of what, in fact, was done by the Wesleyan Methodist Church, which seems to me on the authorities to which I have referred to be admissible, makes that, in my judgment, abundantly clear, and I hold that the testator, in using the phrase "mission work," meant Christian mission work and that the phrase so interpreted indicates charitable work. Nothing, I think, can be made of the fact that the area within which the income is to be expended is defined by reference to "the district served by the Church," because the validity of the trust must be tested as at the date of the testator's death, and at that date the church was standing and in active service in the Methodist cause. Therefore, I start with a gift which as a matter of construction is charitable.

In approaching the question of impracticability, I have, first, to consider at what date I have to regard that matter, because circumstances have changed, as the evidence shows, very greatly since the date of the death of the testator. There was no difficulty in carrying out the charitable trust when the testator died. On the other hand, this legacy was a future legacy, and this case differs in that respect from *Re Slevin* (4), where there was an immediate legacy, although it had not been paid over immediately and probably, as a matter of business, could not have been paid over immediately. Nobody has been able to find any case in which this point has arisen for decision. I do not regard *Re Slevin* (4) as deciding it, because, as I have said, that was not a case of a future legacy, but, while it is always dangerous to use passages extracted from a judgment which was directed to a somewhat different state of affairs, I cannot help feeling that KAY, L.J., who delivered the judgment of the court in *Re Slevin* (4), expounded the principle applicable in an authoritative manner which indicates clearly the solution of the problem with which I am concerned. In *Re Slevin* (4) the testator gave a legacy to an orphanage, voluntarily maintained by a lady at her own expense, which was in existence at the testator's death, but was discontinued shortly afterwards and before his assets were administered, and it was held (reversing STIRLING, J.), that, on the death of the testator, the legacy became the property of the orphanage, and that, on the orphanage ceasing to exist, the property in the legacy became applicable by the Crown for charitable purposes. KAY, L.J., said ([1891] 2 Ch. 240):

> The orphanage did come to an end before the legacy was paid over. In the case of a legacy to an individual, if he survived the testator it could not be argued that the legacy would fall into the residue. Even if the legatee died intestate and without next of kin, still the money was his, and the residuary legatee would have no right whatever against the Crown. So, if the legatee were a corporation which was dissolved after the testator's death, the residuary legatee would have no claim. Obviously it can make no difference that the legatee ceased to exist immediately after the death of the testator. The same law must be applicable whether it was a day, or month, or year, or, as might well happen, ten years after; the legacy not having been paid either from delay occasioned by the administration of the estate or owing to part of the estate not having been got in. The legacy became the property of the legatee upon the death of the testator, though he might not, for some reason, obtain the receipt of it till long after. When once it became the absolute property of the legatee, that is equivalent to saying that it must be provided for; and the residue is only what remains after making such provision. It does not for all purposes cease to be part of the testator's estate until the executors admit assets and appropriate and pay it over; but that is merely for their convenience and that of the estate. The

rights as between the particular legatee and the residue are fixed at the testator's death.

At the end of his judgment he says (*ibid.*, 243):

> In the present case we think that the Attorney-General must succeed, not on the ground that there is such a general charitable intention that the fund should be administered *cy pres* even if the charity had failed in the testator's lifetime, but because, as the charity existed at the testator's death, this legacy became the property of that charity, and on its ceasing to exist its property falls to be administered by the Crown, who will apply it, according to custom, for some analogous purpose of charity.

Though I admit fully that that was a case in which the legacy had not been paid, not because it ought not to have been paid according to the terms of the disposition, but for some reason connected with the administration of the estate, yet I think that case is a decision that the question whether or not the charity or the charitable purpose lapses has to be ascertained at the moment when the charity trustees become absolutely entitled to the legacy, that is to say, at the moment of the testator's death and not at the moment when it becomes payable to them, which, of course, in the case of a future legacy is a future time. Even if I am wrong on this point and if the proper time to test the question of impracticability is the date of the death of the tenant for life, which was the point of time at which the legacy became payable according to the true construction of the will, namely, Nov. 7, 1944, I am by no means satisfied that the charitable disposition has become impracticable. That is, of course, a question of evidence. I need not go through it all because, as I have already indicated, my view is that the future of this area is still undecided, and it is not possible to say at present how far the trust is practicable and how far impracticable. Therefore even if, as a matter of law, I ought to test the matter as it stood on Nov. 7, 1944, I should not be prepared as a matter of fact to hold that this trust was then impracticable.

Accordingly, in my judgment, this is a valid and effective charitable disposition. I am absolved from the necessity of pursuing the case any further because counsel for one of the trustees of the church, representing all of them, and the ATTORNEY-GENERAL are in agreement that I should direct a scheme. In so doing I am not expressing any opinion on the question whether, if the trustees of the church had chosen to resist the ATTORNEY-GENERAL, they could or could not successfully have done so on the facts disclosed in this case.

Declaration accordingly. Matter referred to chambers for settlement of a scheme. Costs out of the estate in due course of administration.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Pearce & Major*, Plymouth (for the plaintiff); *Law & Worssam*, agents for *Spear & Sons*, Plymouth (for the first defendant, trustee of the church); *Billinghurst, Wood & Pope* (for the second defendant, representing all legatees except trustee for church); *the Treasury Solicitor* (for the ATTORNEY-GENERAL).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

NAAMLOOZE VENNOOTSCHAP BELEGGINGS COMPAGNIE "URANUS" v. BANK OF ENGLAND AND OTHERS.

Affirmed. C.A. [1948] 1 All E.R. 465.

CHANCERY DIVISION (Wynn-Parry, J.), February 3, 1948.]

Practice—Costs—Security for costs—Order against defendant—Plaintiff and defendant out of jurisdiction—Plaintiff ordered to give security.

In an action to decide the ownership of certain bearer bonds, it was discovered by the plaintiffs, a Dutch company incorporated out of the jurisdiction, that one of the defendants was in effect agent for a Dutchman and a Dutch charity, both resident out of the jurisdiction, and on the plaintiff's volition these parties were joined as defendants. The two new defendants applied for security for costs, which was ordered by the master, and thereupon the plaintiffs asked that the new defendants should also give security as being persons out of the jurisdiction. This the master also ordered. On appeal by the new defendants:—

HELD: it could not be accepted that, where the plaintiff and one or more defendants were resident out of the jurisdiction and such defendant or defendants were granted an order for security of costs, it was only equitable that the plaintiff should himself be given such an order, and, therefore, the general rule being that a defendant should not be ordered to give security except in exceptional circumstances, *e.g.*, where he is in the position of plaintiff through having filed a counterclaim, the plaintiff's application should have been dismissed.

Observations of STIRLING, J., in *Re Compagnie Generale d'Eaux Minerales* A *et de Bains de Mer* ([1891] 3 Ch. 451, 458), *considered.*

[AS TO SECURITY FOR COSTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 64-68, para. 108; and FOR CASES, see DIGEST, Practice, pp. 903-915, Nos. *4428-4583.*]

Case referred to:

(1) *Re Compagnie Generale d'Eaux Minerales et de Bains de Mer*, [1891] 3 Ch. 451; 60 L.J.Ch. 728; 40 W.R. 89; 43 Digest 196, *437*.

B PROCEDURE SUMMONS.

The plaintiffs, a foreign company incorporated out of the jurisdiction, having been ordered to give security for the defendants' costs, applied that those defendants, who were also resident out of the jurisdiction, should give security for costs. On appeal from the master, WYNN-PARRY, J., dismissed the application. The facts appear in the judgment.

C *C. A. Settle* for the plaintiff.

J. H. A. Sparrow for the defendants.

WYNN-PARRY, J.: The plaintiff is a foreign company incorporated out of the jurisdiction. The defendants are (*a*), the Bank of England, (*b*), Baring Bros. & Co., Ltd., (*c*), the Swiss Bank Corporation, and (*d*) and (*e*), a Dutchman and a Dutch charitable body, both resident out of the jurisdiction. The action is D brought by the plaintiffs to determine the ownership of a number of bearer bonds of 4 per cent. British Funding Loan, 1960/1990. I am told that difficulties have arisen through the purchase of certain of these bonds by the two Dutch defendants in Amsterdam in 1940, at which date they were, under the trading with the enemy legislation, to be regarded as enemies. I am also told by counsel that, owing to the complication which has arisen in this and similar matters, a decree has been promulgated in Holland pursuant to which the bonds in suit E are under the control of the competent Dutch court, and that in due course, subject to any judgment affecting the matter which may be made by this court, the fate of the various bonds will be decided in Holland. So it appears that the subject-matter of this action is not in jeopardy.

The two Dutch defendants took out a summons asking that the plaintiffs be ordered to give security for costs. The master made an order directing that F security should be given, and the correctness of that course is not disputed by the plaintiffs. The plaintiffs, however, then asked that the defendants in question should themselves be directed to give security for costs, and on that application also the master directed that security should be given. It is of that part of the master's order that complaint is made by these two defendants. These defendants were brought into the action after the issue of the writ when it was discovered that Baring Brothers & Co., Ltd., were not themselves bene- G ficially interested in the bonds, but were, in effect, acting as agents for the defendants in question. These defendants were added entirely on the volition of the plaintiffs, and not at their own request nor that of any of their co-defendants. It is admitted by counsel for the plaintiffs that, if the defendants had not asked for security for costs, he would not, on behalf of the plaintiffs, have been in a position himself to ask for security, but he argues that, as the defendants did take the step of asking for security for costs, it is only equitable H that an order should be made against them ordering them in their turn, as persons out of the jurisdiction, to give security for costs. I am unable to follow this argument. It is based on a few words in a discussion as to costs appearing at the end of the report of *Re Compagnie Generale d'Eaux Minerales et de Bains de Mer* (1). In that case, in which there was a motion to rectify the Register of Trade Marks, and both the applicant and the respondent were resident out of the jurisdiction, counsel for the company said ([1891] 3 Ch. 458): " Before appearing we shall require security for costs." STIRLING, J., said: " You are also out of the jurisdiction. Should it not be mutual ? " The report proceeds: "After some further discussion the matter was ordered to stand over until the second motion day in Michaelmas sittings, the company submitting to the jurisdiction, and security for costs (the amount to be settled in chambers) to be given by both sides."

I am unable to regard that case as constituting an authority for the proposition which is put forward by counsel for the plaintiffs, namely, that where the plaintiff is resident out of the jurisdiction and one or more of the defendants are resident out of the jurisdiction, then notwithstanding that the plaintiff could not, in the first place, ask for an order for security for costs against the defendants, yet, if the defendants apply for an order for security, it is only equitable that the plaintiff should himself be given an order against the defendants for security for costs. The basic principle on which the court proceeds is perfectly plain. In the case of a foreign plaintiff, the order is made to give some modicum of protection to the defendant, whether he be resident in or out of the jurisdiction, in case the action should fail. On the other hand, it is equally matter of principle that a man should not be compelled to provide security for costs as the price of defending himself and his rights. The cases in which the court has intervened to order security as against a defendant are limited to those where, on analysis of the position, it is found that in substance the defendant against whom the order is asked is in the position of a plaintiff. Such a position may occur where the defendant delivers a counterclaim or in cases of interpleader, but I am unable to follow the reasoning involved in counsel's proposition. It appears to me that to accede to it would be to extend very materially the rule which has hitherto been followed by the court, which is that generally a defendant should not be ordered to give security for costs and that he should be ordered to do so only in the exceptional circumstances to which I have referred. Certainly I cannot regard the case to which he has directed my attention as being an authority in support of his proposition, and I can find no good reason for extending the rule to the extent which would be necessary.

Application dismissed with costs.

Solicitors: *H. Davis & Co.* (for the plaintiff); *Slaughter & May* (for the Dutch defendants).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

SIMPER *v.* COOMBS.

[King's Bench Division (Denning, J.), February 2, 1948.]

Landlord and Tenant—War damage—Short tenancy—Determination—Destruction of premises by enemy action—No rent paid by tenant—House rebuilt by owner—Tenant's right to possession—Landlord and Tenant (War Damage) (Amendment) Act, 1941 (*c.* 41), *s.* 1 (2).

In July, 1944, a house, which was let on a weekly tenancy, was demolished by a flying bomb and the tenant went to live elsewhere. No notice to quit was served and no other steps were taken to determine the tenancy, and the tenant, in accordance with the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1 (2), paid no rent. In 1945 and 1946 the landlord rebuilt the house and in April, 1946, he entered into occupation of it himself. In an action for possession brought by the tenant:—

Held: the tenancy of the land, which had never been determined by a notice to quit, had not been determined by either the destruction of the premises, the provisions of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, or the erection of the new house, and, therefore, the tenant was entitled to possession of the new house.

[For the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1 (2) and (3), see HALSBURY'S STATUTES, Vol. 34, p. 157.]

Action for possession of a house brought by the tenant against the landlord. The house had been demolished by a flying bomb, but later it was rebuilt by the landlord who went into occupation of it. Denning, J., gave judgment for the tenant. The facts appear in the judgment.

C. L. Henderson, K.C., and *Fay* for the tenant.
Lloyd-Jones for the landlord.

DENNING, J. : Early in 1941 the tenant, Mrs. Simper, was bombed out of a house near Victoria Docks, London. She then took the tenancy of 47, Danson Lane, Welling, from May 10, 1941. The rent was 25*s.* a week, and she paid it regularly until July 15, 1944. The house was then struck by a flying bomb and was practically demolished. Mrs. Simper was injured, and she was taken to a rest centre and later to the North of England where she was under medical treatment. Eventually she returned to Welling and was accommodated in a requisitioned house. Throughout this time she paid no rent for the house in Danson Lane, being exempted from doing so by s. 1 (2) of the Landlord and Tenant (War Damage) (Amendment) Act, 1941. She hoped, however, to resume her tenancy of the house, which the landlord had begun rebuilding in 1945, but she did not succeed in doing so because as soon as it was rebuilt, on Apr. 18, 1946, the landlord himself occupied it. The tenant now brings this action claiming that her weekly tenancy has never been determined and that she is still the tenant of the premises.

The position at common law is plain. She had a contractual tenancy, and that tenancy has never been determined by due notice to quit. It, therefore, continues in existence. The destruction of the house by a bomb did not determine the tenancy. It is well settled that the destruction of a house does not by itself determine the tenancy of the land on which it stands. That was realised at the beginning of the recent war, and so in the Landlord and Tenant (War Damage) Act, 1939, there was a number of elaborate provisions dealing with the position when houses were damaged by enemy action, and an elaborate system was prescribed by the Act whereby a tenant could give a notice of disclaimer, which, if accepted, would mean the surrender of the lease disclaimed, or a notice of retention. If he gave a notice of retention, there was no rent payable while the house remained unfit for occupation, but he still remained tenant. He retained the land. The Act of 1939 did not work very well in regard to short tenancies because tenants of houses let at weekly rents knew nothing about notices of disclaimer or notices of retention, so the legislature intervened on their behalf and, by the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1 (2) and (3), in effect treated tenants on short tenancies as having given notice of retention. Those sub-sections provide that no rent is payable in respect of a period during which the house is unfit for occupation and unoccupied and that a proportionate rent is payable if the house is partly fit for habitation and that part is occupied by the tenant. I am quite satisfied that the Act does not determine the tenancy. No doubt, the landlord still has the contractual right to determine the tenancy, but the only power given by the Act to determine short tenancies is that conferred by s. 1 (6), which does not apply in this case.

The result is that there has been nothing at common law to determine the tenancy. There has been no notice to quit. The destruction of the premises is not sufficient, and the Landlord and Tenant (War Damage) (Amendment) Act, 1941, does not determine the tenancy. The tenancy, therefore, remains in being. The fact that a new house has been erected on the site does not make any alteration to the legal position. The cost of the new house has been borne for all practical purposes by the War Damage Commission. It has not fallen on the landlord. That house is substantially the same as the old one. It is annexed to and part of the land which was let under the tenancy, and, therefore, it is now included in the tenancy which has never been determined. The tenant, Mrs. Simper, is still the tenant of the premises, and is entitled to possession of them.

Judgment for possession with costs.

Solicitors : *Freshfields* (for the plaintiff) ; *Dehn & Lauderdale*, agents for *Dehn, Lauderdale & Weedon*, Welling, Kent (for the respondent).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

RALEIGH CYCLE CO., LTD. AND ANOTHER *v.* H. MILLER & CO., LTD.

[House of Lords (Lord Thankerton, Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott), October 14, 15, 16, 22, 23, 24, 27, 28, 30, 1947, February 13, 1948.]

Patents—Infringement—Validity of patent—Novelty dependent on anterior discovery—Ambiguity and obscurity in specification—Indication of inventive step—Width of claim—Limitation of claim by reference to plan.

The appellants discovered that, contrary to general belief, a light receiving only 20 electrical pulses a second and not a minimum of 50 pulses was adequate for the lighting of a pedal bicycle, and they were, therefore, able to produce an efficient dynamo of sufficiently light weight and small size to be fitted to the hub of a bicycle wheel. On Nov. 26, 1935, they applied for a patent and the complete specification was accepted on June 28, 1937. The specification recited that the object of the invention was "an improved electric generator for the hub of a cycle wheel . . . which gives a steady light even at slow speed but which is only driven at the same speed as the cycle wheels . . . The stator may be about 3½ inches diameter and has the same number of poles (20) as the rotary magnet." The claims in the specification were *inter alia* for: (1) "an electric generator for a cycle comprising a multipolar annular permanent magnet and a wound multipolar armature mounted within the hub of the cycle wheel, characterised in that the multipolar permanent magnet is fixed to the wheel hub and that the armature is fixed to the wheel spindle . . . (5) an electric generator for a cycle, constructed, and arranged substantially as herein described, with reference to and as illustrated in the accompanying drawings." The respondents produced an article which was the mechanical equivalent of the appellants' device, and the appellants began these proceedings in respect of an alleged infringement of their patent.

Held: (i) although the inventive step resided in the discovery which the appellants device embodied and not in the arrangement or construction of the apparatus, the article was qualified to rank as a manner of new manufacture within the Statute of Monopolies.

(ii) (Lord Simonds and Lord Normand *dissentientibus*) notwithstanding that there was no clear statement in the specification of the discovery which was the real inventive step, the invention was sufficiently described therein, the description being adequate to enable one with reasonable skill and knowledge in the art to carry the invention into effect and a patentee not being bound to include in his specification a statement of the inventive step.

(iii) (Lord Simonds and Lord Normand *dissentientibus*) on the true construction of the specification, it would be clear to a skilled reader that the "steady light" promised was obtainable with a frequency of 20 pulses a second and that the former minimum standard of 50 pulses was not required, and there was, therefore, no false representation.

(iv) in claim 1 the word "multipolar" meant having not less than 4 poles, and as the meaning was not restricted in the context to show that 20 poles or thereabouts was intended, the claim was bad because its ambit was too wide.

(v) (Lord Simonds and Lord Normand *dissentientibus*) claim 5 was limited in extent by the incorporation therein of the drawings, and was a good, distinct and separate claim, which the respondents had infringed.

Hale v. *Coombes* (1925) (42 R.P.C. 328), *applied.*

Tucker v. *Wandsworth Electrical Manufacturing Co., Ltd.* (1925) (42 R.P.C. 531), *distinguished.*

[As to Ambiguity and False Suggestion in Specification, see HALSBURY, Hailsham Edn., Vol. 24, pp. 629-633, paras. 1182-1189; and for Cases, see DIGEST, Vol. 36, pp. 613-622, Nos. *780-908.*]

Cases referred to:

(1) *Hale* v. *Coombes,* (1925), 42 R.P.C. 328; 36 Digest 635, *1046.*

(2) *Tucker* v. *Wandsworth Electrical Manufacturing Co., Ltd.,* (1925), 42 R.P.C. 531; 36 Digest 587, *477.*

(3) *Hatmaker* v. *Nathan (Joseph) & Co., Ltd.*, (1919), 36 R.P.C. 231; 36 Digest 613, *789*.
(4) *Re Alsop's Patent*, [1906] 1 Ch. 85; 75 L.J.Ch. 134; 94 L.T. 38; 23 R.P.C. 65; *subsequent proceedings*, (1907), 24 R.P.C. 733; 36 Digest 648, *1213*.
(5) *British Ore Concentration Syndicate, Ltd.* v. *Minerals Separation, Ltd.*, (1909), 27 R.P.C. 33; 36 Digest 614, *795*.
(6) *Electric and Musical Industries, Ltd.* v. *Lissen, Ltd.*, (1938) 4 All E.R. 221; 56 R.P.C. 23; Digest Supp.
(7) *British Thomson-Houston, Ltd.* v. *Corona Lamp Works, Ltd.*, (1921), 39 R.P.C. 49; 36 Digest 839, *3261*.
(8) *No-Fume, Ltd.* v. *Frank Pitchford & Co., Ltd.*, (1935), 52 R.P.C. 231; Digest Supp.
(9) *De Havilland's Application*, (1931), 49 R.P.C. 438.
(10) *J. & S. Eyres, Ltd.* v. *John Grundy, Ltd.*, (1939), 56 R.P.C. 253; Digest Supp.
(11) *Natural Colour Kinematograph Co., Ltd.* v. *Bioschemes, Ltd.*, (1915), 32 R.P.C. 256; *affg.* S.C. *sub nom. Re Smith's Patent*, (1914), 31 R.P.C. 237; 36 Digest 615, *804*.
(12) *Simpson* v. *Holliday*, (1865), 5 New Rep. 340; 12 L.T. 99; *subsequent proceedings*, (1866), L.R. 1 H.L. 315; 36 Digest 615, *808*.
(13) *Vidal Dyes Syndicate, Ltd.* v. *Read Holliday & Sons*, (1912), 29 R.P.C. 245; 36 Digest 617, *833*.
(14) *Norton & Gregory, Ltd.* v. *Jacobs*, (1936), 54 R.P.C. 58; *affirmed*, (1937), 54 R.P.C. 271; Digest Supp.
(15) *Hattersley (George) & Sons, Ltd.* v. *Hodgson (George), Ltd.*, (1906), 23 R.P.C. 192; 36 Digest 640, *1100*.
(16) *Turner* v. *Bowman*, (1924), 42 R.P.C. 29; 36 Digest 560, *248*.
(17) *Benton & Stone, Ltd.* v. *Denston (T.) & Son*, (1925), 42 R.P.C. 284; 36 Digest 770, *2500*.
(18) *Submarine Signal Co.* v. *Hughes (Henry) & Son, Ltd.*, (1931), 49 R.P.C. 149; Digest Supp.

APPEAL by patentees from an order of the Court of Appeal, dated June 4, 1946 (see 63 R.P.C. 113) affirming, on different grounds, a decision of VAISEY, J., made on Jan. 17, 1946, in an action for an alleged infringement of a patent brought by the appellants against the respondents. VAISEY, J., held the patent to be invalid for want of subject-matter, and the Court of Appeal, while finding that there was an inventive step, decided that the patent was invalid on the ground of "failure of consideration" in the specification. The House of Lords now unanimously held four of the five claims in the specification bad, but by a majority held the final claim to be good, and remitted the matter to the Chancery Division to consider what relief should be given in respect of the infringement. The facts appear in the opinions of LORD SIMONDS LORD NORMAND, and LORD MACDERMOTT.

Heald, K.C., *Drewe, K.C.*, and *Marlow* for the appellants.
Shelley, K.C., *Aldous* and *Parmiter* for the respondents.

The House took time for consideration.

Feb. 13. **LORD THANKERTON:** My Lords, I have had the privilege of considering the opinions about to be delivered by my noble and learned friends, and I have found that the views about to be expressed by LORD MORTON OF HENRYTON and LORD MACDERMOTT so fully represent the views entertained by me that, except with regard to the validity of claim 5, as to which I will add some observations, I am content to express my concurrence in their views.

A close consideration of *Hale* v. *Coombes* (1), and *Tucker* v. *Wandsworth Electrical Manufacturing Co., Ltd.* (2), satisfies me that there was no difference of principle. The decision of this House in *Hale's* case (1) was before the Court of Appeal in *Tucker's* case (2). The claim must define the scope of the monopoly, but it is legitimate to incorporate as part of the claim passages from the body of the specification. Reading those passages into the claim, one must still find that it answers to the test of definition of the scope of the monopoly. For this purpose consideration must be had of the particular claim in the specification which is before the court of construction. Decisions in other cases on other specifications, however, may be so closely analogous as to be of assistance. The question as to the proper construction of claim 5 in the present case depends on the words of incorporation, *viz.*, "constructed and arranged substantially as herein described with reference to and as illustrated in the accompanying drawings." The description suffers from the same indefiniteness of the word "multipolar" as has led to the rejection of claim 1—which does not resort to incorporation—but the drawings show a magnet and stator both with 20 poles. The description refers to the drawings as "of one example of generator," and the crucial question of construction is whether the incorporating words of claim 5 do or do not limit the claim to the 20 pole generator shown in the drawings. The point is a narrow one, but I am of opinion that, on a fair construction, the incorporating words do so limit the claim as to make the preferred embodiment shown in the drawings into "the example." The terms of claim 2 in *Tucker's* case (2) are not identical. The phrase "with reference to" did not appear, and, in my opinion, this difference is not negligible. I should add that I am in agreement with my noble and learned friends in feeling a preference for Lord Tomlins' view in *Tucker's* case (2). I concur in the motion about to be proposed by Lord Morton of Henryton.

LORD SIMONDS: My Lords, this appeal is said by counsel for the appellants to raise questions of novelty and importance in the law relating to patents, and it is true that the argument has ranged over a wide field. But, having given the matter the best consideration that I can, I come to the conclusion that the substantial question is whether the specification under review is (to use the words of Alderson, B., so often cited in this case) "fair, honest, open and sufficient," words that are apt to describe the obligation of the patentee in relation both to the body of the specification and to the claims. With much that was said on behalf of the patentee I am in sympathy. The art of drafting specifications is a difficult one and the court should not be astute to find a way of defeating a patent. When this has been said, however, it still remains that it is imperative in the public interest that the now statutory prescription should be observed, that the nature of the invention and the manner in which it is to be performed should be sufficiently and fairly described and ascertained, and (equally pertinent to the present case) that the scope of the monopoly claimed should be sufficiently and clearly ascertained. It will in this case, I think, be found that it is from the failure to observe these requirements that much controversy, otherwise unnecessary, has arisen.

My Lords, the decision of this case fortunately does not involve the consideration of any questions of scientific difficulty and it is perhaps surprising that the evidence should fill some 300 pages of typescript, to little of which counsel thought it necessary to refer your Lordships. The letters patent in question, No. 468, 065, were, on Nov. 26, 1935, granted to the appellants for an invention entitled "Improvements in Electric Generators" and it is convenient before considering the specification to say a few words about the state of the art at that date. The title does not indicate that the patent relates or is intended to relate to electric generators of the type used to generate current for the purpose of providing light for a pedal cycle, but I will assume that that is the intended scope of the monopoly. For many years before the date of the patent small dynamos had been used for providing light on bicycles and in practice such dynamos had been so fixed on the bicycle that a small pulley-like wheel or knob on an extension of the rotor axis was rotated by contact of its circumference with the rim or tyre of the wheel, thus producing a considerable gearing effect. The disadvantages of such dynamos were obvious, in particular, the friction set up by the operation of the pulley wheel on the tyre or rim caused a braking action which made the cyclist's task a harder one, but, however disadvantageous, this device was deemed necessary for this and no other reason, that it was assumed that without such gearing a sufficient output of current to produce a steady light in the bicycle lamp could not be obtained. This assumption itself rested on a further assumption that a frequency of something like 50 pulses of electricity a second was necessary for the provision of a steady light. Since a four pole dynamo with direct drive between its rotating shaft and that of the wheel of a normal bicycle would give approximately four pulses per second at a pace of four to five miles an hour, it was necessary to introduce a gear of 12½ : 1 to obtain the requisite 50 pulses. I have deliberately adopted an example which assumes a four pole dynamo, because the word "multipolar" which occurs so often in this case means "having four poles or more." These being at the date of the patent the commonly accepted assumptions, the patentee made a discovery which led directly to the invention, the subject of his letters patent. He discovered that the assumption that a frequency of

50 pulses per second was necessary to produce a steady light for a cyclist was quite wrong and that a much lesser frequency was adequate. The material fact in determining whether a light is adequate is its steadiness rather than its brightness and it was previously considered that it flickered too much and was not sufficiently steady if the frequency was less than 50 pulses a second. The patentee discovered that from the point of view of the cyclist there was a sufficiently steady light reflected on the road if it had 20 pulses a second. From the point of view of the pedestrian or other traveller on the road there was no harm in an unsteady light. It gave him as good a warning as a steady one. The patentee, having made this discovery, proceeded to make an article which gave effect to it. It achieved, under the name of a "Dynohub," an immediate commercial success, and, though, I think, no great ingenuity was needed for the construction of the article, I am not prepared to dissent from the view taken by the Court of Appeal that here there was subject-matter to support a patent. The discovery was the inventive step which gave to the invention the necessary merit.

I must now turn to the specification to see what, on its true construction, the patentee promises and what is the monopoly that he claims. Before doing so I observe that the case has two features : (*a*) it is one of unusual simplicity in which there can be little excuse for any obscurity, and (*b*), while, no doubt, it is not strictly necessary to describe the inventive step, it may be difficult without doing so satisfactorily to state the nature of the invention and the manner in which it is to be performed and to define the area of monopoly. It is conspicuously due to this that the patentee has found himself in difficulty.

Lord Greene, M.R., has submitted the specification to a critical examination (63 R.P.C. 132 *et seq.*). I find myself so fully in agreement with it that I do not think it necessary to do so again. I would only emphasise a few points. I cannot for myself entertain any doubt on a fair reading of the body of the specification that in it the patentee is telling the world that he has invented an improved electric generator and that the improvement consists in an improved construction and arrangement of parts which will give a steady light even though the generator is only driven at wheel speed. Nor can I doubt, since he is presumed to be addressing himself particularly to the manufacturer or workman skilled in the art, that, in promising a steady light, he must be taken to mean that which they had always regarded as a steady light, *i.e.*, a light produced by at least 50 pulses of current per second. They did not know that 20 pulses per second would provide sufficient steadiness. If they had known, the discovery would not have been his. Nor does he tell them this essential fact, the reason assigned for that omission being that he was under no obligation to mention the "inventive step." It was urged on your Lordships that, inasmuch as in describing the details of "one example of generator made in accordance with the invention" he says that the "'magnet' may conveniently have 20 deep poles" and later on says that "the stator may be about 2½ inches diameter and has the same number of poles (20) as the rotary magnet," he must be read as meaning by "steady" light a light with a degree of steadiness different from that hitherto postulated, for no one, it is said, who was skilled in the art could imagine that an apparatus consisting of a magnet and an armature with 20 poles each would produce a light equivalent in steadiness to that produced by a frequency of 50 pulses per second.

If, my Lords, it was the function of a specification not to enlighten but to puzzle and perplex the reader, and if its obscurity could be justified by the fact that it contained a clue which might lead to its solution, I should be willing to accept this argument, but, with Lord Greene, M.R., I reject it. To the skilled and the unskilled reader alike the specification is a plain promise that by the improved construction and arrangement of parts his generator will give the steady light which was postulated as the minimum necessary for the cyclist. If it means anything else, it is not in the words I have already cited "fair, honest, open and sufficient." If this is, as I hold it clearly is, the promise of the specification, equally clearly it has not been fulfilled. For what is new is not the provision of a steady light in the sense in which that expression was used in the art by means of an improved construction and arrangement, but the provision of a light, the steadiness of which owes nothing to any improvement of construction or arrangement, but which is adequate for its purpose only because a lesser frequency than hitherto supposed has been discovered to be adequate. I will deal later with the bearing of this on the objection of ambiguity. At the moment I am concerned with the promise and the failure to perform it. Here again I find myself in complete agreement with Lord Greene, M.R., with whose judgment on this point the other members of the Court of Appeal agreed. As he justly observes, failure to fulfil the promise of a specification appears sometimes to have been regarded as a separate head of objection, sometimes as a form of misrepresentation, sometimes as a lack of utility. If the promise is not fulfilled, the consideration fails. That is only another way of saying that there is lack of utility because the use which is promised is not achieved, and, if so, the patent may be regarded as having been obtained on a false suggestion or misrepresentation. It is just this comment which the editor of Terrell on Patents (8th ed., p. 110) makes (and, I think, rightly makes) on *Hatmaker* v. *Joseph Nathan & Co., Ltd.* (3), a case in which the observations of Parker, J., in *Re Alsop's Patent* (4), were approved in this House. In the latter case the judge was considering whether there was a failure of consideration in that the promise of the specification was not fulfilled, a question which arose on a plea of inutility. It was urged on your Lordships that in the present case there was no failure of consideration, and further that, if there was any misrepresentation, it was not a material one. In support of this plea it was pointed out that the commercial success of the patented invention left its utility in no doubt, but, as Lord Greene, M.R., has pointed out, this type of performance is something qualitatively different from that promised. The promise is of one thing, the performance of another. The consideration for the grant (the *quid pro quo*) is the utility of that which is promised. It is irrelevant that, if some other promise had been made, it would be found that that promise had been fulfilled and that the utility of the result could not be denied.

Therefore, my Lords, I should on this short ground dismiss this appeal, but since I understand that not all your Lordships take the same view, it is right that I should express my opinion on the other questions which are involved in the appeal. Closely interwoven with the matter that I have been discussing is the question of ambiguity and, before I come to the claims, where the essential question arises on the sufficient ascertainment of the scope of the monopoly, I must say something about the body of the specification. I do not wish to qualify in any way the principles of construction which prevail in this branch of the law and I would repeat that a greater degree of clarity than the subject-matter reasonably admits is not to be demanded of the patentee, but it appears to me that this specification falls far short of the standard that may fairly be demanded and I can only attribute to the proper zeal of the advocate the plea that it represents a fair sample of the art of draftsmanship. That such a plea can be advanced makes it the more imperative that this House should reassert the necessity of candid and careful statement. In *British Ore Concentration Syndicate, Ltd.* v. *Minerals Separation, Ltd.* (5), Lord Halsbury, L.C., said (27 R.P.C. 47) :

> . . . even if negligently or unskillfully he [the patentee] fails to make distinct what his invention is, I am of opinion that the condition is not fulfilled and the consequence would be that the patent would be bad.

Such citations might be multiplied. Applying them to the present case, I find in the specification statements so well calculated to mislead, if the invention rests, not on improved construction but on the discovery that a lower standard of steadiness of light suffices, that I should on this ground also hold the patent to be invalid.

I now examine the further question, whether the specification sufficiently and clearly ascertains the scope of the monopoly claimed. I understand that your Lordships are agreed in holding that claims 1, 2, 3 and 4 are invalid because this condition is not satisfied in regard to them. With this view I agree, but will add a few words of my own. I need not repeat what was said in this House, and, particularly, by Lord Russell of Killowen, in *Electric and Musical Industries, Ltd.* v. *Lissen* (6). In truth, he said nothing new, but his long experience in the trial of patent actions lends emphasis to the importance which he attached to the rules for the construction of claiming clauses which he there repeats.

In the present case claim 1 is for "an electric generator for a cycle comprising a multipolar annular permanent magnet and a wound multipolar armature mounted within the hub of the cycle wheel, characterised in that the multipolar permanent magnet is fixed to the wheel hub and that the armature is fixed to the wheel spindle." I omit the concluding words of the claim which appear to add nothing. The only word in this claim which, perhaps, requires explanation is "multipolar." This, as I have already said, is a technical word meaning having four poles or more. For the rest, the claim is clear and unambiguous. Recourse to the body of the specification for explanation, qualification, or extension is neither required nor is legitimate. What, then, is there in the claim which even suggests that the area of monopoly is that which in the specification may be hinted at, but is not clearly stated, *viz.*, a generator for generating electricity for a bicycle lamp having a permanent magnet with 20 poles or thereabouts and an armature with 20 poles or thereabouts ? It was contended for the appellants that the words "for a cycle" when fairly construed meant "suitable for providing an adequately steady light for a cycle" and that, those words having been read into the claim, the word "multipolar" must then be read, not as meaning "having four or any greater number of poles," but as meaning "having a sufficient number of poles to give an adequately steady light," a number which the skilled workman would after trial and presumably practical experiment on a cycle ascertain to be 20 poles or thereabouts. This contention rests on a misapplication of the principle, which no one would dispute, that the inventor is not required to relieve the competent workman from an obligation to take trouble. The drawings annexed to a specification are not working drawings. The description is sufficient if the competent workman with the knowledge of the art which he then has understands what is intended and can carry it out. It was from this point of view that the well known *Corona* case (*B.T.H.* v. *Corona Lamp Works, Ltd.* (7)) was pressed on the House, and it was suggested that LORD GREENE, M.R., had fallen into error in not regarding it. To me it seems that the *Corona* case (7) is remote, indeed, from the present one. There, to the objection that the word "large" was a relative one and so vague that the ambit of monopoly was not clearly defined, the answer was made (I take the words of LORD CAVE (39 R.P.C. 80), but similar citations could be taken from the speeches of the other learned Lords) :

> At the date of the patent, every practical lampmaker had his table of dimensions of filaments . . . and he knew perfectly well what thickness of filament was required in order with a given voltage to produce in a vacuum bulb the desired candle-power. Indeed, when once the voltage and candle-power were ascertained, the thickness of the filament was fixed for him.

In my opinion, LORD GREENE, M.R., rightly disregarded a case which bears no resemblance to the present one. For here the word "multipolar," with which the word "large" in the *Corona* case (7) is to be compared, is of a vagueness which cannot be remedied by the skilled workman's knowledge at the date of the patent. On the contrary, it must appear to him a mystery. His knowledge was that a frequency of 50 pulses was necessary. He is told in the body of the specification that owing to an improved construction and arrangement 20 poles on the magnet and 20 poles on the armature will be found a convenient number. With no explanation why this should be so to assist him he is left in the dark whether any number in the whole range of multipolarity from four to infinity is within the scope of the monopoly. I would adopt the words of ROMER, L.J., in *No Fume, Ltd.* v. *Frank Pitchford & Co., Ltd.* (8) (52 R.P.C. 243) : "the patent will be a public nuisance, hindering and embarrassing those persons engaged in the particular art, from carrying on their legitimate trade or business." It follows that claim 1 is bad, and with it fall claims 2, 3 and 4.

I turn now to claim 5 which to me presents greater difficulties than any other part of this case. It is : "An electric generator for a cycle, constructed, and arranged substantially as herein described, with reference to and as illustrated in the accompanying drawings." I will ignore the fact that the punctuation (*i.e.*, commas after "cycle" "constructed" and "described") is not calculated to assist in the interpretation of this claim. LORD GREENE, M.R., did not find it necessary to deal with this point, nor would it be necessary for me to do so but for the fact that the majority of your Lordships do not agree in affirming his view that the whole patent is invalid for the reasons already given.

Somervell and Cohen, L.JJ., both thought the claim was not a limited, but a wide, claim and fell with claim 1. Cohen, L.J., in particular, founded his opinion on the decision of the Court of Appeal in *Tucker* v. *Wandsworth Electrical Manufacturing Co., Ltd.* (2), in which case claim 2 was for: "An electric switch, substantially as herein set forth and illustrated" and it was held that the claim was not confined to the particular kind of switch, *viz.*, a tumbler switch, which was shown in the drawing, but was a wide claim which fell with claim 1. It was contended by counsel for the appellants that *Tucker's* case (2) was distinguishable, or, if not, was wrongly decided. There is this, at least, to be said for his contention, that, as I read the authorities, there has been a general tendency to give to such a claim a limiting effect, because (if for no other reason) it becomes merely otiose if it is as wide as the main claim. The difficulty, and, indeed, the artificiality, of the problem is indicated by the decision of the Comptroller in *De Havilland's Application* (9). It cannot, I think, commend itself to your Lordships that monopoly rights should depend on such fine distinctions of language as he on a review of the cases finds decisive. Yet I do not find it easy to supply a better test by which the question can be determined. Such a claim must, no doubt, be construed in the light of the document of which it forms a part. That, again, is a generalisation which is unlikely to shed any light, though it may supply a clue to the decision in *J. & S. Eyres, Ltd.* v. *John Grundy, Ltd.* (10). In the difficulty in which I find myself I am tempted to say that such a claim, the width or narrowness of which lies in such doubt, is necessarily void for ambiguity. I do not think it desirable to go so far, and will be content to say that, where, as here, the description is by reference to the accompanying drawings and the relevant figure is described as "one example" of generator made in accordance with the invention, and, where, further, there is nothing in the claim to indicate what is the novelty that is claimed so as to define the scope of the monopoly, I find myself thrown back to the general body of the specification and to the main claim and cannot hold claim 5 to be an independently valid claim. This is, I think, in accordance with the reasoning of Sargant, L.J., in *Tucker's* case (2), and I do not find in *Hale* v. *Coombes* (1) any decision of principle which compels me to a different view.

A last question arises, but arises only if a majority of your Lordships hold that, claim 1 being invalid, claim 5 is nevertheless valid. This question is whether claim 5 has been infringed. It is very possible that, if claim 1 were valid, your Lordships would entertain little doubt it had been infringed. As I read the judgments in the courts below, this was the view there taken. It was not necessary for either the trial judge or for the members of the Court of Appeal to consider the question on the assumption that only claim 5 was valid, but that is now the question and it has for me an air of unreality, for, as I have already said, I do not know what is the scope of the monopoly claimed by claim 5. It becomes, however, necessary to refer to claim 4 which is: "An electric generator for a cycle according to claims 1, 2 or 3 characterised in that the stator windings are of stepped form so as to accommodate the maximum possible size of windings relative to the space available between the armature poles." This particular characterisation has been already described in the body of the specification and is embodied in the accompanying drawings. I cannot but assume that it is at least one of those "details of the improved electric generators" in which it is said that the invention still further resides. Now, the respondents' alleged infringing article omits this feature, and for this and other reasons they deny infringement. The appellants retort that there is no importance whatever in the stepped form of stator windings and that the variant adopted by the respondents is not a substantial one, but, my Lords, claim 5, if it is a narrow one, beyond all question includes claim 4. The patentee has himself asserted by that claim that this form of stator winding is an integral part of the combination. I have no reason to suppose that it is less important than any other integer in the combination, and I cannot accept his present plea that a combination omitting a part, which he himself has gone out of his way specifically to claim, can be regarded as his combination. It is, I think, impossible for the court to ignore the claim that he has made and assume that the omission of the integer is an unsubstantial variant. It might be otherwise if the main claim stood or if the patentee in his so-called "preferred embodiment" had specified the area of his claim. The inherent vice of this sort of claim is thus clearly exhibited, for in effect the court is left in just that state of uncertainty which commonly existed before it became necessary to state in a claiming clause the scope of the monopoly claimed. I would conclude that if, contrary to my own opinion, claim 5 is held to be valid, this appeal must still be dismissed upon the ground that the appellants have not proved infringements of that claim.

LORD NORMAND: My Lords, the appellants' Dynohub generator for
A lighting pedal bicycle lamps was the fruit of the inventors' discovery that a light receiving twenty pulses per second was a steady enough light from the point of view of the bicyclist in the saddle looking at the road before him. It had previously been supposed that a light receiving less than about fifty pulses per second would be too unsteady. The manufacturers were trying to provide the best form of generator which would give a sufficiently steady light when the bicycle was ridden at slow speed, that is, about four to five miles per hour.
B At that speed the ordinary bicycle wheel revolves once per second, and if the generator were to revolve at the same speed it must have a fifty pole magnet to produce the fifty pulses per second which were deemed necessary. Such a generator was in size and weight wholly unsuitable. What was then generally used was a generator with a four pole magnet and a four pole armature, but for such a generator to produce fifty pulses of light per second it was necessary
C that the rotor should make thirteen revolutions or thereby a second. A considerably higher rate of revolution was in practice obtained by fixing on an extension of the generator's rotor axis a small pulley wheel which was driven, when required, by contact with the tyre of the bicycle wheel. The normal diameter of a bicycle wheel may be taken to be about twenty-six inches and a pulley with a diameter of one inch could thus be driven at a speed of twenty-six revolutions per second when the bicycle was ridden at a speed of four to
D five miles per hour. But the tyre-driven generator had practical disadvantages. It caused a braking action on the wheel; it was easily damaged by grit and mud; it was apt to slip if the tyre was wet or coated with slush. Yet there were many such devices on the market and they were largely used by cyclists, so great was the advantage of a lamp lit by a generator over other forms of bicycle lamps. All efforts to devise an improved generator which would avoid the disadvantages of the tyre-driven type were without real result until the appellants'
E Dynohub was made, though for four years before the date of the appellants' application a material was known which made it possible to make a twenty pole generator suitable in weight and size to be built into the hub or into an extension of the hub of a pedal bicycle. One reason for this lack of progress was the idea, fixed in the minds of the manufacturers and others concerned in this art, that a light with fifty pulses per second was essential. Accordingly,
F when hub generators were suggested—and there were some paper inventions of this sort—they contained gearing so that the rotor revolved at a much higher speed than the hub of the bicycle wheel. But the complications of the gearing prevented these generators from having any success. The inventor's discovery that a light which received only twenty or thereby pulses per second would suffice was, therefore, important, and once it was made it was not difficult for the inventor to perceive how it might be applied in the industry and to design a
G generator with a twenty pole magnet and a twenty pole armature built in the hub so that the rotating parts of the generator revolved with the revolving hub and the stator was fixed to the axle. The device itself was merely a combination of known integers, a small generator and a bicycle hub, but it did produce a new and useful result and it has in consequence achieved commercial success.

The respondents have attacked the appellants' specification on many grounds.
H Some were abandoned before the case reached your Lordships' house, and of those which were urged upon your Lordships some present little difficulty. The issue of subject-matter was decided against the appellants by VAISEY, J., and in favour of the appellants by a unanimous finding of the Court of Appeal. The respondents have now appealed against that finding. I am of opinion that it should be affirmed. I respectfully adopt the passage in the judgment of SOMERVELL, L.J., in which he disposed of the contention that there was no inventive step. If that step is once established, and if the patentee has perceived how it can be applied in a manufacturing process and has described

a combination, even if all parts of it are old, by which it can be carried into effect, there is patentable subject-matter. It was said that this invention only differed from previously known devices in that these had gearing while this had none. The omission of a known integer from a combination has as little or as much effect on the issue of subject-matter as the inclusion of a known integer in a combination. The issue here depends on other considerations. I would not belittle the inventive step, and, for my part, I do not well see how to measure inventive ingenuity, but, if the problem had been recognised for some years and if the solution had been sought in vain, though a successful solution would have won for the discoverer a great financial prize, I am willing to think that the inventive step reflected a high degree of ingenuity and that it was less obvious than it afterwards seemed to trade rivals who themselves failed to take it.

A much more difficult question is whether, as the Court of Appeal has held, there has been failure to fulfil the promise of the specification. I find myself only partially in agreement with the Court of Appeal, and as I have the misfortune to differ from the majority of your Lordships, I shall have to deal with this point at some length. The promise is that an electric generator constructed as described, although running at a slow speed, generates a current having a frequency which gives a steady light even at low speeds. The slovenliness which pervades the specification makes its appearance in this sentence, but I think that the meaning is not seriously obscured by the use of " slow speed " in relation to the revolutions of the generator rotor and of " low speeds " in relation to the progress of the bicycle. Nor do I find myself obliged or prepared to read the promise as meaning more than that this generator constructed as described does, in fact, generate a current having a frequency which gives a steady light although it is running at a slow speed. I think that the emphasis is on the clause introduced by the word " although," and the repetition of the same idea by the words " even at low speeds " is for the purpose of enhancing this emphasis. I, therefore, respectfully dissent from the Court of Appeal's finding that there was a representation that the particular construction of the generator described is the cause of the steadiness of the light, but on the meaning of the words " steady light " for the manufacturer or workman versed in the art of making generators for lighting bicycles I am at one with the Court of Appeal. It is to such a manufacturer or workman that the patent is addressed, and it is of the essence of the inventive step that a steady light for a bicycle meant for these addressees a fifty pulse light, and that the inventor had found that this was a needlessly high standard. When they read the words " steady light " or " steadiness of light " in the specification, what the words would at once bring to their minds must have been the fifty pulse light of the prior art. Of course, the specification itself might show that the words were used in another sense than that which they had acquired in the art, and it is, therefore, necessary to consider, along with the passage already cited, two other passages in the specification. In the first the patentees state that with electric generators for use on cycles heretofore in use it has been necessary in order to obtain the desired output and steadiness of light for the rotor to be rotated at a considerably greater speed than the wheels of the cycle. Here I have no doubt that the " desired steadiness of light " means the fifty pulse light, and I note the absence of any qualifying or warning words such as " deemed to be requisite." The next paragraph states that the present invention has for its object an improved electric generator for the hub of a cycle and having an improved construction and arrangement of parts, which gives a steady light even at slow speeds but which is only driven at the same speed as the cycle wheels. The sentence is awkward and shapeless. It seems to me that the antecedent of " which " at both places where the word occurs is " generator." I think also that the conjunction " and " when it first occurs is used somewhat strangely to connect " for the hub of a cycle wheel " with " having an improved construction and arrangement of parts." There is nothing in this passage to show the addressee that the steady light referred to is anything else than what he had hitherto regarded as a steady light in this art. It is argued, however, that the addressee, reading the whole specification, would find it said that the generator might conveniently have a twenty pole magnet, and from that he would know that a fifty pulse per second current at a road speed of five miles per hour was an impossibility, and conclude that steadiness of light in the specification had a special meaning. What that special meaning was he would, it was further argued, discover by trying the invention on a bicycle and observing the light on the road before him, but it is no less true that the addressee would find it implied in the specification that any multipolar generator would produce the desired result. Yet multipolar means having four or more poles, and it is clear that a generator with fewer than sixteen poles will not produce a light that is steady in any sense. It may, therefore, be doubted whether the addressee of the specification would discover as easily or as certainly as the appellants suppose that " steady light " was used in a special sense and what that sense was. It is, I think, just as likely that he would have been in great doubt whether there was not a fundamental error in the specification. However that may be, I agree with LORD GREENE, M.R., that the argument put forward by the appellant, if accepted, would result in the re-writing of the specification and not in its interpretation. In *Natural Colour Kinematograph Co., Ltd.* v. *Bioschemes, Ltd.* (11) LORD PARKER said (32 R.P.C. 269) :

> . . . if the specification contains statements calculated to mislead the persons to whom it is addressed, and render it difficult for them without trial and experiment to comprehend in what manner the patentee intends his invention to be performed, these statements may avoid the patent.

That is a principle of wide application, not referable only to insufficient directions for carrying out the invention, and it is pertinent to the present issue. In *Re Alsop's Patent* (4) the same high authority, then PARKER, J., said (24 R.P.C. 752, 753) :

> In considering the validity of a patent for a process, it is therefore material to ascertain precisely what the patentee claims to be the result of the process for which the patent has been granted . . . the utility of an invention depends upon whether, by following the directions of the patentee, the result which the patentee professed to produce can in fact be produced . . . it may well be that an invention, which is void because it does not produce the result, or one of the results, claimed, may nevertheless be useful as producing other results.

In my opinion, these observations apply to this case. The invention has, in fact, produced a useful result, a light steady enough for the bicyclist, but it has not produced what was promised, a light steady in the sense in which the addressee understands steady. In the same case PARKER, J., distinguished the result claimed from useful purposes to which it was claimed the result could be applied. Failure to produce the result claimed involves invalidity. Failure of the promise that the result can be applied to a certain purpose will not invalidate unless there is a misrepresentation so material that it can be said that the Crown has been deceived. In the present case the failure is a failure to produce the result claimed. Counsel for the appellants relied on *British Thomson-Houston, Ltd.* v. *Corona Lamp Works, Ltd.* (7), for the proposition that a relative word such as " steady " may be construed by reference to the knowledge of the expert to whom the specification is addressed. In that case the relative word was " large " in the context " a filament of large diameter." LORD CAVE said (39 R.P.C. 80) of this :

> I agree that, as one element in the combination described in the specification is that the filament used shall . . . be of large diameter, and as " large " is a relative word, some intelligible standard or criterion of largeness must be found in the specification. But it appears to me that such a criterion is to be found in a comparison of the filaments to be used under the patent with those previously in use for a like purpose. At the date of the patent, every practical lamp-maker had his table of dimensions of filaments running from half a mil. up to 10 mils. and beyond ; and he knew perfectly well what thickness of filament was required in order with a given voltage to produce in a vacuum bulb the desired candle-power.

This, so far from helping the appellants, really disposes of their argument, for it treats as the criterion the knowledge which the skilled workman brings to his reading of the specification, not the knowledge resulting from trials which he may be tempted to make in order to clear up something in the specification which contradicts his experience. It is true, as the appellants contended, that a specification should be read as a whole, with intelligence and common sense and the intention of understanding it in a sense which will make it workable, but the patentee cannot rely on the skill and knowledge of the addressee to correct errors or false promises which he has inserted in the specification.

In *Simpson* v. *Holliday* (12) LORD WESTBURY, L.C., said (12 L.T. 99):

> When it is said that an error in a specification, which any workman of ordinary skill and experience would perceive and correct, will not vitiate a patent, it must be understood of errors which appear on the face of the specification, or the drawings it refers to; or which would be at once discovered and corrected in following out the instructions given for any process or manufacture, and the reason is, because such errors cannot possibly mislead. But the proposition is not a correct statement of the law, if applied to errors which are discoverable only by experiment and further inquiry. Neither is the proposition true of any erroneous statement in a specification amounting to a false suggestion, even though the error would be at once observed by a workman possessed of ordinary knowledge of the subject. For example, if a specification describes several processes, or several combinations of machinery and affirms that each will produce a certain result, which is the object of the patent, and some one of the processes or combinations is wholly ineffectual and useless, the patent will be bad; although the mistake committed by the patentee may be such as would be at once observed by an ordinary workman. A

LORD WESTBURY'S judgment was affirmed on appeal (L.R. 1 H.L. 315). In *Vidal Dyes Syndicate, Ltd.* v. *Read Holliday & Sons* (13) FLETCHER MOULTON, L.J., said (29 R.P.C. 271): B

> . . . if, on the proper construction of the specification, the court holds that the patentee has claimed a process which is so dangerous that an expert chemist would avoid it, or even a process which an expert chemist would take to be impossible, the consequence is, not that the patentee is relieved from the consequences of his blunder, but that his patent is invalid—until the specification is duly amended—if the process is in fact impossible, or if he has not given adequate directions how it can be carried out. C

The LORD JUSTICE cited (*ibid.*, 272) the following words of LORD CRANWORTH:

> It may be that in construing a specification the court may sometimes feel justified in understanding the language, not according to its ordinary meaning, but in the mode in which it would be understood by skilled workmen called upon to act according to its direction. But this does not warrant us in giving effect to a specification claiming two things, one practicable, and the other impracticable, because a skilful workman would know that one of them could not be acted upon, and so would confine himself to the other. This would not be to construe a specification according to the language of workmen, instead of according to our ordinary language, but to reject something claimed by the patentee, because a workman would know that it was an impracticable claim. D

In *Norton and Gregory* v. *Jacobs* (14) SIR WILFRED GREENE, M.R., put the same point (54 R.P.C. 276): E

> The fact that a skilled chemist desiring to use the invention would reject certain reducing agents as being unsuitable is one thing; it is quite a different thing to say that a claim must in point of construction be cut down so as to exclude those reducing agents because a skilled chemist would not use them. To adopt the latter proposition would not be to construe the specification but to amend it . . .

Though the observations in the two last cited cases are directed to the construction of claims, they apply with equal force to promises in the specification. I, therefore, reject the contention that the promised steadiness of light is to be understood in some sense not known in the prior art and not explained by the specification, but possibly ascertainable by a workman after having made the apparatus described and tried it in use. Still less is it permissible by arguments of this kind to cut down the promise to produce a steady light by means of a multipolar generator to a promise to produce a steady light by means of a generator having about sixteen or more poles. F G

This is an unusual case, but the invention is itself unusual. It is not required of a patentee that he shall describe the discovery or inventive step from which the invention springs, but it is necessary to avoid any ambiguous language when referring to it in the specification and any representation about it which may be misleading may prove fatal to the patent. When there is nothing novel in the invention apart from the inventive step, the patentee ought in his own interest to state in plain terms what his discovery is, instead of making obscure or oblique references to it with the result that a reader steeped in the prior art may be misled about the object said to be attained by the invention. I am, therefore, for refusing the appeal. It is not strictly necessary for me to consider the claims, but it may be convenient that I should briefly indicate my view on some of the arguments submitted. I have had the advantage of reading the criticisms of claim 1 which are contained in the judgments of my H noble and learned friends and I agree with them that claim 1 does not satisfy the statutory requirement that there shall be a distinct statement of the invention claimed. The passages from the judgment of LORD RUSSELL OF KILLOWEN in *Electric and Musical Industries, Ltd.* v. *Lissen, Ltd.* (6) (56 R.P.C. 39), cited by VAISEY, J., in the present case (63 R.P.C. 122) are an authoritative exposition of the function of the claim in a specification, and, tested by these passages, the first claim in this case is bad for ambiguity and uncertainty. The only other claim that need be mentioned is claim 5. It may at one time have been an arguable question whether a claim is permissible which purports to define the area of monopoly by a reference to an apparatus as described and drawn in the specification, but claims of this sort have been too long used in practice and have too often received judicial recognition for them to be rejected now because they throw the reader back on the body of the specification and the drawings, there to discover for himself, if he can, what is the invention claimed. Claim 5 must, therefore, be treated as a claim of permissible type. Such a claim usually figures, not as the sole nor as a principal claim, but as a secondary claim, and the design of those who employ it is, I think, to fall back on it if an earlier claim in general words is found to be invalid. They expect by its means to salve something from the wreckage of their larger hopes. It is in that sense usually a narrower claim than the principal claim, but the question whether it is a valid claim must in every particular case depend on the construction of the specification as a whole including the claim. The claim cannot be valid unless the description and drawings enable the reader to distinguish between what is claimed and what may be made or performed without trespassing on the area of monopoly. When the drawings are, on a sound construction of the specification and claim as a whole, only referred to as giving an example, albeit the preferred example, of an apparatus made in accordance with the invention, the claim will not be valid unless the verbal description by itself distinguishes what is claimed as the invention, but whether a drawing is merely an example does not depend on the use of the word "illustrated" as opposed to the word "shown" or on any such conventional verbal distinction. On the view which I have already expressed about the specification it would be impossible to declare the claim valid, and it would be unreal to discuss the validity of the claim on the supposition that the specification was differently expressed and distinguished as the invention a generator combined with the hub as described and drawn and having a twenty pole magnet and armature as drawn. In my opinion, therefore, it would not serve any useful purpose for me to carry further the discussion of the claim.

LORD MORTON OF HENRYTON: The appellants' application for a patent is dated Nov. 26, 1935. The complete specification was accepted on June 28, 1937, and the "Dynohub" was first exhibited at the Cycle Exhibition at Olympia, London, in September, 1937. It is clear from the evidence that the appellants' "Dynohub" was an immediate commercial success, and I think there can be no doubt that it filled a long felt want. The respondents lost no time in putting on the market the article which is complained of as being an infringement of the appellants' patent. VAISEY, J., in dealing with the issue of infringement, said (63 R.P.C. 129):

> A comparison of the description and drawings in the plaintiffs' specification with the defendants' blue print, which was reproduced in Exhibit P. 5 (*a*), no less than the comparison of the articles actually manufactured by the plaintiffs and the defendants respectively, satisfies me that the differences between them are colourable and devoid of significance and that the defendants have adopted and copied the plaintiffs' device in every essential particular, and that the patent, if it stands, has been infringed. I find that the defendants' product is an absolute mechanical equivalent of the plaintiffs' patented article or, more accurately, of the article described in the specification.

In these circumstances, the appellants started the present proceedings by writ dated July 18, 1939. The respondents denied infringement, alleged that the applicants' patent was invalid for a number of reasons, and counterclaimed for revocation. The trial of the action was greatly delayed by the war. VAISEY, J., while deciding several issues in favour of the appellants, held that the patent was invalid for want of "subject-matter." In other words, he held, following the terms of s. 25 (2) (*f*) of the Patents and Designs Acts, 1907-1946, that "the invention is obvious and does not involve any inventive step having regard to what was known or used prior to the date of the patent." Accordingly, he dismissed the action and made an order for revocation of the patent. The Court of Appeal, differing in this respect from VAISEY, J., held that there was an inventive step, but affirmed the decision of the judge on other grounds. All the members of that court held that the patent was invalid on the ground of "failure of consideration," because the complete specification contained a promise or promises which was or were not fulfilled. They also held that all the claims were open to objection. They, therefore, agreed in dismissing the appeal.

I agree with the Court of Appeal in thinking that there was here an inventive step, and there is no doubt that, as a result of this inventive step, there was put on the market a neat and useful device, attractive to the cyclists for whose use it was intended because it eliminated the friction and other disadvantages of the tyre-driven dynamos and, even at low speeds, illuminated the road with a light which appeared to be steady to the eye of the cyclist and gave sufficient warning of his approach. I cannot, however, agree with the Court of Appeal in its finding that there was a failure of consideration. This specification is addressed to persons skilled in the art, primarily, no doubt, to the manufacturers of cycle requisites, whose object is to produce useful and attractive objects for pedal cyclists. Reading the specification as a whole and bearing in mind the persons to whom it is addressed, I cannot find in it any promise which is not fulfilled. My views on this branch of the case agree entirely with the views which are about to be expressed by LORD MACDERMOTT. I am content merely to express my agreement with these views, as I cannot improve on the words in which he has expressed them. I feel sure that in so doing I shall not be thought guilty of disrespect to my noble and learned friends who have expressed contrary views on this point.

I now pass to a consideration of the claims. Three of your Lordships have already expressed the view that claim 1 is invalid. I share that view and I shall only add a few words on this point. Apart from any other possible objections to this claim, I think that the use of the word "multipolar," as descriptive of the magnet and the armature, raises a fatal objection to it. "Multipolar" is a technical word having a simple and well-established meaning. It means "having not less than four poles." I can find nothing in the context which would justify giving any other meaning to the word. If this is its meaning, it is clear that the claim covers constructions which would be quite useless for a cycle—for instance, it would cover an electric generator wherein both the magnet and the armature had only four poles. It is said, however, on behalf of the appellants that the words "for a cycle" mean "suitable for lighting a pedal cycle" and exclude any construction which would not be useful for the purpose. In my view, if the word "multipolar" is given any meaning other than that which it ordinarily bears, claim 1 becomes ambiguous and the appellants have failed sufficiently and clearly to ascertain the scope of the monopoly claimed. I agree with the view of LORD GREENE, M.R., that (63 R.P.C. 138):

> . . . the worker in the art, who has to discover the boundary which separates the open from the forbidden territory, is . . . entitled to a good deal of sympathy, since he has to find the definition of the boundary in the pregnant words "for a cycle" and to test the light that he obtains by a novel and *ex hypothesi* unknown standard.

As all your Lordships agree in thinking that claim 1 is invalid, I shall not pursue this matter further. Claims 2, 3 and 4 must fall with claim 1, since they all incorporate by reference the word "multipolar" in their description of the magnet and armature.

I now come to claim 5, and, before examining its wording, I desire to make some preliminary observations. For many years it has been a common practice to insert, as the last claim in a patent specification, a claim on the same lines as claim 5 in the present case. I think that the reason why such a claim has been inserted, in the present case and in countless other cases, is as follows. The patentee fears that his earlier claims may be held invalid because they cover too wide an area or fail sufficiently and clearly to ascertain the scope of the monopoly claimed. He reasons: "If I have made a patentable invention and have described the preferred embodiment of my invention clearly and accurately and without any insufficiency in the directions given, I must surely be entitled to protection for that preferred embodiment, and that protection may fairly extend to cover anything which is substantially the same as the preferred embodiment." This reasoning seems sound to me, and I cannot doubt that, if claim 5 had read " an electric generator for lighting a pedal cycle, constructed and arranged substantially as described herein and shown in the accompanying drawings," it would have been a valid claim. Your Lordships are of opinion that the appellants have made a patentable invention. So far as I can see, there is no insufficiency or ambiguity in their description of the preferred embodiment of that invention or in the accompanying drawings. In these circumstances, the appellants must surely be entitled to obtain at least this measure of protection. My Lords, does not claim 5, on a reasonable construction thereof, mean exactly the same as the claim which I have just set out ? I have substituted the words " for lighting a pedal cycle " for the brief expression " for a cycle " in claim 5, but, in my view, no one could read the description of the preferred embodiment, and look at the drawings, without realising that the words " for a cycle " have that meaning. The remainder of the claim which I have just set out reproduces, to my mind, the meaning of the words " constructed, and arranged substantially as herein described, with reference to and as illustrated in the accompanying drawings." There are, I think, only two possible objections to the construction which I place on claim 5. The first is based on the presence of the commas after the words " constructed " and " described " respectively. The commas are not happily placed, on any view of the claim, but I cannot find that their presence either makes my construction of the claim unlikely or tends to support the alternative construction which I am about to mention. The second objection is, however, of a more serious nature, and may be stated as follows : " Claim 5 is not a narrow claim, but a very wide one, at least as wide as claim 1. It claims the invention ' as described ' and the drawings are referred to in the claim merely as an illustration of one form which the invention may take." This argument is based on certain decided cases, and, in particular, on *Tucker* v. *Wandsworth Electrical Manufacturing Co., Ltd.* (2). Before turning to the authorities, I would point out that this is a strange construction to place on the last of five claims in a specification. Is it really to be supposed that in his last claim the patentee merely intends to echo his first claim, adding a reference to the drawings which seems, on this footing, to be needless and possibly confusing ? It is surely more likely that the last claim, referring to the drawings, is intended to be a narrow claim, incorporating the drawings as part of the description, and directed to saving the patent from revocation, if all wider claims are held to be bad.

With these observations, I turn to the cases cited in argument before us. In *Hale* v. *Coombes* (1), the claims which were most discussed in your Lordships' House were claims 1 and 6. Claim 1 was :

> A projectile of the type herein referred to provided with a device which before the discharge of the projectile is engaged therewith and is so connected with the striker as to prevent any forward movement thereof and which is adapted to be caused by its inertia to lack any relation to the projectile and so become disengaged from the striker immediately after the projectile has begun to move away from the gun substantially as described.

Claim 6 was :

> Projectiles of the type herein referred to provided with striker engaging and liberating or disengaging means constructed and arranged and adapted to operate substantially as hereinbefore described with reference to and as shown respectively in Figs. 1 to 4 inclusive, in Figs. 5 and 6, in Figs. 7 and 8 and in Figs. 9 and 10 of the drawings.

The majority of this House held that claim 6 was a good claim. LORD SUMNER, after expressing the view that the words " substantially as described " in claim 1 did not serve to restrict that claim within patentable limits, expressed himself (42 R.P.C. 346) as follows :

> Claim 6, however, stands on a somewhat different footing, for, after the words " constructed and arranged and adapted to operate substantially as hereinbefore described " the inventor continues " with reference to and as shown respectively in " certain annexed figures. I think that this addition, bringing in the figures, which are clear in themselves, does limit claim 6 to a contrivance which follows the figures and does not go beyond them. It virtually directs that the drawings are to be read into and as part of this claim, an unusual but permissible form to adopt (*Hattersley* v. *Hodgson* (15)). Thus Claim 6 does not merely stand or fall with the construction of Claim 1.

My Lords, too much reliance cannot be placed on other cases in deciding a question of construction, but, to my mind, the only distinction between the words used in claim 6 in *Hale* v. *Coombes* (1) and the words used in claim 5 in the present case lies in the substitution of the words "as illustrated" in the present case, for the words "as shown" in the former case. I think this is a distinction without a difference, that the words "as illustrated" in claim 5 of the appellants' specification merely mean "as shown" or "as depicted," and that the concluding words of claim 5 "direct that the drawings are to be read into and as part of this claim." In *Hattersley* v. *Hodgson* (15), to which A LORD SUMNER refers, the relevant claims contained the words "substantially as herein shown and described," and LORD MACNAGHTEN said (23 R.P.C. 201): "I think the dobby which they claim is shown and described in the specification into which the patentees direct you to read the accompanying drawings," and LORD LINDLEY observed (*ibid.*, 203): ". . . if his language can be fairly construed so as to render his patent valid, it is to be so construed," an observation which may be usefully applied to the present case. In *J. & S. Eyres,* B *Ltd. v. John Grundy, Ltd.* (10) a claim in the words "a manhole or gulley cover or grid constructed substantially as shown and described with reference to figs. 1 to 4 or figs. 5 and 6" was construed, and as I venture to think rightly construed, as being a narrow claim limited by the reference to the drawings, and as saving the patent from complete invalidity.

Three cases were cited to us in which claims, somewhat similar in their wording to claim 5, were given a wide construction. These cases are summarised by C the Assistant Comptroller in *Geoffrey De Havilland's Application* (9). They are *Turner* v. *Bowman* (16), *Benton and Stone, Ltd.* v. *Thomas Denston and Son* (17), and *Tucker* v. *Wandsworth Electrical Manufacturing Co., Ltd.* (2). I need say little about the first two of these cases, which preceded the decision of this House in *Hale* v. *Coombes* (1). In each of them the patent in question was held to be valid and to have been infringed, but I cannot agree with all the observations made by ASTBURY, J., in reference to the claims. In *Tucker's* D case (2) the only claims were:

> (1) An electric switch adapted to co-operate by a quick make and break action by virtue of a compression spring element pivotally co-operating on the one hand with the contact arm and on the other hand with an operating member and which operating member is utilised also for positively displacing the contact arm both in the operation of breaking and in the operation of making throughout or substantially throughout its entire stroke (as distinguished from positively displacing it only in the initial part E of its stroke) in the event of its spring failing to act or act effectively. (2) An electric switch substantially as herein set forth and illustrated.

TOMLIN, J., had held that claim 1 was invalid, but that claim 2 was valid because it was limited to the specific switch, known as a "tumbler" switch, which was depicted in the drawings. The defendants appealed, and the Court of Appeal held that claim 2 was a wide claim, that it was open to the same objections as claim 1, and that the patent was invalid. My Lords, it might be possible F to draw some fine distinction between the wording of claim 2 in *Tucker's* case (2) and the wording of claim 5 in the present case, but it seems to me that the Court of Appeal decided wrongly and TOMLIN, J., decided rightly. In my view, on the facts of *Tucker's* case (2), the patentee was quite entitled to claim protection for his "tumbler" switch by appropriate words, and claim 2 could most fairly and reasonably be construed as claiming only that measure of protection. G Only one switch was "set forth and illustrated," namely, the tumbler switch, and claim 2 was presumably intended to be different in its scope from claim 1, otherwise it would have been otiose. In the result, the patentee did not even get protection for the tumbler switch, which was, in fact, the only switch made under the patent (see 42 R.P.C. 489, line 19).

With regard to *De Havilland's Application* (9), to my mind, a claim to "an air-brake . . . substantially in the form illustrated in the accompanying H drawings" is a narrow claim of the same kind as claim 5 in the present case, and no difference of meaning is achieved by substituting "shown" for "illustrated." It was suggested in argument that the word "substantially" in claim 5 might introduce uncertainty as to the scope of the monopoly. I cannot accept this suggestion. The word merely indicates that the patentees are not limiting their monopoly to an electric generator which corresponds in every detail with the generator shown in the drawings, but claim the right to object to the manufacture or sale of an electric generator which is in substance the same as the generator so shown. It may be said with some force that the rights of the patentees would have been the same if the word "substantially" had been omitted from the claim. Even so, its presence cannot render the claim invalid. It may be a matter of some difficulty, in some cases, for the court to decide whether an alleged infringement is or is not substantially the same as the electric generator shown in the drawings, but the court does not shrink from such a task. I add that this word appears, in an almost identical context, in claim 6 in *Hale* v. *Coombes* (1) and in various claims which were held valid in a number of other cases.

Having formed the view that claim 5 alone is valid, I must now consider whether the respondents have infringed that claim. If claim 4 had never appeared in the specification, I should feel no doubt that the respondents had infringed. Infringement is a question of fact and Vaisey, J., who heard evidence on the point, was satisfied (1) that the differences between the article described in the specification and shown in the drawings and the alleged infringement are colourable and devoid of significance, (2) that the respondents have adopted and copied the appellants' device in every essential particular, and (3) that the respondents' product is an absolute mechanical equivalent of the article described in the specification. I cannot imagine a more complete and clear finding of infringement and deliberate copying by a defendant. There was ample evidence to support these findings and I agree with them.

So far, there is no difficulty on the issue of infringement. It was contended, however, that it is not open to this House to find infringement, because the stator windings in the respondents' product are not of stepped form, and this characteristic is expressly set out as being an integer of claim 4. Reliance is placed on the decision of the Court of Appeal in *Submarine Signal Co.* v. *Henry Hughes and Son, Ltd.* (18) to which I must shortly refer. My Lords, I am wholly unable to accept this contention. The evidence called before Vaisey, J., established the facts already stated. Are your Lordships bound to hold that the appellants are disqualified from proving these facts because of the specific reference to the stepped form of windings in the invalid claim 4? I know of no principle of law or equity which leads to this conclusion. Claim 5 is a separate claim which is, in my opinion, valid. Must not your Lordships consider whether, in fact, having regard to the evidence and to the judge's findings thereon, the differences between the article described in the specification and the respondents' article are such as to make the latter substantially different from the former? It may be that it is proper to take into account the fact that claim 4 was put forward, as one of the relevant facts to be considered, but surely this fact cannot conclude the matter against the appellants. In the *Submarine Signal* case (18), to quote Romer, L.J., (49 R.P.C. 176):

> The patentee in every one of the claims other than claim 11 refers to a "sound emitter" as the thing that has to produce the sound waves. When he comes to claim No. 11 he drops that expression altogether, and he substitutes for it the expression "an electric oscillator." Now the patentee must have intended something by that change, and I think it is useless for him to say in court that although he has introduced the words "an electric oscillator" instead of the words "a sound emitter," an electric oscillator is not of the essence of the invention that he claims in claim No. 11.

It was for this reason that the Court of Appeal held that, in considering claim 11, there was no room for the application of the doctrine of mechanical equivalents, and, therefore, claim 11 had not been infringed. If your Lordships had been considering whether claim 4 had been infringed, the *Submarine Signal* case (18) would have been very much in point in the present case, but in claim 5, as I read it, the appellants have laid no more stress on the stepped form of the windings than on any other feature of the invention. They have incorporated into claim 5 the whole of the features mentioned in the description of "the improved electric generator to be described hereinafter" and shown in the accompanying drawings. In these circumstances, it is surely open to the appellants to prove, if they can, in the case of any one of these features, that an alleged infringement, which leaves out that particular feature, is "an absolute mechanical equivalent of the article described in the specification" and is only colourably different from that article. I may add that the appellants attached so little importance to the stepped windings, as a feature of their invention, that they omitted this feature from the "Dynohub" generator which they put on the market with such success. This is an interesting fact, but it has not influenced me in forming my opinion.

My Lords, for the reasons which I have endeavoured to state, I think that, although claims 1 to 4 are invalid, claim 5 is valid and has been infringed. I propose that the order appealed from be reversed, that the order of the Court of Appeal be discharged, and that it be declared that claim 5 of the appellants' letters patent, No. 468,065, is the only valid claim and has been infringed, that the cause be remitted to the Chancery Division to determine what, if any, relief should be granted to the appellants in accordance with s. 32A of the Patents and Designs Acts, 1907 to 1946, and that there be no costs here or below.

LORD MACDERMOTT : My Lords, on the question whether the invention exemplified by the appellants' Dynohub may properly be the subject-matter of a grant of letters patent I entertain no doubt. I am satisfied that it is qualified to rank as a manner of new manufacture within the meaning of the Statute of Monopolies, that it is not obvious, that it does not lack novelty, and that it is useful in so far as utility falls to be regarded as an ingredient of subject-matter. The reasons which lead me to these conclusions have already been voiced and I need not restate them. It is, however, desirable in view of the nature of the other issues in this appeal that I should express my concurrence specifically on one aspect of this question of subject-matter. I agree that the essential element, the inventive step, resides in the discovery which the Dynohub embodies and turns to practical account and not in the arrangement or construction of the apparatus. This discovery has been variously described in the courts below, but there is no real conflict as to its character. Prior to the appellants' application the view held by those versed in the art was that to obtain from an electric bicycle lamp an illumination which would be satisfactory to the cyclist, in the sense of being without noticeable flicker at slow speeds, there ought to be a minimum of about 50 pulses of electric energy per second. That view assumed that the frequency needed to make the light seem flicker-free to an observer in front looking towards the lamp was that requisite to produce the same result for the rider on the bicycle. The discovery was that this assumption was unfounded and that 20 pulses per second or thereabouts, though not capable of giving an impression of continuous light to the observer in front, were capable of giving an illumination which, to the cyclist who saw only what was reflected from the road, was steady in the sense of being without apparent flicker. That discovery was the key to a neat solution of several problems which had beset the art of the electric lighting of pedal bicycles for some time, as it happened that 20 pulses per second could be obtained, with the use of a known steel of high coercivity, from a generator rotating at wheel speed when the normal bicycle was being ridden quite slowly. That being so, the Dynohub construction, as well as embodying the new standard of frequency, gave the protection from weather conditions and that freedom from the friction of gearing or equivalent devices which had long been desired, but the mechanical means to these ends were in themselves obvious, and the inventive step must, therefore, be found in the discovery just mentioned.

Coming to the complete specification, the first question is whether the invention is sufficiently described. This I take as raising the ground of objection stated in para. (*h*) of s. 25 (2) of the Act. It must be looked at from the viewpoint of one with reasonable skill and knowledge in the art who reads in order to ascertain how to carry the invention into effect. So regarded, I share the view already expressed that the description is sufficient. It is true that it does not include a clear statement of the discovery which was the real inventive step. I cannot but feel that this omission was unfortunate in the present case and that it has left much debatable which might otherwise have been beyond dispute, but it is not fatal for a patentee is not bound to include in his specification a statement of the inventive step.

I come next to the plea of false representation, or failure of consideration as it was sometimes called. This plea cannot be always separated from that of inutility. Here, it may in its substance be taken as the ground of objection stated in para. (*k*) of s. 25 (2) of the Act which reads : "(*k*) that the patent was obtained on a false suggestion or representation." Vaisey, J., found in the appellants' favour on this issue, but held the letters patent bad for lack of subject-matter. The Court of Appeal thought there was subject-matter, but was unanimous in upholding the objection under discussion. The representations relied on by the respondents as false and sufficient to invalidate the grant were two in number. They are not to be found in the pleadings, but may be taken as stated by COHEN, L.J., in the passage in his judgment where he says (63 R.P.C. 145):

> I find it impossible to construe the promise of the specification as meaning anything but a promise (*a*) that the apparatus made in accordance with the instructions contained therein would give a light of the steadiness thought up till then to be essential for a bicycle lamp, that is to say, a light with a frequency of 50 pulses per second, and (*b*) that this resultant steady light would be produced by an improved method of construction. It seems to me clear for the reasons given by my brethren that neither of these promises is fulfilled.

My Lords, it is plain on the evidence that the appellants' Dynohub gives the cyclist a satisfactory light at slow riding speeds and has proved a commercial success. The defendants, indeed, have advertised the alleged infringement, their almost identical hub dynamo, as giving—"brilliant light even at walking speeds," but these facts do not in themselves meet the plea, for it is equally clear that the appellants' apparatus does not give a frequency of more than 20 pulsations per second at slow speeds. Accordingly, if the specification promised what the Court of Appeal held it to promise, there has been misrepresentation. The effect of that would depend, no doubt, on the materiality of the representation as it can hardly be said, even in this somewhat subtle branch of the law, that letters patent are "obtained" on the strength of what is immaterial. I shall, however, assume materiality for present purposes and, so assuming, this whole plea becomes a matter of the interpretation of the specification. It comes down, indeed, to a very narrow question—do the words "steady" and "steadiness," as applied to the light, connote a light with a frequency of 50 pulses per second, or are they, as the appellants say, merely employed to describe the reflected light as the cyclist sees it from the saddle when his lamp is in use to illuminate the way ahead? These alternatives represent, literally, two points of view as well as two common uses of the word "light." The construction urged by the respondents and adopted by the Court of Appeal looks from in front at the light as the source of illumination; that contended for by the appellants looks from behind at the light which is shed. There is no further practicable choice, for with alternating current "steady" cannot well have an absolute meaning. If the respondents are wrong, the appellants are right, and, if the appellants are right, the evidence supports the promises and the objection fails.

Before referring to the relevant passages in the specification it will be convenient to mention several general considerations which, though not conclusive in themselves, cannot be left entirely out of account. (1) The evidence, while showing that a frequency of 50 pulses per second was regarded, prior to the appellants' application, as the minimum necessary to obtain a light which would be steady to the eye, does not show that the words "steady" and "steadiness" as used in the art had in themselves any special or technical meaning. They were apt to describe any light—be its frequency 50, 100 or 200 or more—which appeared steady. (2) The respondents' interpretation, if sound, promises a frequency incompatible with any construction embodying the discovery which constituted the real inventive step. (3) The broad purpose of an invention, as gathered from a fair reading of the specification, need not be left out of mind when construing an expression capable of more than one meaning. For example, the promise of a steady light in a specification dealing with a lighthouse lamp may well warrant a construction different from that of a similar promise made in relation to a cinema projector. (4) It is sometimes said that the specification is addressed to those skilled in the art. But this does not mean that its promises need necessarily be of a technical nature or that, where there is a choice of meaning, the technical construction is to be preferred. The results promised may well relate to the utility of the invention in the hands of the actual users; and in the case of articles in common use, like bicycle accessories, it is but reasonable to assume that those skilled in the art will have the practical requirements of purchasers very much in mind.

I now turn to the specification. The first material paragraph runs:

> With electric generators for use on cycles heretofore in use it has been necessary

in order to obtain the desired output and steadiness of light for the rotor of the generator to be rotated at a considerably greater speed than the wheels of the cycle.

It is said that the words "the desired output and steadiness of light" point back to the frequency of 50 pulses a second aimed at by the earlier devices. This paragraph relates plainly to what I may call the pre-Dynohub types of generator, but these, on the evidence, had at most but 12 poles and could not give a steady light in *any* sense of the expression, throughout the whole range of riding speeds, unless revolving faster than the wheels. When this is remembered the words just referred to may bear the appellants' interpretation without conflicting with the context. So read, the passage says, in effect, that the earlier generators had, in order to get the desired output and a light which would have the desired steadiness to the eye of the cyclist, to rotate at more than wheel speed. The passage is certainly not as lucid as it might be, but, taken as it stands, I think that is the preferable view of its meaning. Then, a little later, there comes this paragraph : A B

> The present invention has for its object an improved electric generator for the hub of a cycle wheel and having an improved construction and arrangement of parts, which gives a steady light even at slow speeds but which is only driven at the same speed as the cycle wheels.

The crucial words here are—"which gives a steady light even at slow speeds." My Lords, if this passage stood alone, I venture to think that the worker in the art would not consider the sense in any way altered if the words "the cyclist" were inserted after "gives." Having read thus far, he might still be wondering how such a promise could be made good, but I think he would have little difficulty as a practical man, and in view of the ordinary meaning of the language used, in regarding the words "improved" and "steady light" from the standpoint of the cyclist. The proof of this invention obviously lay in its user and it was on the cyclist's verdict more than that of anyone else that its success depended. It is, however, said that this paragraph does not stand alone and that, when linked with "steadiness of light" in the passage first quoted, the technical construction must prevail. It is unnecessary to refer to the consistory paragraph or the detailed description of the construction which follows it except to say that the latter makes a lengthy reference to drawings which depict a 20 pole generator. It may also be added, as beyond question on the evidence, that such a generator, when rotating with the wheel at slow riding speeds, produces in or about 20 pulsations per second. Then comes this passage : C D E

> The stator may be about 3½ inches diameter and has the same number of poles (20) as the rotary magnet. It is found that an electric generator constructed as hereinbefore described although running at a slow speed generates a current having a frequency which gives a steady light even at low speeds.

My Lords, any doubt there may be in the earlier parts of the specification as to which of the rival interpretations should prevail is, to my mind, entirely removed by this passage. It tells the skilled reader—and I do not think he need be very skilled for this purpose—that, whatever he may have thought till then, the promised steady light is a light obtainable with a frequency of 20 pulses per second and does not, therefore, require, or take its character from, the former minimum standard of 50 pulsations. Fairly read, it can, in my opinion, mean nothing else, and, if that be so, it repels conclusively the construction upheld by the Court of Appeal. I would, therefore, hold in favour of the appellants' interpretation and against the objection of false representation and failure of consideration. For the reasons indicated in the general considerations enumerated, I find this result at least in harmony with the nature of the invention and the purpose of the document. It also, I am glad to think, accords with the merits, for the person most concerned, the cyclist, has, undoubtedly, got what the inventor aimed at giving him—an improved construction and a satisfactory light. F G H

The next matter for consideration is the validity of the claims. Claim 1 was attacked on several overlapping fronts. Ambiguity, inutility and undue width were all alleged against it. My Lords, the scope of claim 1 turns on the scope of the word "multipolar" as used therein in relation to the permanent magnet and the armature. It was admitted that in the art "multipolar" means having four or more poles. Accordingly, unless the word has some narrower meaning in claim 1, the territory which that claim stakes out is wide in the extreme. So wide, indeed, as to include, in one direction, generators which could not give the light promised, and, in the other, generators which would not embody the inventive step. Counsel for the appellants sought to restrict the meaning of "multipolar" by contending that the opening words of the claim—"an electric generator for a cycle," should be construed as "an electric generator *suitable* for a cycle," and that, so construed, the claim would only operate in respect of generators of the type described which had the number of poles needed to utilise the discovery so as to produce a satisfactory bicycle light. This, it was said, would, having regard to the evidence, restrict the meaning of "multipolar" to 20 poles or thereabouts. My Lords, when the specification is read as a whole I am prepared to accept the view that "electric generator" means an electric lighting generator and that "cycle" means a pedal bicycle, but to inject any such adjective as "suitable" is, I think, to transgress an elementary rule of construction in that the real object of the addition is to secure a result rather than to clarify the expressed intention. I am, therefore, of opinion that "multipolar" must be construed in the sense in which it is understood in the art. That being so, I think it must follow that, however unambiguous its wording may be, the ambit of this claim is too wide. I would, therefore, hold claim 1 bad.

Claims 2, 3 and 4 suffer from the same defect as claim 1 and must fall with it. There remains claim 5 which reads: "An electric generator for a cycle, constructed, and arranged substantially as herein described, *with reference to and as illustrated in the accompanying drawings*." The question here is, as I see it, one of construction. Do the words I have italicised make the drawings part of the claim? Or do they refer to them merely as depicting one example of what has already been more generally described? If the former, claim 5 is narrow and so limited with respect to the number of poles as, in my opinion, to avoid the fate of the earlier claims. If the latter, the words in question are otiose and the claim is as faulty as the others. That drawings may be so incorporated with a claim as to preserve it from a fatal wideness appears from the decision of this House in *Hale* v. *Coombes* (1), where the incorporating words were very similar to those employed here: see the observations of Lord Sumner (42 R.P.C. 346) and, for a more modern instance, *Eyres, Ltd.* v. *Grundy, Ltd.* (10). On the other hand, in *Tucker* v. *Wandsworth Electrical Manufacturing Co., Ltd.* (2), the Court of Appeal read the words "substantially as herein set forth and illustrated" as relating to the earlier description in its width and, therefore, inoperative to restrict the claim to the drawings. My Lords, claim 5 is unhappily punctuated, but I have reached the conclusion that, on its true construction, it ought to fall on the *Hale* v. *Coombes* (1) side of the line. *Tucker's* case (2) seems to me to come very near the line indeed, and, on consideration, I think the decision of Tomlin, J., is to be preferred to that of the Court of Appeal. Whatever the authority of that case, I think claim 5 falls to be distinguished on the ground that it points back only to that part of the description which explains the detail of the accompanying drawings and which, though given as one example of the invention, is clearly segregable from the more general descriptive passages. I am, therefore, of opinion that claim 5 is a narrow claim and good. The objection that the letters patent were invalid because the appellants had abused the monopoly was not sustained in the lower courts or before this House and no more need be said of it.

There remains the question whether, on the evidence, the respondents have infringed claim 5. My Lords, I have had an opportunity of considering the opinion of Lord Morton of Henryton on this branch of the case. I fully agree with his conclusion that the respondents have so infringed. I also agree with the reasoning on which that conclusion is based and would, if I may, adopt it in its entirety. For these reasons, I would, for my part, allow the appeal in terms enabling the appellants to obtain such relief as, on the views I have expressed, they may show themselves entitled to, having regard to the provisions of s. 32A of the Act.

Appeal allowed. No order as to costs.

Solicitors: *Steadman, Van Praagh & Gaylor*, agents for *George Linter*, Nottingham (for the appellants); *Woodham Smith, Borradaile & Martin* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re ROGERS' QUESTION.

Distinguished. Rimmer *v.* Rim
[1952] 2 All E.R. 863.

[Court of Appeal (Lord Greene, M.R., Asquith a
January 30, February 2, 1948.]

Husband and Wife—Title to property—Matrimonial home—Both parties contributing to purchase—Intention of parties—Married Women's Property Act, 1882 (*c.* 75), *s.* 17.

In a question between husband and wife, under s. 17 of the Married Women's Property Act, 1882, as to the title to the matrimonial home, the judge, after seeing and hearing the witnesses, should try to conclude what was in their minds at the time of the purchase and then make an order which, in the changed conditions, fairly gives effect in law to what the parties must be taken to have intended at the time of the transaction.

Before marriage the wife found a house, the price of which was £1,000, and herself opened negotiations with the vendor. The sum of £100, provided wholly by the wife, was paid on or before the signing of the contract, and the balance of £900 was raised by means of a mortgage of the house with a building society. Both the contract and the conveyance were made in the name of the husband, who also entered into the mortgage and an indemnity policy required by the building society and paid all instalments and interest due under the mortgage. In proceedings ~~under~~ s. 17 of the Married Women's Property Act, 1882, each party claimed that he or she had always intended that the beneficial ownership should be in him or her. On conflicting evidence the judge came to the conclusion that the intention of the parties at the time was that each should contribute a certain proportion to the purchase price of the house, the husband nine-tenths and the wife one-tenth, and he made an order that the husband should hold the house on trust for sale and that the parties should be entitled to the proceeds of sale in those proportions. On appeal :—

Held : on the evidence it was reasonable to infer that each party intended to contribute to the house in the proportions found by the judge and his order should be affirmed, subject to a proviso that, in so far as on a sale nine-tenths of the proceeds of sale was insufficient to discharge what was due in the mortgage, the husband was liable to make good to the wife any deficiency.

[As to Summary Proceedings between Husband and Wife as to Property, see HALSBURY, Hailsham Edn., Vol. 16, p. 740, para. 1211 ; and for Cases, see DIGEST, Vol. 27, pp. 260, 261, Nos. *2296-2303*.]

Appeal by the wife from an order of Roxburgh, J., dated July 25, 1947, that the husband should hold a house, the former matrimonial home, on trust for sale and that the parties should be entitled to the proceeds of sale, in the proportion, as to the husband, of nine-tenths, and, as to the wife, of one-tenth. The order was affirmed subject to a slight variation. The facts appear in the judgment of Evershed, L.J.

Blanshard Stamp for the wife.
A. H. Ormerod for the husband.

Cur. adv. vult.

Feb. 2. **EVERSHED, L.J.,** read the following judgment. In this case the issue is between a man and a woman whose marriage has, unfortunately, foundered, as to the beneficial ownership of a house acquired (in the name of the husband) at or shortly before their marriage on Apr. 1, 1939. In this, as in most similar cases, the difficulties of a judge are aggravated by the circumstances that the two contesting parties are now extremely hostile to each other and that the conditions of a broken marriage, which now subsist, were not fully appreciated by either party, even if, as the learned judge thought, they were not absent from the mind of one of the parties, when the transaction in question was entered into. When two people are about to be married and are negotiating for a matrimonial home it does not naturally enter the head of either to enquire carefully, still less to agree, what should happen to the house if the marriage comes to grief. What the judge must try to do in all such cases is, after seeing and hearing the witnesses, to try to conclude what at the time was in the parties' minds and then to make an order which, in the changed conditions, now fairly gives effect in law to what the parties, in the judge's finding, must be taken to have intended at the time of the transaction itself.

In this case ROXBURGH, J., after seeing and hearing the two parties and two other witnesses called for the wife, came to the conclusion that the wife and the husband had it in their minds to contribute in certain proportions (*viz.*, as to nine-tenths the husband and one-tenth the wife) to the purchase of the house in question, 160, Craddocks Avenue, Ashtead, and his order, subject to one point mentioned hereafter, gives effect to that conclusion by providing that the husband should hold the house on trust for sale and that he and his wife should be entitled to the proceeds of sale in the same proportions of nine-tenths and one-tenth. Counsel for the wife has forcibly argued that the learned judge was wrong in his conclusions and in his method of giving effect thereto. For my part, I find it impossible to say that he was wrong, subject only to the one small point already indicated. The admitted facts are these. The wife found the house, the price of which was £1,000, and herself opened negotiations with the vendor, Mr. William Robinson (a witness in the case for the wife). The sum of £100 was paid in cash on or before the signing of the contract and the whole of this sum was provided by the wife (as to half of it, in fact, on her behalf by her father), though it appears to have reached Mr. Robinson wholly or partly *via* the husband. No further cash was provided by either party, the whole balance of £900 being raised by means of a mortgage of the house with the Halifax Building Society. Both the contract and conveyance were made in the name of the husband, who also entered into the mortgage and an indemnity policy required by the building society. All instalments of principal and interest due under the mortgage and so far paid have been paid by the husband.

If this matter had rested there, and in the absence of any other evidence of the intention of the parties, it would, as it seems to me, have been difficult for counsel for the wife to quarrel with the learned judge's conclusion that the two of them intended to contribute in the proportions he found, *viz.*, nine-tenths for the husband and one-tenth for the wife. The husband, having himself no cash, raised the sum required by the mechanism described. He made himself solely responsible for the repayment to the building society and, as I have said, in fact, has himself paid all instalments so far. For practical purposes the position does not really differ from that which would have arisen had wife and husband respectively put up £100 and £900 in cash. There was, however, certain further evidence, and the real contest of fact between the parties turned on what occurred on the occasion in March, 1939, when the contract was signed and both husband and wife (then engaged to be married) were present with Mr. Robinson. Although it was denied by the husband, the learned judge accepted the evidence of the wife, supported by Mr. Robinson, that there was on this occasion what counsel for the wife called a tiff. The tiff seemingly arose out of the wife's discovery that the contract had been made out in the name of the husband. To that she objected and claimed that the contract should be made out in her name. To that claim the husband in turn objected, and in the end, as I have said, both contract and conveyance were in the name of the husband.

What is the inference proper to be drawn from this evidence ? It is clear, and in the circumstances, perhaps, not surprising having regard to existing relations, that each party has put forward extreme claims. The husband has alleged that the property was, and was always intended to be, his beneficially, subject only to his obligation to repay the £100 provided by his wife, which, he said, was a loan. That contention the learned judge has rejected. The wife, in the course of her cross-examination, went so far as to suggest that the property is, and was always intended to be, beneficially entirely hers, the husband's obligations and payments as to the mortgage interest, rates, taxes, etc., being entered into or provided as part of the household expenses which it would be his proper function to discharge. It is fair to say that counsel for the wife has not sought to maintain any such extreme claim, and the wife's claim as presented to this court must be taken to be qualified by an admitted obligation to indemnify her husband in regard to his mortgage obligations, but this view, too, the learned judge has rejected. In his view, the effect of the evidence of the so-called tiff was to support, or, at least, not to contradict, the conclusion that each must be taken to have contributed to the purchase in the proportion in which they did, in fact, contribute or (in the case of the husband) make himself liable to contribute. In my judgment, he was right. It is more than possible that each went away from the meeting in question with a somewhat different, though vague and certainly never formulated, idea of what its effect had been. It is, at least, clear that, whatever her protests, the wife knew that in spite of them the property would be in her husband's name. Equally is it clear to my mind that the wife was unwilling to make any further contribution to the purchase (though she appears to have been possessed of some £500 which could have been so applied) or to make herself liable, as I understand her cross-examination, for any mortgage which she expected her husband to undertake. In the circumstances, it seems to me wholly unreasonable to suppose that the wife thought she could both have her cake and eat it, but wholly reasonable to infer, as ROXBURGH, J., inferred, that each intended to contribute to the home in the respective proportions found by the judge.

In fact, as may be supposed, the value of the house has greatly increased, so that on a sale and after satisfaction of the mortgage out of the husband's nine-tenths each party will, on the basis of the judge's judgment, in fact, get the benefit of the enhanced value in the proper proportions, but counsel for the wife has argued that the form of order made will not achieve arithmetically what the learned judge intended, or must be taken to have intended, if the property is sold for less than £1,000, unless it is sold for nothing at all, for, having regard to the form of order, the loss would inevitably fall exclusively or principally on the wife. As things are, the point is almost certainly academic, but it could be remedied, and (subject to what counsel for the husband may say) should, in my judgment, be remedied, by adding a proviso to the effect that in so far as on a sale nine-tenths of the proceeds of sale is insufficient to discharge what may be due thereout to the mortgagee, the husband is liable to make good to his wife any deficiency.

ASQUITH, L.J.: I agree. The fact which stands out decisively is that the wife never intended in any circumstances to be saddled with any liability in respect of nine-tenths of the purchase price. I think the reasonable inference from this and the other facts in evidence is that at which the learned judge arrived.

LORD GREENE, M.R.: I agree. It seems to me that one or two answers by the wife while giving evidence make it perfectly clear that she was intending and expecting that her husband would pay off the amount of the mortgage. In the ordinary way that would be paid off by instalments comprising both principal and interest. She appreciated that the payments would take that form and she regarded the payments so to be made by her husband as part of the household expenses, both the element in the payments representing interest and the element representing principal. It seems clear to my mind that she was expecting that the liability to pay back £900 principal advanced was to be a liability of her husband alone. She said, when asked by the learned judge who was finding the other £900: "Presumably my husband." Again, when asked whether she thought the repayments of capital were part of the household expenses, she replied: "Yes." That means that she was expecting them to be paid by her husband. It is clear to my mind, as my Brothers have said, the last thing she expected to do in any circumstances, directly or indirectly, was to undertake any liability at all with regard to the purchase. I say directly or indirectly for this reason, that, if her case is right, then, if the property had been conveyed to her and she had been the mortgagor, under the mortgage she would have been directly liable for the mortgage debt. Similarly, if her case is right, her husband, if he had been sued on the mortgage, would have been entitled to an indemnity against her. In neither way was she intending, in my opinion, to undertake any liability because she regarded it as her husband's share of the transaction. I agree with the order proposed.

Appeal dismissed with costs.

Solicitors: *Wilfrid Ellis* (for the wife); *W. T. Jones* (for the husband.)

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* MILLIWATT, LTD.

[King's Bench Division (Cassels, J.), February 2, 3, 1948.]

Revenue—Purchase tax—Liability—Electric heating pads and blankets—"Appliances and apparatus of a kind used for domestic purposes"—Finance (No. 2) Act, 1940 (*c.* 48), *sched. VII, para.* 7.

Electric heating pads and blankets, provided with three switches to control the heat at three different temperatures and alleged by the manufacturers to have been designed for use for medical purposes, could be used without special knowledge and were advertised for use, and, in fact, were widely used, for domestic purposes :—

Held : the pads and blankets were "appliances and apparatus of a kind used for domestic purposes" within the meaning of the Finance (No. 2) Act, 1940, sched. VII, para. 7, and were, therefore, chargeable to purchase tax under ss. 18 and 19 of the Act.

[For the Finance (No. 2) Act, 1940, ss. 18, 19 and sched. VII, para. 7, see HALSBURY'S STATUTES, Vol. 33, pp. 408, 410, 433.]

Action for the recovery of purchase tax in respect of electric heating pads provided with three switches to control the heat at three different temperatures. The defendants contended that the articles, being designed for medical purposes, could not be classified as domestic appliances, but it was held that the articles were "appliances and apparatus of a kind used for domestic purposes" within the meaning of para. 7 of sched. VII to the Finance (No. 2) Act, 1940, and were, therefore, liable to purchase tax under ss. 18 and 19 of the Act.

H. L. Parker for the Attorney-General.

Friend for the defendants.

CASSELS, J.: Under ss. 18 and 19 of and sched. VII, para. 7, to, the Finance (No. 2) Act, 1940, purchase tax is chargeable on "domestic cooking and heating appliances, and other appliances and apparatus of the kind used for domestic purposes." This is a friendly action brought to test the question whether the Milliwatt electric heating pads and blankets which are made by the defendants and are provided with three switches to control the heat at three different temperatures come within the words "other appliances and apparatus of a kind used for domestic purposes." If they do, purchase tax is chargeable ; if they do not, they are purchase tax free.

On behalf of the Attorney-General there was put before the court a publication by the defendants setting forth certain claims for pads with the three-heat control. The defendants advertised that this pad could be used by anybody without special knowledge, that its use was not restricted to the bed, that the patient could sit in an armchair or lie on a divan, and that certain complaints had been successfully treated with the pad. As to the blankets, the defendants advertised that they were essential in every home and that they replaced hot-water bottles, because they were more convenient, effective and economical. There was also put in a pamphlet about heat-therapy from the Medical Supply Association, to whom the defendants sell many of these pads and blankets. A medical note on that document stated that "Electrically heated pads and blankets are of value in every home. For the healthy they ensure thoroughly aired beds, etc. ; for the ailing they give wonderful relief from pain," and then it mentions various troubles to which flesh is heir. The catalogues of some other manufacturers claim that these pads could be used in babies' cots. Evidence for the Attorney-General was called from the Civil Service Stores and the Army and Navy Stores which showed that these pads and blankets had been sold by them to ordinary members of the public, the sale being restricted between 1942 and the end of the war to those who could produce a doctor's certificate, but being without restriction now. A witness from Faudels, Ltd., gave similar evidence with regard to sale by a wholesaler to a retailer. The evidence for the defendants was from Mr. Summers, the defendants' managing director, the designer of these pads and blankets, with twenty years' experience, ten years with a company called Thermega and ten with the defendants. He claimed that the three-heat control pads and blankets were designed and produced for medical purposes. Three temperatures can be obtained, 100 degrees, 120 degrees and 162 to 170 degrees. He said shock cases are treated with these appliances. Mr. Yeo, manager of the electrical department of Savory & Moore, said that his firm sells these articles for therapeutic purposes in illness.

This question has been the subject-matter of discussion between the Commissioners of Customs and Excise and the defendants since 1940. The contention throughout of the defendants has been that these pads and blankets, being designed for medical use, ought not to be classified as domestic appliances. On Mar. 21, 1941, the commissioners wrote stating that liability to tax was determined by reference to the nature of the articles and not to their actual use, that " appliances of a kind used for domestic purposes were chargeable with tax irrespective of the use for which they might be employed." Counsel for the defendants submitted that the converse of this must also be true. After much discussion the commissioners decided, on Dec. 14, 1944, that " for the present " the three-heat control blankets and pads were not chargeable but single control blankets and pads remained chargeable. That was on condition that the three-heat control blankets and pads were only available to private purchasers on production of a medical certificate. On Apr. 14, 1945, the commissioners reconsidered the position and decided that all such blankets and pads other than pads specially shaped to meet the requirements of particular complaints, like electric eye and ear pads, must be regarded as within the scope of the schedule of chargeable goods. The defendants were not prepared to accept this without a contest. Where there is a question what goods are chargeable it must be decided by a court of law, and a decision of the commissioners does not bind the court. It is to be observed, however, that in a notice by the commissioners in 1942, issued by way of official assistance to traders, certain electric appliances were classified as chargeable, *e.g.*, ultra-violet lamps, infra-red lamps, and radiant heat lamps, while electro-therapeutic equipment designed for hospital or professional use was not chargeable. In the same publication electrical appliances such as warming pads and blankets were stated to be chargeable.

I have only to deal with this case. Most of the authorities on the word " domestic " are to be found in cases concerning the domestic use of water, and they are not of much assistance. I think " domestic " in the present connection means the house or the home. A great variety of articles go to make a home, not because they are necessary, but because they are calculated to contribute to the comfort and well-being of people in the home. Such articles may be said to be of a kind used for domestic purposes. The fact that any one of these articles may be used for medical purposes does not prevent its being an article of a kind used for domestic purposes. I do not think that war-time restrictions on its sale can alter its character, neither is its character altered because the manufacturer designs it for medical use.

My attention has been called to the Finance (No.2) Act, 1942, which clearly shows in more than one instance that where goods have been designed, specially for industrial use they are exempted from charge although other articles of the same kind in ordinary use, *i.e.*, garments and footwear, are chargeable at the higher rate under the Act. The same thing attaches to headgear, scarves, collars, cuffs, and other things. If the legislature had desired that these pads and blankets, if designed for some special use, should be exempted from the tax, I think they would have said so. In the home one finds the sick as well as the healthy, the feeble as well as the strong. Warmth is acceptable to both, and I cannot see that it makes much difference whether it comes from the fire in the grate, the gas in the stove, the hot-water in the bottle, or the electricity in a pad or blanket, however the current may be adjustable or controllable. Here is an appliance of great utility and practical convenience which can be used by anybody without special knowledge and with a negligible current consumption. It can surprise nobody that it should have gone into domestic use. I have no doubt that these pads and blankets, even with the three-heat control, are appliances and apparatus of a kind used for domestic purposes, and, therefore, goods chargeable to purchase tax. I so hold. There must be judgment for the agreed sum of £107 10*s*. 0*d*.

Judgment for the Crown with costs.

Solicitors : *Solicitor of Customs and Excise* (for the Crown) ; *Parkers & Hammond* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

REDMAN *v.* REDMAN.

[COURT OF APPEAL (Tucker and Wrottesley, L.JJ., and Vaisey, J.), February 4, 1948.]

Divorce—Discretion—Relevant considerations—Desire of respondent to re-marry—Bigamy of petitioner.

A wife, who had contracted a bigamous marriage, sought a divorce on the grounds of her husband's adultery, and asked the court to exercise its discretion in her favour. It was put in the forefront of the case for the wife that the discretion should be exercised to enable the husband to marry a woman by whom he had had a child, but when the evidence failed to support the proposition that the husband desired to re-marry, the case was not presented to the commissioner on grounds favourable to the wife. In his judgment the commissioner stated that he was satisfied that he would not be justified in exercising his discretion in favour of the wife and he dismisssed the petition, but he did not set out his reasons for arriving at that conclusion. On appeal by the wife,

HELD: the fact that a judge or commissioner does not set out every one of the reasons which actuated him in coming to his decision is not sufficient to support an argument that he has not applied his mind to the relevant considerations, but, on the facts, as a result of the way in which the case had originated and been presented, the commissioner had not given sufficient weight to some of the relevant considerations, and the discretion of the court should be exercised in the wife's favour.

Dictum of VISCOUNT SIMON, L.C., *in Osenton & Co.* v. *Johnston*, ([1941] 2 All E.R. 245, 250; 165 L.T. 235, 238), *applied.*

Per TUCKER, L.J.: The fact that the respondent may desire to get married and regularise the position of some woman whom he may, perhaps, have deceived is, no doubt, a relevant consideration under the fifth of the headings in the speech of LORD SIMON, L.C., in *Blunt* v. *Blunt*, where, referring to the considerations determining the exercise of the court's discretion, he said ([1943] 2 All E.R. 76, 78; 169 L.T. 33, 34): "To these four considerations I would add a fifth of a more general character, which must, indeed, be regarded as of primary importance, namely, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down."

Per curiam: The mere fact of bigamy having been committed by the spouse who is asking for the exercise of discretion does not in itself operate as a bar to such exercise, but bigamy is properly to be weighed in the balance with other matters when the court is considering the question of the exercise of its discretion, and the circumstances in which the bigamy was committed must be carefully taken into account.

[AS TO DISCRETION OF COURT IN GRANTING A DECREE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 686-690, paras. 1018-1025; and FOR CASES, see DIGEST, Vol. 27, pp. 359-367, Nos. *3446-3538.*]

Cases referred to:—

(1) *Blunt* v. *Blunt*, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; Digest Supp.

(2) *Osenton & Co.* v. *Johnston*, [1941] 2 All E.R. 245; [1942] A.C. 130; 110 L.J.K.B. 420; 165 L.T. 235; Digest Supp.

APPEAL by the wife from an order of Mr. Commissioner EDDY, dated June 10, 1947, refusing a decree of divorce in an undefended suit in which he found that the adultery was proved, but refused to exercise his discretion in the wife's favour. The appeal was allowed and a decree *nisi* granted. The facts appear in the judgment of TUCKER, L.J.

Turner-Samuels, K.C., and *Fairweather* for the wife.
The husband did not appear.

TUCKER, L.J.: The parties were married in March, 1935, when the wife was 23 years of age. According to her evidence, unknown to her her husband had venereal disease at the time of the marriage. The marriage was never properly consummated because of a disease from which the husband was suffering, and so the sexual relationship between the parties was very unsatisfactory, but for that no blame attached to the wife. That being the position, they parted in October, 1935. In 1940, the husband joined the army and the wife heard nothing from him until 1946, when she received a communication from solicitors acting on his behalf indicating that he desired her to divorce him. Meanwhile, during this interval of 11 years, she had been working as a single woman. In 1940 she met a man named Cross. Intercourse took place between them and in March, 1942, a child was born. Cross agreed to marry her and on Apr. 28, 1942, they bigamously went through a form of marriage. The wife lived with Cross until September, 1945, but she was unhappy with him and she then left him. She was, apparently, a truthful witness at all stages of her evidence. She was almost encouraged to say that Cross had left her. She would not have that, but said that she left him. She also said that she had posed to Cross as a single woman and that he was unaware of her marriage when he went through this form of marriage with her. Later, she went to the police and gave them information about her doings, and when this case was heard by the commissioner proceedings for bigamy were pending against her, in addition to charges of obtaining money by false pretences which arose out of the fact that Cross, when he joined the army, had made the necessary arrangements for her to receive the allowances due to a soldier's wife. Those proceedings have since been terminated and their result is immaterial to any matter that we have at present to consider.

That is the history of this marriage. This woman had a make-believe kind of marriage with the husband and an unfortunate association with Cross, and she is now left at the age of 36 with an illegitimate child and no husband. Her husband, who had disappeared into the blue for 11 years, suddenly emerged when he had got a girl into trouble and wished to marry her. He appears to have instigated the proceedings which were brought by his wife against him in order that he might marry this girl. He was evidently called at the hearing, having been duly warned, to give evidence to prove his own adultery, and to support the wife's case for the exercise of the court's discretion by stating that he desired to be free to marry this girl. It is to be said in his favour that he was also a very frank witness and he would not have any of that. When he was asked: "If there should be a divorce in this case, what are your intentions with regard to Miss Holloway?", he said: "I do not know. At one time we were going to get married, but I have not seen her for some time now. Whether she is of the same mind now I do not know." He was asked: "Of what mind are you?", and replied: "It depends on the girl mostly." Counsel for the wife, in his address to the commissioner, said that the judge undoubtedly had had the whole truth, emphasised the sad aspects of the matter, pointed out that relief by way of nullity on the ground of the existence of venereal disease was not open to her under the law as it stood in 1935, and urged, perhaps rather optimistically, that, if the learned commissioner did exercise his discretion, there was some chance that the husband would marry the girl Holloway, and the wife, having served whatever sentence she might have to serve, would emerge a better woman and able to lead a decent life. The commissioner, in giving his decision, said:

> I am satisfied that I should not be justified in exercising discretion so far as the petitioner is concerned. Three summonses were put before me relating to charges against her which are now pending in the magistrates' court. One alleges bigamy, the second, obtaining a valuable security by false pretences, and the third, obtaining from His Majesty by false pretences the sum of £416 16*s.* 6*d.* It would be improper for me to comment on these matters. I, therefore, content myself with saying that, on the material before me, I see no ground whatever to justify me in exercising my discretion in favour of the petitioner and the petition is accordingly dismissed.

I desire to emphasise as strongly as I can that the fact that a judge or commissioner does not set out every one of the reasons which actuate him in coming to his decision will not be sufficient to support an argument in this court that he has not applied his mind to the relevant considerations, nor is it necessary for him to set out all the matters which are summarised under the five well-known headings in LORD SIMON's speech in *Blunt* v. *Blunt* (1). One naturally assumes that judges and commissioners have these matters in mind and endeavour to apply them. The mere fact that, in his judgment, the commissioner may not have mentioned some fact or other or that he emphasised some other fact is quite insufficient to persuade me that he did not, in fact, apply his mind properly to relevant matters which he does not in terms mention. Further, it is necessary to emphasise that it is not our discretion that is being sought. The discretion is that of the learned commissioner, and we can only interfere if we are satisfied that there has been a wrongful exercise of that discretion in that no weight or no sufficient weight has been given to relevant considerations. Regarding this case as a whole, I am driven to the conclusion that the commissioner did not give sufficient weight to some of the relevant considerations, and I think that came about as a result of the way in which the case had been presented to him. It had been put in the forefront of the argument that the discretion should be exercised to enable the husband to re-marry. There was no indication that the wife was contemplating matrimony. The whole case was put forward for the benefit of the husband. It is true that the fact that he may wish to get married and regularise the position of a woman whom he may have deceived is a relevant consideration under the fifth of the headings in LORD SIMON's speech in *Blunt* v. *Blunt* (1) ([1943] 2 All E.R. 78):

> To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, *viz.*, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

I think the desire of the husband to get married is a relevant consideration which comes properly under that head. I am driven to the conclusion that in the present case the commissioner had been directing his mind primarily to the position of the husband and had attached too much weight to the fact that the wife had been guilty of bigamy. I think he must have lost sight of the very peculiar circumstances of this case, the history of the marriage, the fact that the wife's adultery had been contributed to by the conduct of the husband whom she had not seen for several years before she formed a bigamous association with the man, Cross, and, above everything else, the fact that she is now 36 years of age and, although she is not contemplating matrimony for the moment, will, if discretion is not exercised in her favour, be precluded for all time from contemplating a matrimonial alliance, and that will result in the maintenance of this so-called marriage in circumstances which I cannot think will be beneficial in the interest of the community at large or will enhance the sanctity of marriage.

In these exceptional circumstances, I think that this is a case in which the commissioner cannot have given due weight to relevant considerations and is, therefore, one in which it is open to us to apply our minds to the matter, and I further think it is one in which discretion should be exercised in favour of the wife. In coming to that decision I do not desire for one moment to be thought to be minimising the seriousness of the offence of bigamy, nor to be indicating that that is not a proper matter to be weighed in the balance together with other matters when judges or commissioners are considering this difficult question of the exercise of discretion.

WROTTESLEY, L.J.: This is a case in which I have felt considerable difficulty and it is only with some doubt and hesitation that I have finally come to the conclusion that the appeal ought to be allowed—the more so because I feel that it is pretty clear that in the circumstances presented to the commissioner I should have come to the same conclusion as the commissioner. The fact is that the case was not presented to the commissioner on grounds favourable to the wife, for there were grounds favourable to her which might have acted to counter-balance the unfavourable aspects of her case. She was very hardly dealt with in her original marriage. Nearly seven years passed before this bigamous ceremony, and that is not unimportant. What I may call the more important criminal element in her conduct in entering into this bigamous marriage was the concealment of the truth from her "husband." I have looked to see what her explanation of that was. The commissioner attached importance to the point and asked: "Did you tell this man, Cross, when you went through this ceremony with him, that you were a single woman?" The answer was: "Yes, he asked me. Why I did not like to tell him I was married was because he would ask for explanations about why did I leave my first husband, or why he left me. I did not like to say about his venereal disease." I am bound to say that occurs to me to be a reasonable answer A which goes some way to explaining why she had concealed from this man the distressing facts of the original marriage. As to the fraud, it was not in all the circumstances a very serious case. The woman was, undoubtedly, entitled to be supported and so was her child in any event. Another matter which is important but was not put before the commissioner is that she might, if granted her divorce, desire to re-marry. It seems to me that, if things which could have been said for the wife had been said, the commissioner might well have decided B differently. It is impossible for us to say now what he would have decided, but it is abundantly clear that he was never asked to apply his mind to these problems.

The case seems to fall within the language of Lord Simon in *Blunt* v. *Blunt* (1) where he said (*ibid.*, 79), quoting from what was said in *Osenton* v. *Johnston* (2) ([1941] 2 All E.R. 250): C

> If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations . . . then the reversal of the order on appeal may be justified.

At any rate, the case having been presented thus to the commissioner, the time has now come when this court must consider what can be said on behalf D of the wife. On the whole, although not without some doubt, it seems to me that the balance that Lord Simon referred to in his speech (*ibid.*, 525) tips finally in favour of the wife, and I say that in spite of the bigamy, a matter which certainly had to be weighed carefully by the commissioner. For this reason, and with some doubt, I have come to the conclusion that the appeal ought to be allowed.

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VAISEY, J.: I also am not satisfied that the commissioner brought his mind to bear on several of the relevant considerations in this case. I say that for two reasons:—(*a*) because it was placed in the forefront of the presentation of the case (unjustifiably, as it turned out when the husband went into the witness box) that he desired to marry a woman who had had a child by him; and (*b*) because of the contents of the commissioner's judgment on which my Lords have already commented. Taking that view of the F matter, I apprehend that we are free to say what we think ought to be done in regard to the exercise of discretion on a full review of all the circumstances. As to that, I agree with the judgment of my Lord, and I should wish to express my own very strong view that the light way in which bigamy is now too commonly regarded should neither be encouraged nor easily condoned. It is clear, I think, that the mere fact of bigamy having been committed by the spouse who is asking for the exercise of discretion does not in itself operate G as a bar to such exercise, but the circumstances in which the bigamy was committed have to be carefully considered. This is a case in which, on the whole and not without some hesitation, I think that the discretion ought to be exercised in the wife's favour.

Appeal allowed. Decree nisi. No order as to costs.

Solicitors: *Robinson & Bradley* (for the wife). H

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

FRANKMAN *v.* ANGLO-PRAGUE CREDIT BANK (LONDON OFFICE).

[KING'S BENCH DIVISION (Cassels, J.), January 26, 27, 28, 29, February 2, 1948.]

Conflict of Laws—Contract—Legality—Lex loci contractus and lex loci solutionis—Both in foreign country—Foreign exchange control regulations—Customer's debentures in foreign company deposited by foreign bank in bank's name at London branch—Bretton Woods Agreements Order in Council, 1946 (*S.R. & O.,* 1946, *No.* 36), *art.* 3, *sched., pt. I.* (*Fund Agreement, art.* VIII, *s.* 2 (*b*)).

The defendants were a Czechoslovakian bank with head office at Prague and branches in London and elsewhere. A customer of the bank subscribed for debentures in a Czechoslovakian company which were acquired on the London Stock Exchange by the head office of the bank, credited in its books to the customer, and deposited with its London branch in its own name. The " business conditions " of the bank provided, *inter alia,* that the place of performance and payment should be considered to be that department of the bank which carried out the relevant transaction with the customer. On the customer's death the plaintiff's mother became entitled to the debentures. The head office paid the interest to the mother until, with the plaintiff, she came to live in England just before the war. During the war the London branch of the bank, who did not know the mother and had no dealings with her, paid the interest to the Custodian of Enemy Property, who paid it to the Czechoslovakian Financial Claims Office, who, in turn, paid it to the mother. The mother died in 1945. The plaintiff, on whom the ownership had devolved, issued a writ (citing the London branch as defendants) for the return of the debentures or their value and damages for detinue, but appearance was entered by the bank. Evidence was given that under Czech law the bank and the plaintiff's mother were Czech citizens who came to the agreement in Prague, that the principle *locus regit actum* applied, that the place of fulfilment and payment and the only place where the mother's claim could have been asserted was Prague, that by government decree transfer of securities from an exchange citizen, *e.g.*, the bank, to an exchange foreigner, *e.g.*, the plaintiff or the London branch of the bank, could be made only with the permission of the National Bank of Czechoslovakia, and, that by existing foreign exchange law the bank were restrained from parting with the debentures without that permission, which had been refused, but that there was nothing to prohibit a transaction between two exchange foreigners. Evidence was also given that the Republic of Czechoslovakia, together with Great Britain, signed the Bretton Woods Agreement of the International Monetary Fund, the purpose of which was mutual consideration of foreign exchange control regulations of the signatories. The Bretton Woods Agreements Order in Council, 1946, made under the Bretton Woods Agreements Act, 1945, s. 3, gives the force of law, *inter alia,* to art. VIII, s. 2 (*b*), of the Fund agreement which is as follows : " Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member . . ."

HELD : (i) the London branch of the bank was not a separate entity and the Prague bank were the only parties from whom the plaintiff could seek satisfaction.

(ii) the contract was to be performed in Prague in accordance with Czechoslovakian law, and, as the refusal of permission by the National Bank make the contract unenforceable in that country, the contract could not be enforced in an English court.

Wetherman v. *London & Liverpool Bank of Commerce, Ltd.* (1914) (31 T.L.R. 20) and *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank* ([1939] 3 All E.R. 38 ; 160 L.T. 615), *distinguished.*

(iii) further, although as a rule the court would not enforce the revenue laws of other countries, in this case there were foreign exchange control regulations, honoured by members of the International Monetary Fund, contracts contrary to which were specifically made unenforceable in this country by the Bretton Woods Agreements Order in Council, 1946, art 3, sched., pt. I, and, therefore, the plaintiff was not entitled to recover the debentures.

[As to Enforcement of Contracts Illegal by the lex loci Solutionis, see HALSBURY, Hailsham Edn., Vol. 6, p. 272, para. 327 ; and for Cases, see DIGEST, Vol. 11, pp. 402, 403, Nos. *729-738*].

Cases referred to :

(1) *Wetherman* v. *London & Liverpool Bank of Commerce, Ltd.*, (1914), 31 T.L.R. 20 ; 3 Digest 99, *276*.

(2) *Kraus* v. *Zivnostenska Banka*, (1946), 64 N.Y.S. 2d, 208.

(3) *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank*, [1939] 3 All E.R. 38 ; [1939] 2 K.B. 678 ; 108 L.J.K.B. 861 ; 160 L.T. 615 ; *affg.*, [1939] 2 All E.R. 782 ; Digest Supp.

(4) *De Beeche* v. *South American Stores, Ltd., and Chilian Stores, Ltd.*, [1935] A.C. 148 ; 104 L.J.K.B. 101 ; 152 L.T. 309 ; Digest Supp.

(5) *Ralli Brothers* v. *Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 ; 89 L.J.K.B. 999 ; 123 L.T. 375 ; 11 Digest 397, *699*.

(6) *Ford* v. *Cotesworth*, (1870), L.R. 5 Q.B. 544 ; 10 B. & S. 991 ; 39 L.J.Q.B. 188 ; 23 L.T. 165 ; 12 Digest 388, *3182*.

(7) *Cunningham* v. *Dunn*, (1878), 3 C.P.D. 443 ; 48 L.J.Q.B. 62 ; 38 L.T. 631 ; 12 Digest 388, *3183*.

Action for the return, or the value, or damages for the detention, of debentures in a Czechoslovakian company deposited for a customer by a Prague bank at its London branch in the bank's name. Judgment was given for the defendants. The facts appear in the judgment.

Laski, K.C., and *R. J. S. Thompson* (for *George Maddocks*) for the plaintiff. *Sir Valentine Holmes, K.C.*, and *J. P. Ashworth* for the defendants.

Cur. adv. vult.

Feb. 2. **CASSELS, J.,** read the following judgment : Issues of importance concerning international currency and financial relationship are raised in this case which, at first sight, appears a very ordinary case of detinue and certainly involves comparatively small monetary value. The plaintiff, Austrian born in 1897, resident in this country since July, 1938, and a naturalised British subject since July, 1947, named the London Branch of the Prague Credit Bank as the defendants on his writ, but appearance was entered by the Prague Credit Bank, which is a bank in Prague, Czechoslovakia, with branches in that country and in other parts of Eastern Europe and also in London. The plaintiff seeks to recover from the defendants three debentures of £100 each in the Skoda Works, Ltd., a well known industrial concern in Czechoslovakia. These debentures are, in fact, held in the London branch of the bank at 48, Bishopsgate. While no question is raised as to the ownership by the plaintiff of these debentures, the bank plead that they are unable to deliver to the plaintiff by reason of the law of Czechoslovakia relating to foreign exchange, that the permission of the National Bank of Czechoslovakia, though it has been sought, has been refused, and that the Bretton Woods Agreement Act, 1945, renders the plaintiff's claim unenforceable.

Skoda Works, Ltd., incorporated under the laws of the state of Czechoslovakia, issued 6 per cent. debentures to the amount of five millions sterling in 1930. Part of it was known as the English issue and part of it was in denominations of £100. In Trautenau, a town in Czechoslovakia, there lived Dr. Richard Weiner. He, through the local branch of the Prague bank, subscribed for £300 of these debentures. They were acquired by the Prague headquarters bank on the London Stock Exchange and were deposited by them with their London branch. Dr. Weiner received and continued to receive the interest on those debentures until he died in 1935. The plaintiff's mother, Mrs. Frankman, was the doctor's sister and lived with him in Trautenau. On the doctor's intestacy she succeeded to his estate. By some means which did not transpire she acquired a further £400 of these debentures and we find the reference to this in a letter dated Mar. 22, 1938, in which the Prague bank wrote to her at her then home in Prague that they were crediting her with £700 6 per cent. debentures on her deposit account that the defendants held in London. By May 24, 1938, Mrs. Frankman had sold £400 of these debentures, the Prague bank carrying out the transaction and crediting her current account with the net proceeds of the sale. This left her with £300. Whether those £300 debentures were those which came to her from the estate of Dr. Weiner or not it is impossible to say, and I do not think it matters, although the consecutive numbers seem to indicate that they were. She was left with £300 debentures and they were in London and she had the proceeds of the sale of the £400. The plaintiff came to England in July, 1938. His mother followed him in March, 1939. Her current account at Prague was closed as at Dec. 31, 1942, and according to it she had these debentures in safe custody with the Prague bank. Until her death on Aug. 16, 1945, and while she was living in this country, the mother received the interest on these debentures, but not directly through the London branch of the Prague bank. The London branch did not know the plaintiff's mother and had no dealings with her at all. During the war the London branch was licensed under the law relating to trading with the enemy and for the purposes of that legislation Czechoslovakia was treated as an enemy. The London branch paid the interest in bulk to the Custodian of Enemy Property, the Czechoslovakian Financial Claims Office (which was a part of the British Treasury) received it, and they paid the holders resident in this country, among whom was Mrs. Frankman. She died intestate. The plaintiff took out letters of administration. The estate was sworn at £226 10*s.* 0*d.*, these £300 debentures probably representing the whole of her property. Those are the debentures, the mere pieces of paper acknowledging the debt to the registered holder, which were deposited by the Prague bank in their London branch and which the plaintiff claims to have delivered to him.

Consideration must, therefore, be given to the terms of the contract between the bank and the plaintiff's mother, in whose shoes the plaintiff stands, to the law which is applicable, and to the position of the plaintiff as the acknowledged owner of the debentures. From the time these debentures were acquired through the Prague bank they remained in London. If those debentures were the original debentures acquired by Dr. Weiner he gave the bank authority to deal with them as they chose and to deposit them as they thought best, even abroad. I do not think that enters into this case and I must look to see what the contract was between the bank and Mrs. Frankman. They wrote to her on Mar. 22, 1938, informing her that they held these £300 debentures as well as the £400 on her deposit account that they held *loco* London. They enclosed their business conditions and a declaration for signature concerning the deposit of securities abroad. That signature was not supplied. On Apr. 27, 1938, the bank informed the plaintiff's mother that the securities were deposited with their branch in London. I am satisfied that she assented to the business conditions by her acquiescence. The conditions were sixty-five in number. The plaintiff's mother probably never read them. Translated from the German, Condition No. 11 reads as follows:

> As regards such stocks and securities as were purchased at a stock exchange other than that of Prague or were received by any bank other than a Prague bank, we shall not have the same sent to us unless the customer has ordered the transmission thereof at his own expense and risk, but will leave the same, at the risk and expense of the customer, deposited with our correspondent, where they shall be subject to the legal measures of the respective country; this also applies in the case of our having credited the principal with such securities on a securities deposit account. In the event of our entrusting any securities to or leaving them in the custody of any third party—provided, of course, that we are otherwise authorised so to do—we shall only be responsible for our diligence in selecting the depositary, naturally subject to the provisions of the law of Oct. 10, 1924, No. 241 of the Collection of Laws and Decrees.

Condition No. 50 is as follows:

> The place of performance and payment in respect of all obligations resulting from the business connection with us shall be the place of that department of our establishment which has carried out the relevant transaction with the customer, except in so far, however, as no other special stipulation [has been made] in this connection . . . Place of jurisdiction. For all disputes between ourselves and the principal, the court which is competent for Prague or for our branch office concerned, shall have local jurisdiction. We are, however, also entitled to bring actions in the court which has jurisdiction in accordance with the law.

Under Condition No. 50 I think it is clear that the place of performance of all obligations as between the bank and the plaintiff must be taken to be Prague. It was the Prague bank which credited the plaintiff's mother with the securities. It was the Prague bank which deposited them at their London branch—not in her name, in theirs, but with her knowledge. It was the Prague bank which sold the £400 debentures on May 24, 1938, and referred to the place of deposit as London. It was the Prague bank which was paying her interest in 1938 and referred to the "securities deposited with us." It A would be a natural reflection on the part of the mother that, when she left Czechoslovakia in 1939, as probably she was very pleased to do, the London branch of the bank had these securities in safe custody for her. What I have to consider is whether the law of today prevents her personal representative, her son, from obtaining them.

Dr. Otto Kulhanek, a Czech lawyer, a doctor of laws of Prague University, who for the past eighteen years had been in the employment of the Czechoslo- B vakian National Bank, particularly engaged in the foreign estate department, gave evidence as to Czech law. I take the following from his evidence: (1) That in 1938 the Prague Credit Bank and Mrs. Frankman were Czechoslovakian citizens and came to this agreement in Prague. (2) That *locus regit actum* applies. (3) That the duty of the bank was carefully to guard the thing entrusted to them and to return the same in the condition in which they took it over. (4) That the place of fulfilment and payment is Prague. (5) That C Mrs. Frankman could only assert her claim against the Prague Credit Bank in Prague. (6) That by Czechoslovakian government decrees, only with the permission of the National Bank is it allowed to transfer securities from an exchange citizen to an exchange foreigner. (7) The foreign exchange law now in force restrains the bank from parting with these securities without the permission of the National Bank. This permission was applied for and was refused on D Nov. 15, 1946. Dr. Kulhanek also drew attention to the fact that the republic of Czechoslovakia together with this country signed the so-called Bretton Woods Agreement for the establishment of the International Monetary Fund dated in Washington, Dec. 27, 1945, the purpose of which is mutual consideration of foreign exchange control regulations of the signatories. My attention has also been called to the Bretton Woods Agreements Order in Council, 1946, made under the Bretton Woods Agreements Act, 1945. The schedule to that Order con- E tains the provisions and agreements which are to have the force of law. Article VIII, s. 2 (*b*), of the Fund Agreement reads:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member ...

Dr. Kulhanek said, in his evidence, that the bank are exchange citizens, that the F plaintiff is an exchange foreigner, that the bank's London branch is an exchange foreigner, and that there is nothing to prohibit a transaction between two exchange foreigners. This last answer was given to a question in cross-examination by counsel for the plaintiff. The difficulty about applying that fact to this case is that the bank's London branch is not a separate entity. The party against whom the plaintiff seeks, and can only seek, judgment is the Prague bank, and the contract under which the bank received these securities from G Mrs. Frankman for safe custody was made in Prague and Prague is the place of performance and payment in respect of obligations according to Condition No. 50 of the business conditions. Counsel for the plaintiff sought in aid Condition No. 11 of the business conditions. I have already read that clause. I do not place the same interpretation on it as that which counsel submits. I think Mrs. Frankman's transaction was solely with the Prague bank and the deposit for safe custody with the London branch was the Prague bank's deposit. H I think there was some force in the contention of counsel that the bailee is not entitled to remove the article bailed from the place agreed as being the place of bailment, and, therefore, the bank could not have removed these securities to Prague unless Mrs. Frankman had agreed. She might have said she preferred the safety of London to the risk of Prague. At any rate, when she escaped to England she did not seek to alter Prague's disposition of her securities. Counsel contended that these securities were held in London to her order. I do not agree with this. I think that, if Prague had moved these securities from London without her permission, they would have been in breach of their contract, but, none the less, these securities were held in London to the order of Prague.

Counsel cited *Wetherman* v. *London and Liverpool Bank of Commerce, Ltd.* (1). I think the facts there were different. There the plaintiff caused his shares to be handed to the defendants to the order of a German bank, which German bank was supposed to transfer them to New York. Owing to the first world A war breaking out, the German bank did not give the order to transfer. The plaintiff had no difficulty in getting a decision of SCRUTTON, J., in his favour. He said that the defendants could not say that they would not hand over the shares except by the authority of a third person. In this case there is no third party. The bailment was between Mrs. Frankman and the Prague bank. The point in this case with which I have to deal has been considered in the United States in *Kraus* v. *Zivnostenska Banka* (2), a decision which is, of course, B not binding on me but which is one which I think I should treat with respect. There the plaintiff, before the last war, deposited in Prague with the defendants, a bank in Prague, money and securities. The plaintiff left Czechoslovakia before the war. I do not know whether he got to New York, but in September, 1940, hearing that the defendants had funds in New York, he instituted proceedings for money had and received and to recover the value of the securities. If he had succeeded he was going to execute against the C defendants' funds in New York. He did not succeed because the contract, as here, provided that the place of performance was Prague and the law was Czechoslovakian. It is true that in that case the money and the securities were still in Prague. I do not think that makes any difference. In the case that I am considering the securities, though in London, are under the control of Prague.

D Both the plaintiff and the defendants rely on *Kleinwort's* case (3). I need not deal further with the facts in that case than to say that it concerned a bill of exchange drawn by a Hungarian company and accepted by bankers carrying on business in London and the bills were payable in London. The Hungarian company wrote that they would only be in a position to provide cover at maturity if the exchange regulations prevailing in Hungary enabled them to do so. At the maturity date it was illegal for Hungarian subjects to pay money outside E Hungary without the consent of the Hungarian National Government. It was held that the letter sent by the Hungarian bank was not part of the contract and did not limit the clear promise contained in the undertaking, that the proper law of the contract was English law and that, since the contract was to be performed in England, it was enforceable in the English courts, even though its performance might involve a breach by the defendants of the law of Hungary. BRANSON, J., whose decision in the court of first instance was F affirmed in the Court of Appeal, said ([1939] 2 All E.R. 784) :

> I shall deal with each of these contentions in order. First, as to the law applicable. In each case, the contract is written in English, and consists of an offer made by letter from Hungary to London, accepted by the acceptance in London of bills payable in London. It obliges the defendants concerned to provide pounds sterling in London. London is, therefore, both the *locus contractus* and the *locus solutionis*, and I can see no principle G upon which it should be held that Hungarian law should be applied to it. The only suggestion to the contrary was based by counsel for the defendants on a consideration of the law applicable to bills of exchange. The answer to this suggestion lies in the fact that the contracts here sued upon are not contained in the bills of exchange, though made with reference to them.

At p. 787 the learned judge said :

> Then it is said that, according to the principles of English law, our courts will not H enforce an obligation upon a defendant the performance of which would of necessity involve him in doing something in a foreign country which would be an offence against the laws of that country. For this proposition, the passage in the opinion of VISCOUNT SANKEY, L.C., in *De Beeche* v. *South American Stores, Ltd.* (4) is sufficient authority. He said ([1935] A.C. 156) : " . . . It cannot be controverted that the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do." It is true that his Lordship does not use the words " of necessity," but they are implied in the word " involves." The same principle was enunciated in slightly different language by SCRUTTON, L.J., in *Ralli Brothers* v.

Compania Naviera Sota y Aznar (5) ([1920] 2 K.B. 304) : " In view of the fact that the recent decisions of the House of Lords would require or enable the results of those decisions [*Ford* v. *Cotesworth* (6) and *Cunningham* v. *Dunn* (7)] to be justified in quite a different way, I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent states." Two elements, A then, must co-exist if an English contract, lawful at its inception, is to be rendered unenforcable in the courts of this country by supervenient foreign legislation, (i) there must be an act which the contract requires to be performed in the foreign country, and (ii) that act must have been rendered unlawful there.

In the Court of Appeal MacKinnon, L.J., said ([1939] 3 All E.R. 42) :

> . . . the principle is an application of the one stated with characteristic lucidity and precision in that great work Dicey on Conflict of Laws. Rule 160 is stated as B follows, at p. 647 : " The material or essential validity of a contract is (subject to the exceptions hereinafter mentioned) governed by the proper law of the contract." The proper law of this contract is English law. Then his third exception is this, at p. 657 : " A contract (whether lawful by its proper law or not) is, in general, invalid in so far as (1) the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*) . . ." Here it is said that to pay this money in London is unlawful by the law of Hungary. If this contract had been C to pay money in Budapest, no doubt that principle would have applied and the law of Hungary would have been the *lex loci solutionis.* In this case, however, the payment of the money was to be made in England, and English law is the *lex loci solutionis.* Therefore, the exception where the performance is unlawful by the law of the country where the contract is to be performed does not arise or exist, and no defence can be based by the defendants upon that principle.

That is all I need read from *Kleinwort's* case (3). I do not think that that D case applies to the present matter. I am satisfied that the contract here was to be performed in Prague and that its performance is governed by Czechoslovakian law and that law provides that it cannot be performed without the permission of the National Bank of Czechoslovakia which has been refused. The *lex loci contractus* and the *lex loci solutionis* are both in Czechoslovakia.

Counsel for the plaintiff said that the courts here will not enforce revenue or penal laws of other countries. That is so, but these are financial restrictions E and have to do with the financial position and internationally the financial relationship of Czechoslovakia. The Bretton Woods Agreement shows that such restrictions are honoured by the members of the International Monetary Fund. Those members include Czechoslovakia and this country. In the Final Act of the United Nations Monetary and Financial Conference, 1944 (Cmd. 6546), art. I, on p. 16, it is stated :

> The purposes of the International Monetary Fund are : (i) To promote international F monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems. (ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy. (iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation. G (iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade. (v) To give confidence to members by making the Fund's resources available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity. (vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members H . . .

Article VIII, 2 (*b*), of the Fund Agreement, on p. 24, says :

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, co-operate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this agreement.

Though I have no doubt about the law and the facts in this case, it is not without some regret that I have felt compelled to come to a decision which is against the plaintiff and to hold that this action fails. I give judgment for the bank with costs.

Judgment for the bank with costs.

Solicitors: *W. R. Bennett & Co.*, agents for *Barrow-Sicree & Co.*, Manchester (for the plaintiff); *Freshfields* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Applied. POWELL *v.* POWELL [1951] P. 257

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pplied. SNELLING *v.* SNELLING. 1952] 2 All E.R. 196.

EN (formerly SATTERTHWAITE) *v.* SATTERTHWAITE.

[COURT OF APPEAL (Asquith and Evershed, L.JJ.), January 14, February 5, 1948.]

Divorce—Maintenance—Variation of order—Re-marriage—Appeal—Discretion—Administration of Justice (Miscellaneous Provisions) Act, 1938 (*c.* 63), *s.* 14 (2).

A wife, having been granted a decree of divorce against her husband, obtained a maintenance order providing for the payment to her of £400 a year, less tax, during the joint lives of herself and her husband or until further order. Later, both parties re-married and the order was varied by the registrar, the payment under it being reduced to the nominal sum of 1*s.* 0*d.* a year. This order was affirmed by the judge. The wife appealed on the grounds (*a*) that the registrar and the judge had applied a wrong principle of law, and (*b*) that, having regard to the evidence, the low figure of 1*s.* 0*d.* must be wrong and the result of the order was manifestly unjust:—

HELD: (i) by their re-marrying, the husband had assumed new financial burdens and responsibilities and the wife had secured a fresh legal right to be supported; *pro tanto*, therefore, the means of the husband had been "decreased" and those of the wife "increased" within s. 14 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1938; and, while the re-marriage of a woman, without more, was no ground for reducing her maintenance, these were relevant factors which were properly taken into account by the judge and the registrar.

(ii) it was only where the exercise of a discretion exceeded the generous ambit within which reasonable disagreement was possible, and was, in fact, plainly wrong, that an appellate court was entitled to interfere, and in the present case the court could not on any grounds conclude that the order made involved a miscarriage of justice.

Principle in Evans v. *Bartlam* ([1937] 2 All E.R. 646; *sub nom., Bartlam* v. *Evans*, 157 L.T. 311) *and Osenton* (*Charles*) *& Co.* v. *Johnston* ([1941] 2 All E.R. 245; 165 L.T. 235), *applied.*

[AS TO VARIATION OF MAINTENANCE ORDERS, see HALSBURY, Hailsham Edn., Vol. 10, p. 798, para. 1269; and FOR CASES, see DIGEST, Vol. 27, pp. 505, 506, Nos. *5404-5418.*]

Cases referred to:

(1) *Evans* v. *Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; *sub nom. Bartlam* v. *Evans*, 157 L.T. 311; Digest Supp.

(2) *Osenton* (*Charles*) *& Co.* v. *Johnston*, [1941] 2 All E.R. 245; [1942] A.C. 130; 110 L.J.K.B. 420; 165 L.T. 235; Digest Supp.

(3) *Lister* v. *Lister*, (1889), 15 P.D. 4; 62 L.T. 90; 27 Digest 507, *5440.*

(4) *Perkins* v. *Perkins*, [1938] 3 All E.R. 116; [1938] P. 210; 107 L.J.P. 115; Digest Supp.

(5) *Gardner* v. *Jay*, (1885), 29 Ch.D. 50, 58; 54 L.J.Ch. 762; 52 L.T. 395; Digest, Practice 535, *1987.*

INTERLOCUTORY APPEAL by the wife from an order of WILLMER, J., dated Dec. 11, 1947, affirming an order of the registrar, which varied a maintenance order of Sept. 10, 1942, by reducing from £400 per annum, subject to tax, to the nominal sum of 1*s.* 0*d.* per annum the sum payable by the divorced husband to the wife. The appeal was dismissed. The facts appear in the judgment of ASQUITH, L.J.

Holroyd Pearce, K.C., and *William Latey* for the wife.
Beyfus, K.C., and *H. S. Law* for the husband.

Cur. adv. vult.

Feb. 3. The following judgments were read.

ASQUITH, L.J.: This is an appeal from an order of WILLMER, J., affirming an order of the registrar which varied a maintenance order of Sept. 10, 1942, by reducing from £400 per annum, subject to tax, to the nominal sum of 1*s.* 0*d.* per annum, the sum payable by a divorced husband to his former wife.

The parties were married in 1928. In 1930 a son was born and in 1936 a daughter. In December, 1941, the wife obtained a decree *nisi* against the husband on the grounds of his adultery. In 1942 the decree absolute was pronounced, and on Sept. 10, 1942, there was made the maintenance order with regard to the variation of which this appeal arises. That order provided that £400 a year, less tax, should be paid to the wife during the joint lives of herself and the husband or until further order. It also provided that £76 a year, later raised to £100 a year, free of tax should be paid in respect of one child and £100 free of tax in respect of the other. The present appeal is not concerned in any way with the provision made for the children. It relates solely to the £400 a year less tax payable to the wife.

The wife bases her appeal on two grounds—(i) that the registrar and the judge applied a wrong principle of law, and, (ii) that, having regard to the evidence, a figure as low as 1*s.* 0*d.* per annum must be wrong and the result of the order manifestly unjust. The jurisdiction involved in the making and variation of this type of order is today governed by s. 190 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, and s. 14 (1) and (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1938. These provisions, omitting the immaterial words, read as follows. Section 190 (2) of the Act of 1925 is:

> . . . the court may, if it thinks fit, by order . . . direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable . . .

There follows a proviso now repealed and replaced by s. 14 (1) and (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, which is as follows:

> (1) Where under the Supreme Court of Judicature (Consolidation) Act, 1925, the court has made . . . an order under s. 190 (2) of that Act . . . the court shall have power to . . . vary the order . . . (2) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage.

Between the original maintenance order of 1942 and the present application to vary it both the wife and the husband had remarried. The husband, by so doing, had assumed new financial burdens and responsibilities. The wife, on the other hand, by so doing, had secured a fresh legal right to be supported. *Pro tanto* the means of the husband had been "decreased" and those of the wife "increased" within s. 14 (2) of the Administration of Justice (Miscellaneons Provisions) Act, 1938, which requires these factors, in particular, though not to the exclusion of others, to be taken into account when a question of varying a previous maintenance order arises.

To revert to the wife's contentions. The first was that the registrar—whose order the judge affirmed without giving reasons—misdirected himself, or applied a wrong principle of law, or adopted a wrong approach to the question—all different ways of expressing the same thing. The only indication of the principles of approach of the registrar is contained in the first two or three lines of a judgment which can hardly have exceeded six. According to counsel's note, he said: "I have to look at all the circumstances including the financial position of all the parties." So far, this direction seems unimpeachable, reproducing, as it does, the substance of s. 14 (2). Then follow the words complained of: "The wife chose to marry again," and then follows the decision. It is conceded that if the registrar had said: "She has, in fact, married again," his language would have been wholly free from objection. I am not satisfied that the registrar meant any more than this. Most certainly he did not mean that the re-marriage of a woman, as such, and without more, is a ground for reducing her maintenance to nothing or its equivalent. All he meant, in my judgment, was that it was a relevant factor in so far as it increased her means in money or money's worth.

The case was elaborately argued before WILLMER, J., who confirmed the decision of the registrar, though, as I have stated, without giving any reasoned judgment of his own. In the circumstances, and having heard the arguments before the court, which I understand were put also to the learned judge, I am satisfied that there is no ground for saying that WILLMER, J., any more than the registrar, misdirected himself or exercised his discretion on any wrong principle. There is, accordingly, no substance in the suggestion that the learned judge or registrar applied a wrong principle of law, but the application of a wrong principle of law is not the only ground on which the exercise of this judicial discretion may be challenged. In the present case it is further contended that no reasonable tribunal, acting on the evidence in the present case, could properly award so low a figure as was here awarded, and that the order was manifestly and flagrantly unjust and cannot stand.

It is important to note what must be established under this head. It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere. That is, I think, the principle which emerges from the decision of the House of Lords in *Evans* v. *Bartlam* (1), and *Osenton* v. *Johnston* (2). A considerable volume of affidavit evidence was put in dealing in some detail with the financial position (i) of the husband, (ii) of the wife, and (iii) of Dr. Bellenden, whom the wife married *en secondes noces*. I do not propose to review this evidence. It is sufficient for the present purpose to say that it was sifted and considered with elaborate care by the registrar and the judge and that I cannot persuade myself that the conclusion they have both reached, in a matter in which more conclusions than one were possible, was wrong, let alone so manifestly wrong as to attract the operation of the principle to which I have referred. Before the wife re-married she had to provide board and lodging for herself and her two children. When she remarried she obtained *de jure* a right of support by her second husband, Dr. Bellenden, and *de facto* a home for her children during their holidays. She loses, if the order of WILLMER, J., stands, £400 a year, less tax. Who can say that the advantages she is gaining or has gained are not worth £400 a year, less tax. When she was supporting herself, rent alone might well have cost her the majority of this sum. When the further circumstance of the husband's re-marriage, with a consequent reduction in his available means, is taken into account, I find it impossible to say that the result reached is in any way assailable along the narrow lines of attack open to the wife. I am, accordingly, of the opinion that the appeal should be dismissed.

EVERSHED, L.J. : I agree. The jurisdiction to vary maintenance orders is to be found in s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 14 of the Administration of Justice (Miscellaneous Provisions) Act, 1938. Sub-section (2) of the last mentioned section is in the following terms :

> In exercising the powers conferred by this section, the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage.

In my judgment, it is neither necessary nor desirable to attempt any gloss on, or any further definition of, the clear general language of the sub-section. Subject to and within the wide ambit of the statutes the discretion in cases of this kind of the registrar (and of the judge) has been said to be unfettered : see, *e.g.*, *per* FRY, L.J., in *Lister* v. *Lister* (3) (15 P.D. 7), quoted by BUCKNILL, J., in *Perkins* v. *Perkins* (4) ([1938] 3 All E.R. 119). We were informed that on the hearing before the registrar and again on the hearing before WILLMER, J., all the facts and circumstances were most fully canvassed. No formal judgments were given either by the registrar or by the judge, but save in one respect it has not been suggested to us that either registrar or judge paid regard to matters which should have been disregarded or disregarded matters which should have been taken into account, or, indeed, otherwise misdirected himself in fact or law. The one alleged exception is that, according to a brief contemporary note, the registrar used the phrase "The wife chose to marry Dr. Bellenden." It was urged by counsel for the wife that by this language the registrar must be taken to have inferred that by the mere act of re-marriage the wife forfeited the rights which she had to the receipt of any maintenance from her former husband, and that this error on the part of the registrar must be taken to have infected also the decision of Willmer, J. I do not agree, nor do I accept counsel's interpretation of the phrase of which the registrar made use. I, therefore, find no grounds sufficient to entitle, still less to compel, this court to say that the registrar did not, or that the judge did not, in accordance with sub-s. (2) of s. 14 of the Act of 1938, properly and to the best of his ability consider and weigh all the circumstances of the case including the changes in the resources and prospects of the wife and the husband as a result of their respective re-marriages.

In these circumstances it would, as it seems to me, be quite wrong for this court to interfere with the conclusions both of the registrar and of the learned judge unless we were satisfied that, nevertheless, the order appealed from on some other grounds would result in what has been shown to be a miscarriage of justice: see, *e.g.*, *Evans* v. *Bartlam* (1) ([1937] 2 All E.R., at p. 650), *per* Lord Atkin, and at p. 654 *per* Lord Wright, quoting Bowen, L.J., in *Gardner* v. *Jay* (5) (29 Ch.D. 58). It was forcibly and attractively argued by counsel for the wife that to compel the wife (in effect) to exchange her right to receive £400 a year gross plus her opportunity of earning an independent livelihood for the home which an impecunious doctor was able to provide involved such a miscarriage of justice, and (viewed from another angle) that an order which required one of two men, equally wrongdoers [Dr. Bellenden also having been divorced], to provide for two out of three of the women concerned, was one which "could not stand." I must not be taken to be saying that, had the application come originally before me, I should have made precisely the same order as that appealed from. On that I express no view one way or another, nor, on the other hand, do I attempt any evaluation of my own of the "pecuniary asset" which the wife has acquired in Dr. Bellenden or of the pecuniary liability which the husband has undertaken by his second marriage. It is sufficient, in my judgment, for us to say that we ought not to conclude, and cannot conclude, that, on any grounds, the order made involves anything which could fairly be described as a miscarriage of justice. It, therefore, follows that, in my view, this court ought not to interfere with the discretion of the court below, and accordingly that this appeal must fail.

Appeal dismissed. No order as to costs.

Solicitors: *Peacock & Goddard* (for the wife); *Vizard, Oldham, Crowder & Cash*, agents for *Clark, Oglethorpe & Sons*, Lancaster (for the husband).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

R. *v.* NEWINGTON LICENSING JJ., *Ex parte* CONRAD.

[King's Bench Division (Humphreys, Singleton and Birkett, JJ.), January 23, 26, 27, 1948.]

Intoxicating Liquors—Transfer of licence—Production of documents—"Agreement or assurance" under which licence to be transferred and held—Mortgage of licensed premises by proposed transferee to owners—Jurisdiction of justices to make production order—Licensing (Consolidation) Act, 1910 (c. 24), *s.* 25 (2).

By s. 25 (2) of the Licensing (Consolidation) Act, 1910: "In the case of an application for the transfer of a justices' licence . . . the agreement or other assurance, if any, under which the licence is to be transferred and held shall be produced to the licensing justices . . ."

At the hearing of an application for the transfer of an off-licence, the proposed transferee, in pursuance of s. 25 (2), produced a lease of the licensed premises to herself and an assignment of the interest and goodwill of the transferor, and, in answer to a questionnaire, she disclosed that she had mortgaged the premises to the owners, a brewery company. The licensing justices made a verbal order for the production of the mortgage deed, but the order was not drawn up. On a motion for an order of *certiorari* to quash the justices' order :—

HELD : while the justices had power to refuse the application for the transfer of the licence if the "agreement or other assurance" were not produced in accordance with s. 25 (2), they had no power to order that such a document should be produced.

Per curiam : While the terms of a mortgage of the licensed premises might properly be regarded by the justices in a case where, under s. 23 (2) (*b*) of the Act, there was a question whether the proposed transferee was a fit and proper person to hold the licence, such a mortgage was not an "agreement or other assurance under which the licence is to be transferred" within s. 25 (2).

Per HUMPHREYS, J. : I think that s. 25 (2) intends that there should be produced to the justices any agreement or other assurance under which the licence either is to be transferred or is to be held if there are two separate documents. I would, therefore, substitute "or" for "and" in the phrase "transferred and held." The agreement or other assurance under which the licence is to be *transferred* is, in my opinion, the assignment of the goodwill. The agreement under which the licence is to be *held* must include anything in the nature of a tenancy which gives the transferee the right to occupy the premises as licensee and to sell from them, and, perhaps, though not necessarily, to live there.

Held, further : R.S.C., Ord. 59, r. 8, which provides that "in the case of an application for an order of *certiorari* to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order . . . unless . . . he has lodged a copy thereof . . . in the Crown Office and Associates' Department . . .", refers to a written, and not to a verbal, order made by the inferior court.

[FOR THE LICENSING (CONSOLIDATION) ACT, 1910, s. 25 (2), see HALSBURY'S STATUTES, Vol. 9, p. 1003.]

Cases referred to :

(1) *R.* v. *Hyde JJ.*, [1912] 1 K.B. 645 ; *sub nom., R.* v. *Cooke, etc., JJ.*, 81 L.J.K.B. 363 ; *sub nom., R.* v. *Cooke, Ex p. Atherton*, 106 L.T. 152 ; 76 J.P. 117 ; 30 Digest, 38, *299*.

(2) *R.* v. *Holborn Licensing JJ., Ex p. Stratford Catering Co. Ltd.*, (1926), 136 L.T. 278 ; 90 J.P. 159 ; 42 T.L.R. 778 ; Digest Supp.

MOTION for an order of *certiorari* to bring up to be quashed an order of the Newington licensing justices, purported to have been made under s. 25 (2) of the Licensing (Consolidation) Act, 1910, for the production of a mortgage deed made between the proposed transferee of a licence and the owners of the licensed premises. An order of *certiorari* was made. The facts appear in the judgment of HUMPHREYS, J.

Sir David Maxwell Fyfe, K.C., Milner Holland and *Block* for the applicant.
Slade, K.C., and *Sidney Lamb* for the respondents.

HUMPHREYS, J. : This is an application for an order of *certiorari* directed to the justices of the county of London sitting in the Newington licensing division. The application is made to bring up and quash an order said to have been made by the justices under s. 25 (2) of the Licensing (Consolidation) Act, 1910, which provides *inter alia* that on an application for the transfer of a justices' licence "the agreement or other assurance, if any, under which the licence is to be transferred and held shall be produced to the licensing justices."

On Nov. 3, 1947, Catherine Conrad, the proposed transferee and now the applicant for this order, applied to the licensing justices of Newington for the transfer to her of a justices' licence authorising her in substitution for one Arthur Edward Gaffney to hold a full off-licence in respect of the licensed premises situated at 1, Melbourne Grove, East Dulwich and known as the Champion Stores. Pursuant to s. 25 (2) of the Licensing (Consolidation) Act, 1910, there were produced to the justices in support of the application the agreement or other assurance under which the licence was to be transferred and held by the applicant, to wit, a lease of the premises, dated Oct. 14, 1947, for 14 years at a rent of £50 and a premium of £750, and made between the applicant and Mann, Crossman & Paulin, Ltd., the brewers, who owned the premises ; an assignment of the goodwill, bearing the same date, from the outgoing tenant to the applicant ; and a cancelled tenancy agreement made between the brewers and the outgoing tenant. In response to a written form of questionnaire required by the justices to be completed by or on behalf of the applicant it was disclosed *inter alia* that, to meet financial commitments relating to the transfer, the applicant had herself provided the sum of £2,100 5*s*. 0*d*. and had borrowed the sum of £750 which was advanced to her by the brewers on the security of a mortgage of the premises. At the hearing before the justices no documents A were produced to them, nor was any evidence tendered on behalf of the applicant or otherwise, regarding the manner in which she had raised the loan. The hearing was adjourned on the ground that all relevant documents had not been produced to the justices pursuant to s. 25 (2) of the Act, and, at the resumed hearing on Dec. 1, 1947, after hearing counsel for the applicant, the justices made an order that all documents relating to the loan be produced to them pursuant to s. 25. It is in respect of this order that the applicant moves for B an order of *certiorari*.

In the course of the argument in support of the application it transpired that the applicant in moving for leave had not complied with R.S.C., Ord. 59, r. 8, in that she had failed to lodge in the Crown Office a copy of the order complained of. If the attention of the court had been drawn to that omission, as it should have been, no leave would have been granted. It appeared that C no order had, in fact, been made at the time. The justices had announced their intention to make such an order, but no order had been drawn up. *Certiorari* does not lie to quash an oral statement and these proceedings were, at that stage, wholly irregular. As, however, both parties were anxious to have a decision whether the mortgage in question was or was not a document which had to be produced under s. 25 of the Act, and, particularly, as one of the parties is a bench of justices, the court decided, perhaps unwisely, to overlook D the failure to observe r. 8 and accepted an undertaking by the parties jointly that there would be produced to the court on further hearing a copy of the order which had since been made by the justices and which is to be taken to be the order which the justices notionally had made on Dec. 1. It states : "The licensing justices hereby order you [the applicant] to produce forthwith to them a mortgage," and then it gives the particulars of the mortgage.

In my opinion, that order was made completely without jurisdiction, whether E it is a document which comes within the language of s. 25 or not. Section 25 is entirely silent about any such order being made by a court of licensing justices, a court which, be it observed, is not a court of law. Even if it were a court of law, it would have no power to make an order unless that power was given by statute, and the Licensing Act, 1910, gives no power to the justices to make an order of this nature. Section 25 is quite clear about what is to happen if a relevant document within its terms is not produced. It is for the licensing justices to F decide whether, in the first place, they have power to grant a transfer, and, secondly, whether they will exercise their discretion in favour of a grant. The requirement that the applicant shall produce the agreement or other assurance under which the licence is to be transferred and held is a statutory requirement of which the justices must take notice. If the justices had taken the course of refusing the transfer on that ground, whether they were right or wrong, the G matter would have been in order. Instead, they made an order which, in effect, is nothing more than an order that the transferee shall obey the terms of the statute, and, that order being made, in my opinion, without jurisdiction, it follows that it ought to be quashed on *certiorari*.

That, however, will be of no assistance to the parties who are anxious to obtain the view of the court, although our view on the matter is, possibly, merely *obiter*, on the question whether the justices were right in taking the view, H which it must be assumed they did take, that the mortgage in question falls within the words in s. 25 (2) : "the agreement or other assurance, if any, under which the licence is to be transferred and held." I do not think that that question can be satisfactorily answered without an examination of other sections of the statute which deal with the rights and liabilities of the parties and the procedure to be followed in regard to the transfer of a justices' licence. The group of sections in question is headed "Transfers and Removals," it begins with s. 22 and includes s. 23, s. 24 (which deals solely with removals, and is, therefore, of no importance in this case) and s. 25. For practical purposes, since s. 22 merely provides for holding transfer sessions at certain dates and matters of that sort, it may be said that ss. 23 and 25 are the two sections which deal with the powers of justices to transfer licences. Of those the main section is s. 23, which provides :

> (1) For the purposes of this Act the transfer of a justices' licence is the grant of a justices' licence in respect of certain premises to one person in substitution for another person who holds or has held the licence. (2) An application for the transfer of a justices' licence may be allowed or refused by the licensing justices in the exercise of their discretion, subject as follows :—(*a*) a transfer can only be authorised in the cases mentioned in the first column of sched. IV to this Act and to the persons set opposite thereto respectively in the second column of that schedule . . .

The schedule provides for a number of cases. It is common ground that the only one which is applicable to the present circumstances is the fourth of the cases envisaged : " Occupation of premises given up by the holder of the licence or his representatives." In a case of that nature the licence may be transferred to " the new tenant or occupier of the premises." I am disposed to think that when we turn, as we shall, to s. 25, all that we shall find there is that there must be produced to the justices any document which will show that the proposed transferee is the new tenant or occupier.

Section 23 (2) (*b*) of the Act provides :

> The transferee must be a fit and proper person in the opinion of the justices to be the holder of the licence in addition to being a person to whom a transfer can be authorised under the foregoing provision.

Decisions of this court show that justices have a very wide discretion as to the matters they may take into consideration in deciding whether the transferee is a fit and proper person to hold a particular licence. They are not confined to the consideration of whether he is what would ordinarily be described as a reputable person, a man or woman of good character. They may also consider such matters as fixity of tenure, which may have a bearing on whether the licensee is likely to carry on his business properly in accordance with the law. I express no opinion whether or not a mortgage of licensed premises in certain circumstances might or might not be a relevant document for the justices to consider on the question whether a person is a fit and proper person to be entrusted with a particular licence, but, in any event, it is clear in this case that the justices did not order the production of the mortgage for that purpose.

I turn now to s. 25 (2). I think the sub-section intends that there should be produced to the justices any agreement or other assurance under which the licence either is to be transferred or is to be held if there are two separate documents. The agreement or other assurance under which the licence is to be *transferred* is, in my opinion, the assignment of the goodwill. That document is a relevant document which must be produced to the justices as it was in this case. There remains the agreement, if any, under which the licence is to be *held*. Counsel for the applicant sought to draw a distinction between a document under which the licence is to be held and a document under which the licensed premises are to be held. For my part, I find it very difficult to see that there is any distinction to be drawn. In my view, the agreement under which the licence is to be held must include anything in the nature of a tenancy which gives the right to the transferee to occupy the premises as licensee and to sell from them, and, perhaps, though not necessarily, to live there. In the present case the lease was produced as proof that the applicant was a tenant and occupier. Could anything else be said to be an agreement under which the licence was to be transferred or held ? I do not think so.

In the absence of any affidavit by the licensing justices, I think that it is extremely doubtful whether they really wanted to see this document. I very much doubt whether, if it had been produced, they would have done more than say to their clerk : " Is the mortgage produced ? " and, on receiving the answer : "Yes," say : " Very well then, this transfer is granted." Counsel for the justices, however, argues that a mortgage is, or may be, a sub-demise of the premises, the effect of which is to grant to the mortgagees all the rights in and the ownership of the premises during the term of the lease less one day, and, therefore, it affects the length and the fixity of tenure of the person who holds the lease. I very much doubt whether that is good law. In HALSBURY'S LAWS OF ENGLAND, Hailsham ed., Vol. 23, p. 223, this statement appears:

> Incident to every mortgage is the right of the mortgagor to redeem, a right which is called his "equity of redemption," and which continues notwithstanding that the mortgagor fails to pay the debt in accordance with the proviso for redemption. This right arises from the transaction being considered as a mere loan of money secured by a pledge of the estate.

If that is so and the mortgage is rightly considered as a mere security for money A
advanced, is it the agreement under which the licence is to be "transferred and held"? In my opinion, it is not. The present mortgage is a document which is evidence that the premium for the lease, the acknowledgment of the payment of which is in the lease, has been provided by a loan and the loan has been made by the mortgagee to the mortgagor. It is an extravagant assumption that a person with a substantial lease of premises, who has a mortgage on those premises, ceases to have as full rights in regard to those premises as he would have under B
the lease if the mortgage had not been executed. No doubt, the mortgage gives certain powers to the mortgagee in certain events, but, until those events happen and so long as the moneys secured by the mortgage are punctually paid, it gives him no power to interfere with the property. This document is certainly not a document under which the licence is transferred, and I think it is wrong to say that it is a document under which the licence is held. Even C
if the justices had power to make an order in this case (which I am satisfied they had not), they would have been wrong in making an order to produce this particular document, because it is not one of the documents mentioned in the section. Therefore, in my view, *certiorari* ought to go on the ground on which it is moved for, *viz.*, that the order was made without jurisdiction. It is unlikely that we shall be asked to grant any costs in this case, but, if we are, I should be in favour of refusing any application with regard to costs D
of any sort.

SINGLETON, J.: On the first day of the hearing of this motion it was ascertained that there was no written order in existence, and I expressed the opinion that this court had no power to hear the motion. That remains my view. R.S.C., Ord. 59, r. 8, is clear in its terms. It provides that the applicant shall not question the validity of any order unless before the hearing of the motion E
or summons he has lodged a copy thereof verified by affidavit in the Crown Office and Associates' Department, or accounts for his failure to do so to the satisfaction of the court or judge hearing the motion or summons. The applicant had not lodged a copy of the order in the Crown Office for the simple reason that there was no order. The rule presupposes an order in writing, and there was none. There was, in my view, therefore, nothing for this court to hear. It appeared that the licensing justices had purported to make a verbal order F
for the production of a mortgage of the applicant's interest in the premises. It seemed to me that the parties really wished to get before this court something in the nature of a consultative case. If that were so, a motion for *certiorari* was hardly the way to achieve it. Counsel for the justices said that his clients were most anxious to know whether they were right in making such an order and that he proposed to drop any point under s. 23 (2) (*b*) of the Licensing Act, 1910, and to ask for a ruling on s. 25 (2). G

I agree that s. 25 (2) is not easy to construe. It provides:

> In the case of an application for the transfer of a justices' licence, the person (if any) holding the licence and the person to whom it is proposed that the licence shall be transferred shall attend at the transfer sessions at which the application is heard, and the agreement or other assurance, if any, under which the licence is to be transferred and held shall be produced to the licensing justices, and, for the purpose of compelling the attendance of any such person, or any witness, the licensing justices H
> shall have all the powers of a court of summary jurisdiction: Provided that the licensing justices may, for good cause shown in any particular case, dispense with the attendance of either of such persons, or both . . .

Thus it is required that the person holding the licence and the person to whom it is proposed to transfer it shall be present. That is a condition precedent, but for good cause the justices may dispense with the attendance of either person or both persons. The other requirement, that "the agreement or other assurance, if any, under which the licence is to be transferred and held shall be produced to the licensing justices," is also, it seems to me, a condition precedent to the grant of the transfer. The difficulty in construing this section is two-fold. In the first place, one has to look at s. 23 of the Act to see what is a transfer. By s. 23 (1):

> For the purposes of this Act the transfer of a justices' licence is the grant of a justices' licence in respect of certain premises to one person in substitution for another person who holds or has held the licence.

That is to say, the transferee holds the licence by reason of the grant of a justices' licence. Returning to s. 25 (2), it may be easy to find, if there be one in existence, the agreement or assurance under which the licence is to be transferred. It is said that that document will be an assignment from the transferor to the transferee or some document of that kind, but when one comes to consider what is "the agreement or other assurance under which the licence is to be . . . held," one has to see under what the licence was held at the time of the transfer. If there was a provisional order, it might be held under that. The word "licence" in the section is used rather loosely, and means the licence attached to the licensed premises which licensed premises are held under something. If one is to read the words as "to be held," one naturally comes to the most important document of all, the document under which the proposed transferee is to hold the licence. I draw the conclusion that the legislature, by s. 25 (2), intended to order that "the document"—it may be a lease—under which the proposed transferee was to hold the premises should be produced for the justices' inspection. It is important in the ordinary case that the justices should see that. Counsel for the justices would, however, have the court go further and say that the "agreement or assurance" includes anything which may effect security of tenure, in particular, a mortgage granted by the transferee of his leasehold interest. I cannot see why one should read the words of s. 25 (2) in any wider sense than in their natural sense—"the agreement or other assurance." Counsel submitted that any mortgage of the licensed premises must be produced to the justices under s. 25 (2), but it seems to me that, if the legislature intended that, it would have said so. Counsel's argument would lead to this: before a transferee could get a transfer of the licence from the justices not only must he produce a mortgage by him of his leasehold interest in the premises, but also, if the owners had granted a general mortgage on their property, including the premises in question, he must produce that general mortgage. Furthermore, in the case of a company, if there were a debenture charge on its property, that would have to be produced because that might affect the security of tenure of every tenant of every licensed house belonging to the owners. The same might be said in a case in which a charge had been given to a bank. I cannot think that the legislature intended to place any such burden on the proposed transferee. In my opinion, the words of the section ought to be read in their ordinary meaning and not extended. I would add that the justices, in dealing with an application for transfer, have to bear in mind not only the procedure laid down in s. 25, but also that in s. 23. Section 23 (2) provides:

> An application for the transfer of a justices' licence may be allowed or refused by the licensing justices in the exercise of their discretion subject as follows . . .

They are given a discretion which is to be exercised judicially. One of the matters they have to consider is whether or not the transferee is a fit and proper person in their opinion to be the holder of the licence: s. 23 (2)(*b*).

Since the Act of 1910 was passed there have been several cases before this court in which s. 23 has been considered. One was *R.* v. *Hyde JJ.* (1). There the court pointed out that it was not for the licensing justices to go into matters altogether outside their scope and to consider, in particular, the terms of business as between the owners and the licensee, but all the members of the court were careful to point out that the agreement of tenancy might be of great importance. I take two passages, the first one being from the judgment of Hamilton, J., in which he said ([1912] 1 K.B. 660):

> I do not say that there may not be circumstances in which the terms of an agreement of tenancy may not be very material on the question of the fitness and propriety of the person applying to be the holder of the licence, and that there may not be terms of such a character in an agreement that they would of themselves be materials upon

which justices could, by an inference judicially drawn, come to the conclusion that they left the tenant no reasonable likelihood of keeping his house within the requirements of the law.

Bankes, J., having given his judgment, added this (*ibid.*, 665) :

> In expressing the above views I desire to guard myself against being understood to say that an inquiry into the terms on which an applicant intends to carry on his business, either as between himself and the landlord or as between himself and the public, can never be material.

It is a matter for the consideration of the justices, who have to arrive at a conclusion whether the transferee is a fit and proper person to be the holder of the licence.

In *R.* v. *Holborn Licensing JJ.* (2) it was decided that (42 T.L.R. 778) :

> On an application for the transfer of a licence the licensing justices may consider the security of tenure given to the proposed licensee as a matter affecting his "fitness or propriety." They may also adopt a certain standard length of notice as generally desirable (and if they do so, it is convenient that they should make it publicly known), provided that it is not made a hard and fast rule to be applied indiscriminately.

It was from what was said in that case that the argument developed in this court that a mortgage must be produced under s. 25 (2) because it could affect the transferee's security of tenure. I wonder whether the justices in the present case thought about security of tenure at all. We have no affidavit from them. Their counsel told us that that was on his advice. It is clear that, if the justices had put an affidavit on the file, they could only have said that, so far as they knew, the applicant was a fit and proper person to hold the licence, and when I think of that I am compelled to ask why they wanted to see the mortgage ? So far as I can judge from the argument which has taken place in this court it was merely raised by them or by someone on their behalf as a question of principle. In any case, as I have said, I do not think that the applicant can be obliged to produce the mortgage under s. 25 (2). If and when there arises a serious question whether or not an applicant is a fit and proper person, it may be—I say no more than this—that the justices will think it right to look at such a document. I imagine that cannot arise often. I do not see how it can arise where the proposed transferee is one against whom not a word can be said and who has found a considerable sum of money out of her own resources. The licensing justices are given a wide discretion and they have difficult duties to perform, but I do not regard it as part of their duty to ask for things which are not material to any question before them. This document cannot be required under s. 25. It might become relevant in exceptional circumstances under s. 23 (2).

BIRKETT, J. : I agree with the two judgments which have been delivered. Both have referred to the situation which arose on the first day of the hearing of this matter and to the surprising fact that an application was made to quash an order which, in fact, had no existence. Considerable time was spent in debating that situation, and as a result it was agreed that an order should be produced to be dated Dec. 1. Ironically enough, now that that order is produced, it appears there was no authority to make it. It is regrettable, I think, that, if a decision was really required, a form of procedure should be adopted which apparently is quite inappropriate.

To meet the wishes of the parties, and, particularly, because a bench of licensing justices were concerned, it was thought proper that an answer should be given to the question which counsel for the justices suggested was the only one to be determined by the court—whether, on the proper construction of s. 25 (2) of the Licensing (Consolidation) Act, 1910, the mortgage referred to in the justices' order was "an agreement or assurance" within the meaning of the words in that sub-section. Counsel for the applicant at one time argued that the only document which ought to be produced under s. 25 (2) was an assignment because that was "the agreement or other assurance" under which the licence "is to be transferred and held." At first sight the very wording of the assignment gives colour to the argument because the assignment witnesseth, in consideration of the matters set out, that the vendor as beneficial owner assigns unto the purchaser "all that the goodwill of the vendor to and in the business of a retailer of beer, wines and spirits for consumption off the premises now carried on by him at the said premises and the benefit and advantages of all licences held in connection therewith To hold the same unto the purchaser absolutely." Counsel said that that document of itself is the only document required because it is, in fact, the agreement and assurance of the transfer and shows the terms under which the licence is to be transferred and held, but in the affidavit which was put before the justices it would appear that under s. 25 (2) not only had that document been produced but there had also been produced, among other things, the lease. Counsel for the justices argued that the mortgage was an integral part of the lease, but, in my view, it is not possible to support that contention. It is enough for me, at any rate, to say that the mortgage in question cannot be held to be and is not a document which is "an agreement or other assurance under which the licence is to be transferred and held." For these reasons, I agree with the judgments which have been delivered and the conclusions which have been arrived at.

Order for certiorari. No order as to costs.

Solicitors: *Crossman, Block & Co.* (for the applicant); *R. L. Hazell*, clerk to the justices (for the respondents).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

FRANKLIN *v.* GRAMOPHONE CO., LTD.

[COURT OF APPEAL (Scott, Somervell and Evershed, L.JJ.), December 8, 9, 10, 11, 12, 1947, February 4, 1948.]

Factories—Removal of dust—Metal grinding—Tool sharpening—"Wholly or mainly employed in such work"—Modification of Factories Act by regulations—Employers' common law liability—Factories Act, 1937 (*c.* 67), *s.* 47 (1) *—Grinding of Metals (Miscellaneous Industries) Regulations,* 1925 (*S.R. & O.,* 1925, *No.* 904).

The Factories Act, 1937, s. 47, provides: "(1) In every factory in which, in connection with any process carried on, there is given off any dust . . . of such a character and to such an extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom, and in particular . . . exhaust appliances shall be provided and maintained . . ."

The Grinding of Metals (Miscellaneous Industries) Regulations, 1925, are expressed to apply to "all factories or parts thereof in which is carried on the grinding . . . of metals . . .", but, under the heading "Exemptions," provide that: "Nothing in these regulations shall apply . . . (iv) to any processes in or incidental to the sharpening of tools . . . for use in the factory, except as regards any part of the factory in which one or more persons are wholly or mainly employed in such work.". By reg. 1: "No . . . dry grinding . . . ordinarily causing the evolution of dust into the air of the room . . . shall be performed without the use of adequate appliances for the interception of the dust . . . so that it shall not enter any occupied room . . ."

The shop in which a workman worked contained for the sharpening of tools a dry grinder, not protected by an appropriate appliance, which was in almost continuous use by various workmen, but no one was "wholly or mainly employed in such work." The workman was, however, for considerable periods at a lathe within a few feet of the grinder, from which he inhaled dust which caused his death.

HELD: (i) the shop in which the workman was employed was not a "part of a factory in which one or more persons were wholly or mainly employed in" the work of tool sharpening, and, therefore, the grinder was not within the regulations of 1925 and the employers were guilty of no offence thereunder.

(ii) although the Factory and Workshop Act, 1901, whereunder the regulations of 1925 were made, was repealed by the Act of 1937, the regulations were continued in force by s. 159 (1) of the latter Act, and must, by the terms of that section, be treated as having effect by virtue of

s. 60, and the regulations were capable of modifying, and as a matter of construction they did modify, the provisions of s. 47, with the result that s. 47 had no operative effect.

(iii) the employers were, however, liable at common law for negligence.

[For the Factories Act, 1937, s. 47, see HALSBURY'S STATUTES, Vol. 30, p. 238.]

Cases referred to:

(1) *Miller* v. *Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; Digest Supp. A

(2) *Nicholls* v. *Austin (Leyton), Ltd.*, [1944] 2 All E.R. 485; [1945] K.B. 50; 114 L.J.K.B. 21; 171 L.T. 353; *affd. on other grounds*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; Digest Supp.

(3) *London & North Eastern Ry. Co.* v. *Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; Digest Supp.

Appeal of the employers from an order of Cassels, J., without a jury, dated Feb. 17, 1947, whereby he awarded £2,231 7*s.* 0*d.* to the widow and the mother of a workman who had died from pneumoconiosis after inhaling dust caused by a metal grinding machine. Cassels, J., found the employers guilty of a breach of statutory duty and of negligence at common law. The Court of Appeal held that there was no breach of the statutory duty, but affirmed the finding of negligence. The facts appear in the judgments of Scott and Somervell, L.JJ. B

Beney, K.C., and *R. M. H. Everett*, for the workman's dependants. C

Sir David Maxwell Fyfe, K.C., and *John Thompson*, for the employers.

Cur. adv. vult.

Feb. 4. The following judgments were read.

SCOTT, L.J.: In this case the wife and the mother sue as dependants of a workman employed by the defendants who contracted the dust disease known as pneumoconiosis in their factory at Hayes (then used for war work) and died from it. In the later stages, that illness was accompanied by tuberculosis, but Cassels, J., who tried the case, found that death was caused or contributed to by the dust disease. I agree with his reasoning and his conclusion, and it is unnecessary to make further reference to the tuberculosis. The plaintiffs alleged both breach of duty under the Factories Act, 1937, and negligence at common law. The judge found in their favour on both and entered judgment for the plaintiffs against the appellant company, the occupiers of the factory. The appeal is on liability only. It raises three questions of law, of which two are difficult and of far reaching general importance. All turn on the proper interpretation of the Factories Act, 1937, and the regulations made by the Secretary of State under the Factory and Workshop Act, 1901, but confirmed by the later Act and deemed to have been made under it. I accept all the findings of fact made by the judge, including the conclusions which he reached on a careful review of the medical evidence. D E F

Section 47 of the Act of 1937 provides:

> (1) In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom. G

The Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O., 1925, No. 904) are the relevant regulations. They begin: H

> In pursuance of s. 79 of the Factory and Workshop Act, 1901, I hereby make the following regulations, and direct that they shall apply to all factories or parts thereof in which is carried on the grinding . . . of metals, or any process incidental to the grinding of metals . . .

That paragraph includes other matters, such as the glazing of metals and the cleaning of castings, with which we are not concerned in this appeal. The regulations begin with definitions and they provide that "for the purpose of these regulations," *inter alia*, "abrasive wheel means a wheel manufactured of bonded emery or similar abrasive," and "grinding means the abrasion, by aid of mechanical power, of metal, article of metal, or part of any article of metal by means of a grindstone or abrasive wheel." Then follows a part of the regulations entitled "Exceptions," and it says:

> Nothing in these regulations shall apply . . . (iv) to any processes in or incidental to the sharpening of tools or implements for use in the factory, except as regards any part of the factory in which one or more persons are wholly or mainly employed in such work.

In the body of the regulations following these exemptions the next heading is "Duties." It there says:

> Every occupier and manager of any factory to which these regulations apply, shall be bound to observe the same and it shall be the duty of the occupier to provide and maintain the appliances . . . as and when required by these regulations.

Regulation 1, omitting references to processes called "racing" and "glazing," which are immaterial, provides:

> No . . . dry grinding . . . ordinarily causing the evolution of dust into the air of the room in such a manner as to be inhaled by any person employed shall be performed without the use of adequate appliances for the interception of the dust as near as possible to the point of origin thereof, and for its removal and disposal so that it shall not enter any occupied room, and for the purpose of this regulation the appliances shall not be deemed adequate unless they . . . include [various types of apparatus].

The shop where the deceased always worked was known as O.10. It lay between two other bays. In those bays the employers had installed several grinders with abrasive wheels, which produced dust but were duly protected by the appropriate appliances. In O.10 there was one dry grinder with two abrasive wheels for sharpening tools, which produced dust and would have called for the appropriate appliances if O.10 had been a "part of the factory in which one or more persons are wholly or mainly employed in" the work of tool sharpening. Those are the words of the exception. The judge found as a fact that the wheels (revolving at 2,000 revolutions a minute) were in almost continuous use by various workmen wanting to sharpen tools, but that no one of them was "wholly or mainly employed in such work." The deceased man certainly was not, but he was for a considerable period at a lathe within four or five feet of the grinder, inhaled the dust from it, and died from so inhaling it. The absence of any suggestion that any factory inspector had complained about O.10 supports the employers in their omission to regard the exception on the exception contained in sub-para. (iv) of the exceptions as applicable to O.10. The judge put a different construction on the exception to the exception and thought that it applied to and covered the deceased, but I agree with my Brethren that he was in error in that interpretation. It follows that the grinder in O.10 was not at any relevant time within the regulations and that is presumably why regs. 9 and 17 were never mentioned in the evidence or argument, and I need not refer to them here. It also follows, however, that no cause of action based on a breach of the regulations lay against the employers. They, as "the occupier," had done all that the regulations required of them. They were guilty of no offence and could not be prosecuted under s. 130 (1) of the Act of 1937.

The next question is whether, though free of fault under the regulations, the employers were open to attack for failure to comply with s. 47 or, conversely, whether the occupier remained under a duty to conform to the requirements of s. 47, which are in themselves wide enough (if not displaced by the Metal Grinding Regulations) to give protection to a worker suffering from inhalation of dust emanating from a nearby grinder left uncontrolled by any exhaust appliances. The answer must depend, first, on whether the Secretary of State had statutory power to modify the relevant section or even exclude its enforcement altogether when making "such regulations as might appear to him to be reasonably practicable and to meet the necessity of the case" (those are the words of the Act); and, secondly, whether these regulations did so, that is to say, quite shortly, whether they were a substitute for s. 47. My answer to both questions is affirmative, and for these reasons. The Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O., 1925, No. 904) were made under the legislative powers delegated to the Secretary of State by s. 79 of the Act of 1901, which provides:

> Where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb, either generally or in the case of women, children or any other class of persons, he may certify that manufacture, machinery, plant, process or description of manual labour to be dangerous; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

The necessity of the case which the Secretary of State had under that section to consider, both in certifying and in making regulations, *i.e.*, in drafting his particular legislation to deal with the particular type of mischief to which he was addressing himself, sends one back to s. 74, which provides:

> If, in a factory or workshop where grinding, glazing or polishing on a wheel or any process is carried on by which dust or any gas, vapour or other impurity is generated and inhaled by the workers to an injurious extent, it appears to an inspector that such inhalation could be to a great extent prevented by the use of a fan or other mechanical means, the inspector may direct that a fan or other mechanical means of a proper construction for preventing such inhalation be provided within a reasonable time; and, if the same is not provided, maintained and used, the factory or workshop shall be deemed not to be kept in conformity with this Act.

It is obvious that, where, pursuant to those regulations, the occupier was able to say to the inspector visiting the factory under s. 74: "You will see I have completely carried out every duty imposed by the regulations framed 'to meet the necessity of the case'", the inspector, in answer, could only express satisfaction.

So much for the position under the Act of 1901. Now comes the repeal of this Act by s. 159 (1) of the Act of 1937, but with this proviso to that subsection:

> Provided that any . . . regulation . . . made . . . under any enactment repealed by this Act which is in force at the commencement of this Act shall continue in force and shall have effect as though it had been made . . . under this Act, and, in so far as it could have been made . . . under a particular provision of this Act, shall be deemed to have been made . . . under that provision . . .

In the instant case of the Grinding of Metals Regulations, 1925, the "particular provision of this Act" therein referred to must be s. 47. These were regulations without the epithet "special" prefixed to them, but in the Act of 1937 it would be s. 60 under which they could have been made, and the latter part of the proviso has, therefore, the effect of conferring on them the character of special regulations within the meaning of ss. 60 and 129 (1) (*b*), and sched. II. Section 83 of the Act of 1901 provides:

> Regulations made under the foregoing provisions of this Act [ss. 79, 80, 81 and 82] may, among other things,—. . . (*b*) prohibit, limit or control the use of any . . . process; (*c*) modify or extend any special regulations for any class of factories . . . contained in this Act.

What was the intended meaning in that section of the epithet "special" as applied to regulations does not appear anywhere in that Act, though s. 126 deals with "Special Orders." The use of it in ss. 60, 129 (1) (*b*), and sched. II of the Act of 1937 was then, I think, new, but, even if the regulations of 1925 were invalid because not special, they are deemed to have been made under the Act of 1937 and were thereby validated. Nothing, therefore, turns on this doubt. The conclusion seems to me inescapable that the regulations must of necessity be construed as saying to the occupier of any factory where relevant processes were conducted: "Carry these regulations out honestly and carefully and you will have complied with all the statutory requirements incumbent on you and your factory." If so, its particular provisions must supersede the general provisions of s. 47 and be substituted for them. I have been considering the question under s. 47 and the regulations of 1925 on its merits and apart from authority, since the question is one of interpretation, which must, in the ultimate resort, depend on a close comparison of the language of the one instrument with that of the other, even though certain general considerations such as I have mentioned must be borne in mind. It cannot, therefore, quite be disposed of by the authority of a decision on some other section and some other regulations. The decision, however, in *Miller* v. *William Boothman & Sons, Ltd.* (1), decided by this court, in which GODDARD, L.J., delivered the judgment

of the whole court, was based on nearly comparable considerations, and we then took the same kind of view, namely, that the particular provisions of the regulations then in question were substituted for the general provisions, however unqualified the section of the Act, at any rate to the extent of modifying one similarly absolute provision of the Act. That case may not be a conclusive authority for the present, but it is very nearly so. In the result, I am of opinion that the provisions of s. 47 are superseded by the regulations of 1925 and now have
A no operative effect in a factory to which that order applies.

Another problem is raised by the alternative charge in the statement of claim of negligence at common law. My Brethren are prepared to endorse that claim, and, therefore, to dismiss the appeal. The question is one of difficulty and I confess that I was at first inclined to regard the regulations of 1925 as completely relieving the occupier of the factory from any duty to employ dust prevention apparatus in the part of the factory known
B as O.10, but I have been convinced by my Brethrens' reasoning that that interpretation would confer on the factory occupier in his system of working a wider immunity from his duty of care for the health of workmen employed by him than, at any rate, the limited language of the regulations can justify. I am glad to be so convinced, as it may have a beneficial effect if it reminds factory owners that they cannot regard themselves as necessarily relieved from their common law duty of care merely because regulations under the Act impose positive
C duties limited in their scope. Whether the factory occupier is so relieved depends in every case on the particular regulations prayed in aid, when correctly construed. The appeal will, therefore, be dismissed on the common law issue.

SOMERVELL, L.J.: This is the employers' appeal from a judgment of CASSELS, J., awarding £2,231 7*s.* 0*d.* to the widow and the mother of a deceased workman. The judge found the defendants guilty of a breach of statutory
D duty and negligence at common law in failing to protect the deceased against dust from an abrasive sharpening machine or grinder, with the result that he contracted pneumoconiosis or fibrosis of the lung, which was the cause of death or a cause of death sufficient to establish the defendants' liability. I add these last words because at the time of his death the deceased was also suffering from tuberculosis. As the arguments were complicated, it will be convenient to set them out in outline and in general terms now.

E The Grinding of Metals (Miscellaneous Industries) Regulations, 1925, deal with factories in which the grinding of metals is carried on. They provide that grinding machines shall be fitted with appliances, a hood to intercept the dust and a duct and fan by means of which the dust is drawn off. To this provision there is an exception where the process is that of sharpening tools (as here), unless one or more persons are wholly or mainly employed in such work. It was argued that the deceased was wholly or mainly employed in
F this work. If so, the affirmative provisions of the regulations are applicable and this grinder admittedly had no hood, duct or fan. If the plaintiff failed on this point, what was the position ? Section 47 of the Factories Act, 1937, deals with dust and lays down in general terms the circumstances in which appliances such as those specified in the regulations must be fitted. Is the regulation, on its proper construction, saying that sharpeners need not have
G these appliances unless one or more persons are wholly employed at them ? If so, is this a special code substituted for s. 47, the duties under which may in the result be modified ? Was a regulation which purported to do this *intra vires* the Factory and Workshop Act, 1901 ? If so, was this validated when the regulation was continued in force under the Act of 1937 ? These last two questions, though argued before us, are, in my opinion, covered by an authority to which I refer below. Assuming s. 47 is still applicable, was there a breach
H of it ? If the employers succeed on the above points, were they guilty of a breach at common law of their duty to take reasonable precautions for the safety of their workmen ? Finally, was the deceased specially susceptible to dust and was his death caused by the dust which he breathed or by tuberculosis ?

During the war, the employers, whose normal business is making gramophones and accessories, were engaged on war work. Long hours were worked and more men were employed than in peace time. The deceased was employed from Mar. 31, 1939, to Mar. 3, 1941, as a capstan operator, from that date to Oct. 8, 1942, as a capstan setter operator, and from this latter date to Dec. 16, 1943.

as a capstan setter. On this last date, he was too ill to go to work and, after periods in hospital, he died on Dec. 22, 1944. The workshop where the deceased worked contained a number of lathes and a double wheel grinder for sharpening the tools used in the lathes. One wheel of the grinder was made of aloxite and the other of carborundum. In the process of sharpening the tools, particles from the wheels and the tools were thrown off as dust, the inhalation of which was said to be the cause of the illness and death of the deceased. Some ten to twenty men working in the shop used to sharpen tools on this grinder and among them from March, 1941, was the deceased. On the evidence, no individual, including the deceased, would normally be at the sharpener for more than three hours in the day, usually less, sometimes much less, very occasionally possibly for more. The sharpener was in more or less continuous use throughout the day. There was a further important piece of evidence. From March, 1941, to October, 1942, the deceased, when he was not sharpening tools, was working at a lathe which was only four to five feet away from the grinder. A consulting engineer who was given an opportunity of inspecting the grinder noticed considerable dust on a machine, probably the same lathe, four to five feet distant from the grinder. The deceased was, therefore, for a considerable time continuously very near the source of the dust. Six doctors were called, four by the plaintiff and two by the defendants. The effect of their evidence is set out in the judgment. I do not propose to deal with it in detail, though I have considered it in detail in the light of the arguments put to us. The judge set out his conclusions on it in the following paragraph :

> I have summarised the medical evidence in this case and now form my conclusions on that evidence. I accept what the plaintiff's doctors have said. Three of them were in the most favourable position to express opinions. I am satisfied by their evidence that the deceased contracted pneumoconiosis by inhaling dust from the grinder in the defendants' factory and that this led to intensive fibrosis of the lungs. There is no evidence that he had tuberculosis before the dust disease. I think that there is no doubt that he developed tuberculosis as well as pneumoconiosis and that these two conditions mutually aided each other to become worse and, as a result, he died.

There was ample evidence on which he could come to these conclusions and I agree with them. The relevant provisions of the statutes and regulations have been set out in Scott, L.J.'s judgment, and I will not repeat them.

The first submission on behalf of the plaintiffs at the trial was that the grinder was taken out of the exception by its concluding words, on the basis that the deceased was "wholly or mainly employed" on a process in or incidental to the sharpening of tools. If the grinder is not within the exception, a breach of statutory duty was admitted, as it was not fitted with the appliances described in reg. 1. The judge accepted this submission and counsel for the dependants of the workman before us sought to uphold it on two grounds. He submitted, in the first place, that the deceased's work as a setter operator and later as a setter, apart from the time spent sharpening tools, ought to be regarded as a process incidental to the sharpening of tools. I could have understood a suggestion that the sharpening of tools was incidental to the operating or to the setting, but I can see no ground for the proposition as advanced. Secondly, counsel submitted that a man who, for example, spends two hours out of ten on process A is nevertheless mainly employed on this process if, during the rest of the time, he is spending one hour only on eight different processes. The word "mainly" may, in some contexts, have such a meaning, but I am satisfied that it does not in the present context. I think the judge was wrong on this point. In my opinion, therefore, this grinder was within exception (iv) and there is no breach by the employers of the regulations.

Is this an end of the matter, so far as a breach of statutory duty is concerned, or did any relevant duty still rest on the defendants under s. 47 of the Act ? In *Miller* v. *William Boothman & Sons, Ltd.* (1), this court decided that a regulation made originally under s. 79 of the Act of 1901 was continued in force under s. 159 of the Act of 1937 and could "modify" the obligations as imposed by a section of the Act of 1937. The case was concerned with a circular saw and the decision proceeded on the basis that, under s. 14 (1) of the Act of 1937, the saw would have had to be so completely fenced that it could not have been used. Admittedly it was not so fenced. A regulation, however, had been made which provided for a guard which was to extend "as low as practicable" and the saw in question had such a guard. The court held ([1944] 1 All E.R. 335) that the provisions of the regulations " must be regarded as modifying the provisions of s. 14 in respect of these machines and of substituting the prescribed guarding and fencing for the absolutely secure fencing which the section would otherwise require." It was further said (*ibid.*) :

> These regulations are, in our opinion, undoubtedly *intra vires* the Secretary of State under the Act and, if their object and result be not what we have said, they would, indeed, be little better than a trap for factory owners. To any one reading them, it could not but appear that, provided he followed the provisions of the regulations and saw that his saws were constructed and protected in accordance therewith, he was fulfilling his duties under the Act.

In *Nicholls* v. *F. Austin* (*Leyton*), *Ltd.* (2) this court followed the decision cited. The case went to the House of Lords, where counsel for the appellant argued that *Miller* v. *William Boothman & Sons, Ltd.* (1) was wrongly decided. The House dismissed the appeal on other grounds and expressly reserved its opinion on *Miller* v. *Boothman* (1).

Section 74 of the Act of 1901, dealing with grinding and dust, has already been quoted. I will not set it out again, but it will be seen that, at the time when the regulations were made, the relevant section was one which could only be brought into operation by the administrative action of an inspector. Till then the section imposed no new duty on the employer. This might be said to remove the possibility of the conflict which was assured to exist in *Miller* v. *Boothman* (1) and in spite of which the regulation was held to " modify " the Act. If one of the Secretary of State's inspectors felt that a fan or other mechanical means were necessary in cases not covered by the regulations, it would be, at any rate, open to the Secretary of State to amend the regulations instead of operating the section.

There remains the question whether these regulations do " modify " the obligations imposed by s. 47 in the manner suggested or whether that section still applies to inhalation of dust within the words of s. 47, though the grinder from which the dust comes is one which, under the regulations, is expressly not required to have appliances fitted to it. This depends on the wording of the regulations. It would be possible so to word a regulation as to make it quite clear one way or the other. Counsel for the employers relied on the fact that in the Horizontal Milling Machines Regulations, 1928 (S.R. & O., 1928, No. 548), the exemptions have a proviso which reads as follows : " Provided that these exemptions shall not prejudice the application of s. 10 of the Factory and Workshop Act, 1901, in regard to fencing of such machinery." He submitted that, in the absence of such a proviso, there was, at any rate, a strong inference that the regulations were to be read as a complete code substituted for the general provisions of s. 47 in respect, of course, of the processes with which the regulations dealt. It seems to me that it would be a good thing if it were made clear in all cases to employers who had machines or processes within exceptions, whether they did or did not remain liable to prosecution under that section of the Act which imposes obligations from which, on the face of the regulations, they appear to be relieved. I have come to the conclusion that on this point the employers' argument succeeds, though the question, which is one of construction, is not, I think, an easy one. I am influenced by the fact that, in the relevant exception and in one of the others, there is an exception to the exception. I will not re-read exception (iv), but the natural meaning of the words seems to me to be that, unless one or more persons are " wholly or mainly employed," then the occupier does not have to have a hood, a duct, or a fan. The meaning is the same as if the wording had been : " No hood, duct or fan or similar appliance need be affixed to the machine." Although we are dealing here with a civil action, it is one which has to be based on a breach of a statute which imposes penalties. It would, I think, be sufficient for the employers if the court came to the conclusion that there was ambiguity or that the liability alleged under the section was not clear or that the conclusion to which I have, on the whole, come was a reasonable interpretation. On this subject, I would like to express my respectful agreement with what was said by LORD SIMONDS in *London and North Eastern Ry. Co.* v. *Berriman* (3). It is not necessary, therefore, to consider whether, if s. 47 had been applicable, a breach had been made out.

When one turns to the position at common law, I find myself in agreement with the learned judge. It is, of course, relevant to consider the regulations, and, in very many cases, it would be difficult, if not impossible, to maintain that an employer who had complied with regulations had been negligent at common law. In this case, however, it is the regulation itself, coupled with the evidence, which I find establishes negligence. The regulation, by saying that the appliances must be there if one or more people are employed mainly in or incidental to the process, is an indication that injury is to be apprehended by continuous proximity to an abrasive grinder such as this. Although neither the deceased nor anyone in the shops was wholly or mainly employed at this grinder, there was, as I have said, a lathe within four to five feet of it, at which the deceased, and, presumably, after him someone else, was continuously at work, except when using the grinder. The grinder was itself in practically continuous use. It was stressed for the employers that medical evidence was not clear as to whether pneumoconiosis could be caused by dust of this kind. If this were all, it might well be unreasonable to expect an employer to act on doubtful medical evidence. It is, however, the regulation, of which the employers' officers were aware, which is itself a warning that continuous proximity to a machine such as this continuously working is likely to be injurious. This conclusion is borne out by an answer, which I set out below, given by a consulting engineer called by the employers. At the trial the employers sought to establish that the grinder was only in occasional use. On this point, the judge accepted the evidence of witnesses called by the plaintiff that it was in practically continuous use. The following question and answer are, I think, important :

> (*Q.*)—Would you say that it was bad industrial practice not to have a dust extracting equipment on a grinder used as this one was used ? (*A.*)—It must depend upon the use which is made of the grinder. From what I saw of this one, it was not in constant use ; it was only in occasional use for the touching-up of the edges of tools. There was no large amount of grinding done on it. If it was being used to a considerable extent, I should say that an extractor hood was a desirable feature ; but, under these circumstances, I do not think so.

In coming to the conclusion to which I have, I have had in mind the evidence as to the quantity of dust and the arguments addressed to us on each side on this point. It may well be that, as in many workshops, conditions became very much more difficult and congested in war time, but I think, in leaving this grinder as it was, with someone working in close proximity to it, the defendants fell short of the standard of care which in this matter the law imposes. It was also urged that his illness and death were due to a special susceptibility of the deceased, and reliance was placed on the fact that no one else had apparently suffered injurious effects. On this matter, I do not want to add anything to what was said by the learned judge. I think, therefore, the appeal must be dismissed.

EVERSHED, L.J. (read by SOMERVELL, L.J.) : On the first question raised in this appeal, namely, whether the defendants are liable under s. 47 of the Factories Act, 1937, I find myself in agreement with the judgments which have already been delivered and which I have had the advantage of reading. Since I do not desire merely to repeat what has been said by my Brethren, I confine myself to saying that, in my judgment, as a matter of construction of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, these regulations were intended to apply to all factories in which the grinding of metals was carried on. In so far, therefore, as any factories or any processes were, by the provisions of the regulations, wholly or partly exempt from compliance therewith, to the extent of those exemptions, such factories or processes were intended to be freed from the statutory obligations which the regulations imposed. At the time when the regulations were first made, there were no statutory obligations as regards the grinding of metals, save such as were imposed by regulation or by requirement of the chief inspector (see s. 74 of the Act of 1901). The question, therefore, in the form in which it has arisen in the present appeal could not have arisen prior to the coming into force of the Act of 1937. By virtue of s. 159 of the Act of 1937, the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, have continued in force. They must, by the terms of that section, be treated as having effect as though made by virtue of the appropriate section, that is to say, s. 60 of the Act of 1937. It follows, in my judgment, that the regulations, deemed to have been made by virtue of s. 60, must be treated as capable of "modifying" the obligations imposed by other sections of the relevant parts of the Act, in this instance, s. 47: see *Miller* v. *William Boothman & Sons, Ltd.* (1).

As a matter of the construction of the regulations, deemed to be made by virtue of s. 60, do they so "modify" the terms of s. 47 as to constitute an exhaustive code for those factories to which the regulations are expressed to be applicable, namely, all factories in which the grinding of metals is carried on? In my judgment, yes. On any other view, as has already been pointed out, the exemptions, whether total or partial, are nullified by the language of the section, which, in the circumstances applicable to the present case, requires that "all practicable measures shall be taken to protect the persons employed against inhalation of the dust . . . and, in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained." It was argued by counsel for the dependants that, if this view were correct, then the regulations (see particularly reg. 7) must equally have the effect of absolving all factories where the grinding of metals is carried on from the obligations as to ventilation contained in s. 4 of the Act. On that matter it is not necessary for the purposes of the present appeal to express any opinion. It is sufficient to say that, the question being one of the intention of the regulations according to their true construction, the conclusion that s. 47 is so far modified by the regulations as to exclude from its ambit all factories where the grinding of metals is carried on by no means necessarily involves the further conclusion that such factories are likewise exempted from the scope of s. 4.

I turn to the second question raised in the appeal, namely, whether the learned judge was entitled to hold, as he did, that the appellants were liable for negligence at common law. On this point I agree with SOMERVELL, L.J., that he was so entitled. In my judgment, the obligations imposed by s. 47 of the Act of 1937 do not, as regards those factories to which that section applies, exclude common law liability, though it may well be that, if the general terms of the section are applicable, there is little left on which the common law can, as it were, operate. Nevertheless, as a matter of general principle, it does not seem to me that the imposition in such a section as that at present under discussion of statutory obligations absolves the factory owner or occupier from his common law duty, and, if this is right, then he can be no more absolved by regulations which "modify" the obligations of the statute. The main argument of the employers in the present case was that the medical evidence showed that, though dust diseases are far from fully understood, it is not yet established that such diseases are attributable to anything except free silica, asbestos (magnesium silicate) and coal dust; that there was no evidence of any appreciable quantity of silica (and, of course, no evidence of asbestos or coal dust) in the present case; and that the employers, therefore, were entitled to rest on the known medical knowledge. I feel for myself considerable doubt as to the medical proposition for which Dr. Punch was really the sole protagonist, but, in any case, the argument appears to me a two-edged sword, since there is no evidence that in the present case the employers had any knowledge of the extent or limits of medical research. On the other hand, (*a*) they would know that the Act regards not only toxic dusts, but all dusts in substantial quantity as plainly calling for protective measures; (*b*) they would know, particularly, that, in the case of a grinding machine such as the present, they would be bound by statute to affix appliances if anyone was wholly or mainly employed in using it; (*c*) they would know or ought to know that the machine was at the relevant period working all the time and further that the deceased, from March, 1941, to October, 1942, was whole time employed at a distance, even when not sharpening tools, of four to five feet from the machine and that the dust therefrom substantially affected, on the evidence, an area of six feet in radius; (*d*) they would know, or ought to have known, that the factory was at the material dates working altogether abnormally long hours; and (*e*) on the evidence, the circumstances of the case called for protective appliances as an ordinary and usual act of prudence. In the circumstances of the case, I construe the words "desirable precaution" used by the employers' witness as meaning something much more than a mere reference to amenities.

I think, therefore, that the employers took an unjustifiable risk such as an ordinary prudent man would not take, and, in my judgment, it is no excuse that (*a*) in fact, no complaints had previously been made and, so far as known, no other persons have been affected, or (*b*) in fact (if it be the fact), the deceased was particularly susceptible to the effects of dust inhalation. I add as regards this last point that, on the evidence, the judge was, in my view, entitled to find, as he did, first, that there was no tuberculosis in the deceased prior to the fibrosis which ultimately caused his death, and, secondly, that he was not, in fact, idiosyncratic. In other words, on the facts proved, which were, or should have been, within the knowledge of the employers, they were under a duty to protect the deceased (and any other person in his position) from the effects of working, as he did from March, 1941, to October, 1942, wholly or mainly in close or immediate proximity to the dust given off by the grinder. I only add that, on the evidence, I am clear that the judge was entitled to hold that a substantial quantity of dust was emitted from the grinder. For these reasons, as for those given by SOMERVELL, L.J., I think that, on the second point, the employers fail and that their appeal must, accordingly, be dismissed. A B

Appeal dismissed with costs.

Solicitors: *Blount, Petre & Co.* (for the employers); *W. H. Thompson* (for the dependants of the workman).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

C

HYDE *v.* HYDE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), December 4, 1947; February 6, 1948.]

Divorce—Maintenance—Security—Death of husband before execution of deeds—Liability of executors—Jurisdiction of Divorce Court.

After decree absolute, a respondent husband was ordered to secure to the wife for her life, as from the date of the decree absolute, "the annual sum of £1,200 less tax upon security to be agreed, or wholly or partially by covenant if so agreed." Agreement was reached by the solicitors to the parties as to the security—*viz.*, 15,000 6 per cent. cumulative preference shares in a company of which the husband was a director, to produce £900 per annum—and also as to a personal covenant, binding not only on the husband but also his personal representatives, to pay the remaining £300 per annum. A draft deed was delivered by the wife's solicitors to the husband's solicitors, but it was neither agreed nor executed by the husband before he died:— D E

HELD: (i) by the joint effect of the order and the subsequent agreement the wife acquired a charge on specific assets of the husband, *viz.*, the 15,000 cumulative preference shares;

(ii) the Divorce Court had jurisdiction and a duty to make its own orders effective, and the husband's executors would, therefore, be directed to execute the necessary deed or deeds to give effect to the order coupled with the subsequent agreement, *i.e.*, of the annual sum of £1,200 less tax, (*a*) to secure £900 thereof on the annual income produced by the preference shares, with power to resort to capital for any deficiency, and (*b*) the remaining £300 to be secured by a covenant of the executors limited to the estate of the husband in their hands and applicable for the purpose and not so as to render them or either of them personally liable. F G

[AS TO SECURITY FOR MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, p. 785, para. 1244; and FOR CASES, see DIGEST, Vol. 27, pp. 508-510, Nos. *5467-5475*.]

Cases referred to:

(1) *Harrison* v. *Harrison*, (1888), 13 P.D. 180; 58 L.J.P. 28; 60 L.T. 39; 27 Digest 546, *5971*. H

(2) *Craig* v. *Craig*, [1896] P. 171; 65 L.J.P. 99; 75 L.T. 280; 21 Digest 604, *1912*.

(3) *Maclurcan* v. *Maclurcan*, (1897), 77 L.T. 474; 27 Digest 510, *5478*.

(4) *Waterhouse* v. *Waterhouse*, [1893] P. 284; 62 L.J.P. 115; 69 L.T. 618; 27 Digest 507, *5447*.

(5) *C.L.* v. *C.F.W.*, [1928] P. 223; 97 L.J.P. 138; Digest Supp.

(6) *Stanhope* v. *Stanhope*, (1886), 11 P.D. 103; 55 L.J.P. 36; 54 L.T. 906; 50 J.P. 276; 27 Digest 444, *4566*.

(7) *Thomson* v. *Thomson and Rodschinka*, [1896] P. 263; 65 L.J.P. 80; 74 L.T. 801; 27 Digest 518, *5596*.

(8) *Dipple* v. *Dipple*, [1942] 1 All E.R. 234; [1942] P. 65; 111 L.J.P. 18; 166 L.T. 120; 2nd Digest Supp.

(9) *Serrao* v. *Noel*, (1885), 15 Q.B.D. 549; 21 Digest 212, *511*.

(10) *Burroughes* v. *Abbott*, [1922] 1 Ch. 86; 91 L.J.Ch. 157; 126 L.T. 354; 35 Digest 92, *17*.

(11) *Beaumont* v. *Beaumont*, [1933] P. 39; 102 L.J.P. 4; 148 L.T. 247; Digest Supp.

SUMMONS by the wife against the husband's executors to show cause why they should not be ordered to execute a deed or deeds giving effect to an order A for secured maintenance made on the application of the wife after a decree *nisi* of divorce in her favour had been made absolute. The executors were directed to execute the necessary deeds. The facts appear in the judgment.

Upjohn, K.C., and *John Latey* for the wife.

Middleton, K.C., and *Roland Adams* for the husband's executors.

Cur. adv. vult.

B Feb. 6. **BARNARD, J.,** read the following judgment. This is a summons by the wife, the successful petitioner in a divorce suit, against the executors of the husband to show cause why they should not be ordered to execute a deed giving effect to an order of the Divorce Court dated Feb. 14, 1947. The decree of divorce was made absolute on Sept. 24, 1946, and on Oct. 2, 1946, the wife filed her notice for ancillary relief. On Feb. 14, 1947, an order for maintenance was made in her favour under both sub-s. (1) and sub-s. (2) of s. 190 of the C Supreme Court of Judicature (Consolidation) Act, 1925. On Apr. 2, 1947, the husband died. The order under sub-s. (2), which ordered the husband to pay to the wife until further notice during their joint lives £1,100 per annum less tax, ceased to have effect as from the death of the husband, and the order under sub-s. (1) is now the subject-matter of dispute between the wife and the husband's executors. That order is in the following terms:

> It is ordered that the above-named respondent do secure to the above-named petitioner D for her life as from the date of the decree absolute herein, to wit, Sept. 24, 1946, the annual sum of £1,200 less tax upon security to be agreed, or wholly or partially by covenant if so agreed, and that in default of agreement between the parties it be referred to conveyancing counsel of the High Court to settle the necessary deed or deeds.

Following on that order the wife's solicitors and the husband's solicitors were in negotiation as to the security to be provided and as to the form of the necessary E deed, and before the husband's death they had reached agreement as to the security to be provided, *viz.*, 15,000 6 per cent. cumulative preference shares of Hyde's Anvil Brewery, Ltd., of which company the husband had been governing director, to produce £900 per annum and as to a personal covenant, binding not only the husband but also his personal representatives, to pay the remaining £300 per annum. Following on this agreement, on Mar. 27, 1947, F the wife's solicitors wrote to the husband's solicitors, enclosing a draft deed. The draft deed was neither agreed nor executed by the husband, and after the husband's death Messrs. Parkinson, Slack & Needham, solicitors, of Manchester, wrote to the wife's solicitors on June 5, 1947, confirming that they were acting for the executors of the husband and stating that they had obtained from the husband's solicitors the draft deed of security, which they were returning as the husband had died, and that the order of Feb. 14, 1947, had no operation G against his estate. On Aug. 8, 1947, the executors obtained probate of the husband's estate which was sworn at £150,000 gross (£129,000 net personalty). It emerged in the course of the argument that on some date between that of the decree absolute and that of the husband's death the husband had re-married, and that on his death he left surviving him his widow and two children by his previous marriage.

Counsel for the wife contends that from the date of the order to secure the H wife had a substantive right to property, being in the position of a mortgagee as regards the husband's property, and that the Divorce Court has jurisdiction to enforce her rights. Counsel for the executors does not admit that she has any such rights, and contends that, if she has any claim against the husband's estate, the Divorce Court has no jurisdiction to entertain that claim. I have been referred to a number of authorities by counsel on both sides, *viz.*, *Harrison* v. *Harrison* (1), *Craig* v. *Craig* (2), *Maclurcan* v. *Maclurcan* (3), *Waterhouse* v. *Waterhouse* (4), *C.L.* v. *C.F.W.* (5), *Stanhope* v. *Stanhope* (6), *Thomson* v. *Thomson and Rodschinka* (7), *Dipple* v. *Dipple* (8), *Serrao* v. *Noel* (9), *Burroughes*

v. *Abbott* (10), and *Beaumont* v. *Beaumont* (11), none of which is directly in point.

It is necessary to consider the precise terms of the order of Feb. 14, 1947. Unlike the order in *Maclurcan* v. *Maclurcan* (3), which specified certain property on which the annual sum was to be secured, this order does not specify any property on which the annual sum is to be secured. It merely orders the security to be agreed and does not provide what is to happen failing agreement, since what is to be referred to conveyancing counsel is to settle the necessary deed or deeds. It is not the function of conveyancing counsel to decide what the security is to be. I do not think it could possibly be said that this order created a floating charge over all the husband's property. Indeed, the order itself negatives any such suggestion since it expressly provides "upon security to be agreed," which must mean by the parties themselves or their solicitors acting on their behalf, but, as an agreement was, in fact, come to, all that remained to be done, on the death of the husband, was the formality of settling and executing the necessary deed or deeds. As Chitty, L.J., said in *Maclurcan* v. *Maclurcan* (3) (77 L.T. 475):

> . . . the order having been made, that terminated the jurisdiction of the court except as to the form of the deed to carry out the order. The charge is given by the order, and the deed is only for the purpose of carrying out the order.

I, therefore, find that, by the joint effect of the order and the subsequent agreement, the wife acquired a charge on specific assets of the husband, *viz.*, on the above-mentioned 15,000 shares.

There only remains for consideration whether or not the wife can enforce that order, in the events which have happened, against the husband's personal representatives in this court. No doubt, the wife could have sought to enforce her claim in the Chancery Division, but by s. 43 of the Judicature Act, 1925, this court can make any order which the Chancery Division could make and I consider it to be the duty of this court to see that its own orders are carried out. In *Burroughes* v. *Abbott* (10) P. O. Lawrence, J., rectified a deed securing an annual payment to the wife pursuant to an order of the Divorce Court, and, incidentally, he did this after the death of the husband. In the course of the trial P. O. Lawrence, J., entertained serious doubts whether the Chancery Division was the proper tribunal to make an order for the rectification of the deed, and his reason for this doubt was that, as the Divorce Court was the tribunal which had ordered the deed to be settled and executed, it might be said that the Divorce Court was the proper tribunal to deal with any question of rectification. To set his doubts at rest, as appears from his judgment ([1922] 1 Ch. 97), he consulted the President of the Probate, Divorce and Admiralty Division, who informed him that he thought that it was very desirable that the parties should not be put to the cost of a separate application to the Divorce Court for the purpose of rectifying the deed. The President does not seem to have entertained any doubt that he also had jurisdiction. Common sense seems to dictate that this court should make effective its own orders, and that is the only order I propose to make.

I, therefore, direct the husband's executors to execute the necessary deed or deeds to give effect to the order of Feb. 14, 1947, coupled with the agreement subsequently come to between the wife and the husband, *i.e.*, a deed whereby, of the said annual sum of £1,200, less tax, (*a*) £900 part thereof shall be secured on the annual income produced by 15,000 6 per cent. cumulative preference shares of Hyde's Anvil Brewery, Ltd., with power to resort to capital for any deficiency, and (*b*) the remaining £300 thereof shall be secured by a covenant of the executors limited to the estate of the husband in their hands and applicable for the purpose and not so as to render them or either of them personally liable. In default of agreement as to the actual wording, the matter will be referred to conveyancing counsel to the court for him to settle for the approval of the court the appropriate deed or deeds. There will be liberty to apply.

Order accordingly. Costs of summons to be paid by the husband's executors without prejudice to their right to recover such costs from the husband's estate.

Solicitors: *Preston, Lane-Claypon & O'Kelly* agents for *Evershed & Tomkinson*, Birmingham (for the wife); *Gregory, Rowcliffe & Co.*, agents for *Parkinson, Slack & Needham*, Manchester (for the husband's executors).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

Re NEWPORT CONSTRUCTION CO., LTD., BARCLAYS BANK LTD. *v.* THE COMPANY.

[CHANCERY DIVISION (Roxburgh, J.), December 16, 17, 1947, January 21, 1948.]

Emergency Legislation—Courts (Emergency Powers)—Receiver and manager—Company—Jeopardy—Conditional appointment—Courts (Emergency Powers) Act, 1943 (*c.* 19), *s.* 1 (2).

The Courts (Emergency Powers) Act, 1943, s. 1 (2), provides: "Subject to the provisions of this Act, a person shall not be entitled except with leave of the appropriate court . . . (*b*) to institute any proceedings for foreclosure or for sale in lieu of foreclosure . . . Provided that nothing in this sub-section shall affect . . . (*b*) the institution or prosecution of any proceedings for the appointment by the court of a receiver of any property."

In a motion by a debenture holder for the appointment of a receiver and manager, a case of jeopardy was made out. The writ in the action claimed (i) a declaration that the debenture was a first charge on all the property comprised therein; (ii) all necessary accounts and inquiries; (iii) a receiver and manager; (iv) further or other relief; and (v) costs. No leave had been obtained under s. 1 (2).

HELD: (i) the writ had been so framed as to avoid any claim for foreclosure or sale being made, and, therefore, the plaintiff was entitled to institute the proceedings without the leave of the court.

(ii) in the exercise of its discretion, having regard to the spirit as well as to the letter of the Courts (Emergency Powers) Act, 1943, the court would appoint a receiver and manager for three months, subject to the debenture holder's undertaking to apply forthwith for leave under the Act to amend the writ by adding a claim for foreclosure or sale so as to avoid an extended administration by the receiver without the court having power to order foreclosure or sale.

[FOR THE COURTS (EMERGENCY POWERS) ACT, 1943, s. 1 (2), see HALSBURY'S STATUTES, Vol. 36, pp. 466-468.]

Case referred to:

(1) *Gasson & Hallagan, Ltd.* v. *Jell*, [1940] Ch. 248; 109 L.J.Ch. 83; 162 L.T. 215; Digest Supp.

MOTION by a debenture holder for the appointment of a receiver and manager. There were only three shareholders of the company, two of whom, its only directors, were killed in an accident, and the surviving shareholder took no interest in the company. The company's property was deteriorating, and its work was at a standstill. ROXBURGH, J., made the appointment for three months, subject to an undertaking by the debenture holder to apply for leave under the Courts (Emergency Powers) Act, 1943, s. 1 (2), to proceed for foreclosure or sale. The facts appear in the judgment.

D. B. Buckley for the debenture holder.

The company did not appear. *Cur. adv. vult.*

Jan. 21. **ROXBURGH, J.,** read the following judgment. This is a motion by Barclays Bank, Ltd., for the appointment of a receiver and manager. On Oct. 16, 1946, the defendant company, which carries on business as builders and contractors, issued to the bank a debenture to secure sums from time to time due from the defendant company to the bank. £1,500 or thereabouts is now due thereunder. The facts giving rise to the application are stated in the affidavit, sworn in support of the motion by Mr. Alexander James Neill, branch manager of the branch of the bank at Newport, Isle of Wight.

> 7. The company had only three shareholders, namely Robert Walter Bacon and Robert Horace Bacon, both of 72 Newport Road, Cowes, in the Isle of Wight, and Joan Adelaide Hall, of Warburton's Hotel, Newport Road aforesaid, and the said Robert Walter Bacon and Joan Adelaide Hall were the only directors of the company. They were both killed in an aeroplane accident on Aug. 29, 1947. As a result there is now no-one to direct the business of the company and the work in progress has come to a standstill. In the absence of direction the company's assets are likely to depreciate in value. 8. To the best of my knowledge, information and belief, no steps have been taken or are being taken to obtain grants of representation to the estates of the deceased directors . . . Both the deceased . . . were debtors to the company and to another company for considerable amounts. The remaining shareholder, Robert

Horace Bacon, has taken no interest in the company since the aeroplane accident. No funds are available to enable the company to carry on business, creditors are pressing, and there is no one willing to take on the responsibility of carrying on the business of the company. 9. A number of the company's creditors are pressing for payment of sums due to them by the company and a writ . . . has been issued . . . claiming payment of a sum of £450. There have also been threats of other proceedings, but, so far as I know, no other writs have been served on the company. 10. The company has contracted to build several houses, some of which are partially completed and are deteriorating rapidly in their present state of exposure to wind and rain, so that it is essential that prompt action be taken without delay in this respect. 11. A To the best of my belief and so far as can at present be ascertained, the company is insolvent, but it is impossible to be definite until the assets have been traced and valued and the liabilities have been accurately assessed. The bank does not wish to enforce its security, but desires to protect it and considers that this can best be done by the appointment of a receiver and manager to safeguard the interests, not only of the bank, but also of all the creditors of the company. There are likely to be a number of disputed claims regarding both the assets and the liabilities, and it is felt to be desirable B that a receiver and manager should be appointed by the court who would have the advantage of being able to obtain the directions of the court in cases of difficulty.

In the circumstances it is not surprising that the defendant company has not been represented and has filed no evidence. A case of jeopardy has been clearly established. Accordingly, I should have proceeded at once to make the appointment for which the bank asks but for the Courts (Emergency Powers) C Act, 1943, s. 1, which provides:

> (2) Subject to the provisions of this Act, a person shall not be entitled, except with the leave of the appropriate court, . . . (*b*) to institute any proceedings for foreclosure or for sale in lieu of foreclosure . . . Provided that nothing in this sub-section shall effect . . . (*b*) the institution or prosecution of any proceedings for the appointment by the court of a receiver of any property.

No leave has been obtained under that Act. Accordingly, I must first consider D whether this action is an action for foreclosure or sale. The writ claims (i) a declaration that the debenture dated Oct. 16, 1946, and issued by the defendant company to the bank is a first charge on all the property of the defendant company comprised therein; (ii) all necessary accounts and inquiries; (iii) a receiver and manager; (iv) further or other relief; (v) costs. This endorsement has been carefully framed so as to avoid any claim for foreclosure or sale being made, and it has, in my judgment, succeeded in its object. Accordingly, E it does not contravene the Act, but the appointment of a receiver and manager is a discretionary remedy and I must next consider whether this is a type of action in which I ought to make such an appointment having regard to the spirit as well as to the letter of the Courts (Emergency Powers) Act. On the one hand, there may be cases of jeopardy, like the present, where it is very desirable for the court to make an urgent appointment without awaiting the result of an application under the Courts (Emergency Powers) Act. On the F other hand, great practical difficulties might attend an extended administration by a receiver and manager in a case where the court had no power to order foreclosure or sale. Moreover, if a manager continued in office long enough, the consequences of his administration might in the end closely resemble those of a sale. Bearing all these considerations in mind, I think that the proper course for me to take is to appoint a receiver and manager for a limited period G of time (say 3 months) on the bank's undertaking (which it is willing to give) to apply at once for leave under the Courts (Emergency Powers) Act to amend the writ by adding a claim for foreclosure or sale. The position can be further considered when the result of that application is known. In taking this course I do not think that I am doing anything which conflicts with the decision in *Gasson & Hallagan, Ltd.* v. *Jell* (1) because FARWELL, J., pointed out that that was not a case in which there was any ground for suggesting that it was necessary H to preserve the mortgaged property, whereas in the present case the security is in jeopardy. The order must, of course, be subject to the filing of proper affidavits of service and fitness. I will appoint a receiver and manager for 3 months and he will have liberty to act at once on the bank's undertaking. He must give security within 21 days. *Order accordingly. No order as to costs.*

Solicitors: *Taylor, Willcocks & Co.*, agents for *Bailey & Adams*, Newport, Isle of Wight (for the debenture holder).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Reversed. C.A. [1948] 2 All E.R. 68.

Re COGHLAN (*deceased*).

[Probate, Divorce and Admiralty Division (Willmer, J.), January 21, 22, February 3, 1948.]

Administration—Revocation of grant—Discovery of will—Effect of laches.

The administration of the estate of a deceased, who died in 1892, was completed by 1896, and in 1912 a will, alleged to have been made by the deceased in 1891, was discovered. The plaintiff, who was the administrator of the sole executor and beneficiary under the alleged will, was fully aware of the discovery, but, owing to lack of means and being under the erroneous impression that the will was "statute barred," he took no action until 1935, when he consulted solicitors, and in 1947, after protracted correspondence and one abortive action, commenced an action to revoke the grant of administration to the estate of the deceased and to establish the alleged will. All the original beneficiaries in the administration and some of the beneficiaries entitled to share in their estates were dead. On an application for an order that the action be dismissed under the inherent jurisdiction of the court as frivolous and vexatious, the registrar dismissed the summons on the ground that, although the delay between 1912 and 1935 might amount to such laches as would defeat the claim of the plaintiff if he were claiming on an intestacy, the same considerations did not apply where it was sought to establish a will, and that, having regard to the principle that the court seeks to give effect to the wishes of a testator if it is possible to do so, the plaintiff ought to be allowed to proceed with the action to establish the will and not to be stopped *in limine*. On appeal :—

Held : although the court will always try to give effect to the wishes of a testator, the plaintiff's laches would render hopeless any attempt on his part to follow the assets, so that, even if the action proceeded and the plaintiff succeeded in proving the alleged will, no possible good could result, and, therefore, the action was an abuse of the process of the court and should be dismissed *in limine.*

[As to Jurisdiction of Probate Division to Stay Frivolous Proceedings, see HALSBURY, Hailsham Edn., Vol. 14, pp. 226, 289, paras. 386, 515 ; and for Cases, see DIGEST, Vol. 23, pp. 248, 281, Nos. *3034-3036, 3479-3484*.]

Cases referred to :

(1) *Mohan* v. *Broughton*, [1900] P. 56 ; 69 L.J.P. 20 ; 82 L.T. 29, C.A. ; *affg.*, [1899] P. 211 ; 23 Digest 248, *3035*.

(2) *Lawrance* v. *Norreys* (*Lord*), (1890), 15 App. Cas. 210 ; 50 L.J.Ch. 681 ; 62 L.T. 706 ; 54 J.P. 708 ; 32 Digest 529, *1836*.

(3) *Willis* v. *Beauchamp* (*Earl*), (1886), 11 P.D. 59 ; 55 L.J.P. 17 ; 54 L.T. 185 ; 23 Digest 281, *3479*.

(4) *Mahon* v. *Quinn*, [1904] 2 I.R. 267 ; 23 Digest 248*d*.

(5) *In the Estate of Williams, Williams* v. *Evans*, [1911] P. 175 ; 80 L.J.P. 115 ; 105 L.T. 79 ; 23 Digest 247, *3032*.

(6) *Young* v. *Holloway*, [1895] P. 87 ; 64 L.J.P. 55 ; 72 L.T. 118 ; 23 Digest 119, *1158*.

(7) *Dooley* v. *Dooley*, [1927] I.R. 190 ; Digest Supp.

(8) *Erlanger* v. *New Sombrero Phosphate Co.*, (1878), 3 App. Cas. 1218 ; 39 L.T. 269 ; *sub nom., New Sombrero Phosphate Co.* v. *Erlanger*, 48 L.J.Ch. 73 ; *affg.*, S.C., *sub nom., New Sombrero Phosphate Co.* v. *Erlanger*, (1877), 5 Ch.D. 73 ; 20 Digest 528, *2512*.

(9) *Lindsay Petroleum Co.* v. *Hurd*, (1874), L.R. 5 C.P. 221 ; 20 Digest 529, *2513*.

(10) *Manorama Chowdhurani* v. *Shiva Sundari Mozumdar*, (1914), I.L.R. 42 Calc. 480 ; 23 Digest 248c.

Appeal from an order of the registrar dismissing the defendants' application for an order that the action, brought by the plaintiff for revocation of a grant of administration, be dismissed as frivolous and vexatious. The facts appear in the judgment. The appeal was allowed.

Shelley, K.C., and *Charles Burke* for the plaintiff.

H. C. Leon for the defendants. *Cur. adv. vult.*

Feb. 3. **WILLMER, J.,** read the following judgment. This is an appeal from an order of the registrar dismissing with costs the defendants' application for an order that the action be dismissed under the inherent jurisdiction of the court as frivolous and vexatious. The action is brought to revoke the grant of letters of administration of the personal estate of a person who died in 1892, and to establish an alleged will dated Dec. 23, 1891. The plaintiff claims as the administrator of one Samuel Williams, who was named as sole executor, residuary legatee and devisee in the alleged will. The defendants are sued as trustees under the will of the residuary legatee of one of the beneficiaries in the administration of the estate of the deceased.

The material facts are as follows. The deceased, who was a man of eccentric habits, died in 1892, leaving a very large estate. A diligent search was made for a will, but none was forthcoming. Letters of administration were granted to one of the maternal relatives of the deceased, and after considerable litigation the estate was eventually distributed among four persons who established their title as the only next of kin entitled to share in the estate of the deceased. To these proceedings Samuel Williams was a party, claiming as a paternal relative an equal right to share in the estate of the deceased with the four persons mentioned. His claim, which was for £140,000, was eventually withdrawn on payment to him of a sum of £3,000. Apart from some trivial assets which came to light in 1908 and are of no relevance to these proceedings, the administration of the estate was completed by about 1896. In 1898 an action was commenced by another person, claiming to be the true next of kin of the deceased, and praying for the revocation of the previous grant. The proceedings in this action are reported under the name of *Mohan* v. *Broughton* (1), and resulted in an order of the Court of Appeal dismissing the action under the inherent jurisdiction of the court as an abuse of the process of the court. In that action, the report of which was cited to me and very much relied on by the defendants as an authority in the present proceedings, a plea of *res judicata* failed, but it was held by Gorell Barnes, J., that the action failed by reason of the laches of the plaintiff, who had stood by and practically acquiesced in the previous administration proceedings, and by the Court of Appeal on the additional ground that the action was quite pointless, seeing that the plaintiff could assert any right which she might have by commencing proceedings right away in the Chancery Division without the necessity for any order of this court.

After this nothing of any materiality happened until 1912, when advertisements appeared in the public press, offering a reward of £10,500 for the production of a will of the deceased in favour of his paternal relatives. Not unnaturally, perhaps, in view of the size of the reward offered, this produced a crop of alleged wills, of which the will sought to be established in this action was one. I mention this fact merely to place on record that the will sought to be set up in this action is only one of a number of possible competitors. It is conceded, however, that for the purposes of this application the court is not at liberty to inquire into the genuineness of the will set up by the plaintiff, but must proceed on the hypothesis that the will can be satisfactorily proved if the action is allowed to proceed. All the alleged wills which had been produced were investigated at the time by the solicitors then acting for the administrator of the deceased's estate, who satisfied themselves, rightly or wrongly, that none of them was genuine or worth proceeding on. In the meantime, Samuel Williams, the sole executor and beneficiary under the alleged will now sought to be established, had died intestate in 1909. It appears that on production of the alleged will in 1912 the proposed administrators of the estate of Samuel Williams were advised by solicitors, who actually endeavoured to obtain evidence with regard thereto. It also appears that the present plaintiff was well aware of the discovery of the alleged will, and, indeed, he states in his affidavit that he desires at a later stage of this action to produce evidence with regard to the circumstances leading up to and arising out of the advertisements. In view of the amount of Press publicity which was attracted at the time I can only conclude that the discovery of the alleged will was a matter of common knowledge in 1912. The plaintiff states, however, that he was at the time without the means to proceed, and, furthermore, that he was under the erroneous impression that the will was "statute barred." In consequence thereof he took no action, and the matter remained dormant until 1935. In that year the matter was taken up by the solicitors now acting for the plaintiff, and a certain amount of correspondence took place over the next two years with the defendants' solicitors, who also appear to have made some further efforts to inquire into the genuineness of the alleged will. The correspondence came to an end with an unanswered letter from the defendants' solicitors in August, 1937. Four more years passed, and the plaintiff's solicitors then again returned to the attack in November, 1941. In August, 1943, the plaintiff commenced an action, but after some correspondence between the solicitors it was eventually agreed that the action was improperly constituted. By a consent order the action was dismissed on July 2, 1946, and on Nov. 28, 1946, the present action was commenced. The statement of claim was delivered on Jan. 6, 1947, and on Mar. 18, 1947, the defendants issued the present summons. It remains to state that all the original beneficiaries who were held entitled to share in the estate of the deceased are now dead, as are also some of the beneficiaries entitled to share in their estates. The estate of the deceased has, therefore, been widely distributed among numerous persons in the 50 years which have elapsed since the original administration proceedings. It is conceded, however, at any rate for the purposes of the present application, that there are still at least some assets in the hands of beneficiaries which it would be possible for the plaintiff to follow if, in the appropriate proceedings in the Chancery Division, he were to succeed in establishing his right to do so.

The defendants contend that the plaintiff (or his predecessors) has been guilty of such laches as would make any claim on his part to follow the assets of the deceased quite hopeless at the present date. It is, therefore, contended that the present proceedings are pointless, and incapable of resulting in any benefit to the plaintiff, since, even if he were to succeed in establishing the validity of the alleged will, his equitable right to follow the assets would be defeated by his laches and no good could conceivably result. In the circumstances the defendants allege that the present action is an abuse of the process of the court and ought to be dismissed *in limine* under the inherent jurisdiction of the court. It is conceded that no question of laches arises until 1912, when the alleged will was first discovered, and, in spite of the long time which has elapsed, it is not contended that there has been any laches since the matter was re-opened in 1935. The defendants' allegation of laches rests solely on the delay between 1912 and 1935. As I have stated, the defendants' summons was dismissed by the learned registrar. There is, of course, no note of his reasons, but, according to the information conveyed to me by counsel, the learned registrar took the view that, although the delay might well amount to laches such as would defeat the claim of the plaintiff if he were claiming as on an intestacy, the same considerations did not apply in the present case, where it is sought to establish a will, and that, having regard to the principle whereby the court seeks to give effect to the wishes of a testator, if it is possible to do so, the plaintiff ought to be allowed to proceed with the action to establish the will, and ought not to be abruptly stopped *in limine*.

I have been referred in the course of the argument to a large number of authorities, but, unhappily for me, none of them, so far as I can see, is directly decisive of this case. As to the inherent jurisdiction of the court to dismiss *in limine* an action which is an abuse of its process there can be no doubt: see *per* LORD HERSCHELL in *Lawrance* v. *Norreys* (2) (15 App. Cas. 219), where, however, he goes on to add: " It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases." Whatever else may be said about the present case, I feel sure that nobody would quarrel with the observation that it is certainly a very exceptional one. This inherent jurisdiction of the court to dismiss an action is one which will be exercised in a case where it is shown that no good result can come of the proceedings even if they are successful. It was mainly on this ground that the action was dismissed in *Willis* v. *Earl Beauchamp* (3) (11 P.D. 59) as appears from the concluding remarks in the judgment of COTTON, L.J., at p. 63. This case is interesting because it is one in which the plaintiff was seeking, as in the present case, to recall letters of administration after a lapse of many years and after the administrators had long since been dead. Another case of an action to recall letters of administration being dismissed *in limine* was that of *Mohan* v. *Broughton* (1) previously referred to. As I have pointed out, the action was dismissed by GORELL BARNES, J., specifically on the ground of laches. It would, indeed, be a curious result if, in the present action, nearly 50 years later, when a claim is presented by another person in respect of the same estate, I were to come to the conclusion that there was no laches. It must be pointed out, however, that neither in *Mohan* v. *Broughton* (1) nor in *Willis* v. *Earl Beauchamp* (3) was the plaintiff seeking to establish a will. Neither decision, therefore, is directly decisive of the present case. I have also been referred to cases in which the question of laches arose in connection with plaintiffs who were seeking to revoke probate of a will. Instances of this class of case are *Mahon* v. *Quinn* (4), where laches was found and the action was dismissed, and *Williams* v. *Evans* (5), where it was found on the facts that laches had not been made out. In neither of these cases, however, was the plaintiff seeking to set up an alternative will. In both cases the purpose was to establish an intestacy. Again, therefore, neither decision is directly in point. In the few cases to which I have been referred, where the plaintiff was seeking to establish a will, no question of laches appears to have arisen. Thus, in *Young* v. *Holloway* (6), the plaintiff was claiming revocation of probate of a will (after the court in previous proceedings had pronounced in its favour) to establish an earlier will. It was proved that he instituted proceedings as soon as he became aware of the evidence in support of his claim, and the real question was whether the decision in the earlier proceedings was binding on the plaintiff, so as to constitute an estoppel. In *Dooley* v. *Dooley* (7) the estate of the deceased was administered as on an intestacy, and disputes between various of the next of kin led to proceedings to which the plaintiff was a party. It was known that the deceased had made a will, but everybody believed that he had revoked it. After a lapse of many years the plaintiff for the first time obtained evidence tending to show that the deceased had had no intention of revoking his will. He thereupon promptly instituted proceedings to revoke the letters of administration and establish the will. Again, the main question with which the court was concerned was whether the plaintiff was estopped by reason of the part which he had played in the previous proceedings, and it was held that he was not. Cases of the type of *Mohan* v. *Broughton* (1) were specifically distinguished by the court, on the ground that in those cases there was no question of setting up a will. It will be seen, therefore, that neither *Young* v. *Holloway* (6) nor *Dooley* v. *Dooley* (7) is decisive of this case. Both would have been very much in point if the plaintiff in this case had instituted proceedings promptly when he became aware of the alleged will in 1912.

In the absence of any authority directly decisive of this case the matter must be considered on general principles. The doctrine of laches was discussed in *Erlanger* v. *New Sombrero Phosphate Co.* (8), where the general principle was stated by Lord Blackburn as follows (3 App. Cas. 1279):

> . . . a court of equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by.

It will be observed that Lord Blackburn there refers to notice *or* knowledge. He goes on to quote the decision in *Lindsay Petroleum Co.* v. *Hurd* (9), where it was laid down that the doctrine of laches applies where it would be practically unjust to give a remedy, either because of conduct on the part of the plaintiff fairly equivalent to waiver, or because the other party has been put in a situation in which it would not be reasonable to place him if a remedy is afterwards to be asserted.

Prima facie, at least, the plaintiff in the present case would seem to have been guilty of laches by either of these tests. He had both notice and knowledge of the existence of the alleged will in 1912, and his failure to take action then at least wears the appearance of a waiver of his rights. Moreover, for another 23 years he allowed the beneficiaries and their descendants to live and enter into commitments, to marry and be given in marriage, on the basis that they were properly entitled, without question, to their shares in the estate. In this connection it is, perhaps, important to remember that we are concerned, not only with the actual defendants in this action, who represent the descendants of only one of the four original beneficiaries, but also with all the other beneficiaries and their representatives, who, for all that I know, may now be very numerous. It appears to me that the defendants certainly make out a strong case of laches against the plaintiff, sufficient *prima facie* to defeat any claim by the plaintiff at this date to follow the assets.

Counsel for the plaintiff has, however, taken three points in reply, each of which, it is contended, is a complete answer to the defendants' application to dismiss the action. For convenience I deal with them in the inverse order to that in which they were presented to me. In the first place, it is argued that the administrators were themselves guilty of improper conduct and of breach of their duty as administrators in that they failed, when the will was first brought to light in 1912, to bring it before the court themselves in pursuance of the covenant into which they had entered. The defendants being themselves thus guilty of moral turpitude, they cannot, it is said, now invoke the equitable doctrine of laches. To this contention there are, in my judgment, two answers. A One answer is that the present defendants are not being sued as administrators, but as representatives of one of the beneficiaries. As I have pointed out, it is necessary to consider the rights, not only of the defendants, but also of all the other beneficiaries. Assuming, without deciding, that the administrators were guilty of a breach of their duty in 1912, I do not see why in 1948 this fact should prejudice the rights of innocent beneficiaries. The second answer is that laches is not being invoked to found a claim, but merely as a B weapon of defence. It is the plaintiff who is seeking a remedy, and, if he succeeds here, he will have to invoke the equitable jurisdiction of the court to make good his claim. Those seeking equitable relief are always liable to be met with the equitable defence of laches. Even where the claim is founded on fraud laches may be a good defence. *A fortiori* it must, in my judgment, be a good defence when nothing beyond some irregularity in the administration of an estate is alleged.

C The second point made for the plaintiff is that laches cannot be alleged where the plaintiff gives a reasonable explanation of his delay, and here, it is claimed, he has done so, by a paragraph of his affidavit. In support of this contention the Indian case of *Chowdhurani* v. *Mozumdar* (10) was relied on. That was a case in which after a very long delay the plaintiff was seeking to reopen probate of a will and it was decided on the facts that the claim was not a *bona fide* one, D but the judgment of the court (HOLMWOOD and CHAPMAN, JJ.) contained the following passage (I.L.R. 42 Calc. 488):

> . . . it does not seem to us to matter by what facts such knowledge and acquiescence are established, for neither knowledge, nor acquiescence, nor lapse of time, are of themselves operative as a bar to the proceedings which every person interested in the estate of the testator has a right to bring if they were not made parties in the probate proceedings. What is held is that where knowledge, acquiescence and lapse of time E are shown, the petitioner must give some reasonable and true explanation of the delay; or, in other words, the application must be made *bona fide*.

I take this passage to mean no more than that laches is not established where a reasonable and true explanation of the delay is put forward. If that is what it means, it is a statement with which probably nobody would desire to quarrel, but the question still remains whether, on the facts of this case, the plaintiff has been guilty of laches, and that, in turn, involves the question whether F I can accept as reasonable and true the explanation of his delay which he puts forward. I cannot accept the explanation that the plaintiff was under an erroneous impression as to the law. It appears from the affidavit of Mr. Padfield that those interested in the estate of Samuel Williams, including presumably the plaintiff, were in 1912 advised by solicitors who were actually engaged in attempting to obtain evidence as to the attestation of the alleged will. In G any event, I do not regard ignorance of the law in 1912 as a satisfactory explanation of a delay of 23 years until 1935. Nor am I impressed by the plaintiff's allegation of lack of means in 1912. Lack of means might possibly have prevented the plaintiff from commencing an action in 1912, but it cannot seriously be put forward as an excuse for his utter and stony silence for 23 years. There is no evidence to show that he even so much as wrote a letter giving notice to the administrators of his interest under the alleged will and of his desire H to have it proved. In the circumstances he can hardly complain if his silence was taken to mean that he acquiesced in the view, which seems to have been generally prevalent at that time, that the alleged will was not genuine. I do not think that lack of means can be put forward as an explanation for such a policy of complete inaction as was pursued by the plaintiff.

I come, therefore, to the third point taken for the plaintiff, which I regard as the main point of the case. It is said that in no case where it is sought to establish a will can the action properly be dismissed *in limine*, whatever the laches of the plaintiff and whatever the length of the delay, unless, it is added, the delay is such as to give rise to the suspicion that the alleged will is not a genuine document. I confess that I do not understand the qualification contained in these last words, having regard to the fact that it was contended by the plaintiff and conceded by the defendants that I must approach this application on the basis that the alleged will is a genuine document which can in due course be properly proved if the action is allowed to proceed. If I am to assume for the purposes of this application that the will is a genuine document, it seems to me that the plaintiff's argument must go the length of saying that, wherever it is sought to establish a will, laches on the part of the plaintiff can never in any circumstances be a ground for dismissing the action *in limine*. The argument for the plaintiff is founded on the proposition that the court will always, if it can possibly do so, give effect to the properly expressed wishes of the testator. I certainly should not quarrel with this proposition as a general principle, but I think its application must be qualified by the equally important principle that there must at some time be an end to litigation. Somewhere a line must surely be drawn, otherwise, if a plaintiff can stand by for 20 years without laches being a short answer to his claim, what is the position after 200 years or even 2,000 ? Accepting, as I do, the general proposition that the court will, if possible, endeavour to give effect to the wishes of a testator, I think it remains true to say that its primary concern is with the interests of the living. If no living person is interested to propound a will, the court cannot insist on its being proved merely for the purpose of giving effect to the wishes of the testator. On the contrary, if those interested under a will are cited and choose not to appear, the court will, and commonly does, grant letters of administration to enable the estate to be distributed as on an intestacy. If regard were had only to the wishes of the testator and not to the interests of the living, it would hardly ever be right to sanction the compromise of a probate action, since there must be few occasions on which it can truly be said that the terms of compromise are designed solely to give effect to the wishes of the testator.

In my judgment, it is a mistake to regard the supposed wishes of the testator as so sacrosanct as to enable a person interested under a will to lie by for years before attempting to assert his claim. All the more must this be the case where, to the knowledge of the plaintiff, the estate has already been distributed, whether under the terms of some other will or as on an intestacy. In such a case it seems to me that the court's regard for the supposed wishes of the testator must be tempered by a regard for the rights of the living. If, as in the present case, a will comes to light for the first time long after the estate has already been distributed, it behoves those interested under the will to take the promptest possible steps to assert their rights. I can see no distinction in principle between such a case and a case where, after an estate has been distributed on an intestacy, a person obtains for the first time evidence to show that he is the true next of kin. In the latter case the authorities show that the claim must be promptly asserted, or the plaintiff's claim will be defeated by his own laches. In my judgment, the same is true in the former case. It seems to me that a plaintiff, who lies by for 23 years after the will which he claims to propound has come to light, when the estate has long since been distributed amongst a number of beneficiaries, is clearly guilty of laches as defined by Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.* (8). I am satisfied that such laches on the part of the plaintiff would render quite hopeless any attempt on his part, at this date, to follow the assets. That being so, if this action is allowed to proceed, even assuming that the plaintiff succeeds in proving the alleged will, no good can possibly result, and the plaintiff will be left in no better position. The action being quite pointless, therefore, it is in my judgment an abuse of the process of the court, and should be dismissed now for the same reasons as in *Willis* v. *Earl Beauchamp* (3). I need hardly say that I have hesitated long before coming to a different conclusion from that of the learned registrar, especially on a matter of this kind. It follows, however, from what I have said that in my view he came to a wrong conclusion, and the appeal must accordingly be allowed.

Action dismissed with costs, to include costs of application to registrar and appeal to the judge.

Solicitors : *Piper, Smith & Piper* (for the plaintiff) ; *Witham & Co.* (for the defendants). [*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

ised and Doubted. Gower *v.*
ɪʀ. [1950] 1 All E.R. 804.

GINESI *v.* GINESI.

[Court of Appeal (Tucker and Wrottesley, L.JJ., and Vaisey, J.), February 4, 5, 6, 1948.]

Divorce—Evidence—Adultery—Standard of proof.

In a matrimonial case the same strict proof is required of adultery (which was regarded by the ecclesiastical courts as a "quasi-criminal offence") as is required in a criminal case of a criminal offence properly so-called, namely, that it must be proved beyond all reasonable doubt to the satisfaction of the tribunal of fact.

Decision of the Divisional Court ([1947] 2 All E.R. 438), *affirmed, but for different reasons.*

Cases referred to :

(1) *Churchman* v. *Churchman*, [1945] 2 All E.R. 190 ; [1945] P. 44 ; 114 L.J.P. 17 ; 173 L.T. 108 ; 2nd Digest Supp.
(2) *Rix* v. *Rix*, (1777), 3 Hag. Ecc. 74 ; 27 Digest 331, *3107*.
(3) *Williams* v. *Williams*, (1798), 1 Hag. Con. 299 ; 27 Digest 301, *2780*.
(4) *Loveden* v. *Loveden*, (1810), 2 Hag. Con. 1 ; 27 Digest 296, *2730*.
(5) *Ross* v. *Ellison* (*or Ross*), [1930] A.C. 1 ; 96 L.J.P.C. 163 ; 141 L.T. 666 ; Digest Supp.
(6) *Watt* (*or Thomas*) v. *Thomas*, [1947] 1 All E.R. 582 ; [1947] A.C. 484 ; 176 L.T. 498.

Appeal by the husband from an order of the Divisional Court (Hodson and Barnard, JJ.) made on July 24, 1947 ([1947] 2 All E.R. 438), allowing an appeal by the wife from Bradford justices.

The justices found that the wife had committed adultery and on that account discharged a separation order previously obtained by her against her husband on the ground that he had wilfully neglected to maintain her. The Divisional Court held that the justices had applied the wrong test in arriving at their decision. The Court of Appeal now decided that, although the right test appeared to have been applied, the evidence on which the justices reached their decision was inadequate, and dismissed the appeal. The facts appear in the judgment of Tucker, L.J.

Simon for the husband.

J. Scott Henderson, K.C., and *R. T. Barnard* for the wife.

TUCKER, L.J. : This is an appeal from a decision of the Divisional Court (Hodson and Barnard, JJ.), whereby was allowed an appeal from a decision of Bradford justices, who had discharged an order made on the husband at the instance of his wife for her maintenance on the ground of his failure to maintain her. He had taken proceedings before the justices to have that order varied or discharged on the ground of his wife's adultery, and the justices found that adultery had been proved and discharged the order. From that decision the wife appealed to the Divisional Court and succeeded in her appeal. In his judgment in the Divisional Court Hodson, J., said ([1947] 2 All E.R. 438) :

> It might be desirable if I were to say at once what I mean by the standard of proof in this class of case. It is a matter of history that in matrimonial cases, adultery having been described as a quasi-criminal offence, the standard of proof is a high one, and if authority is required it is to be found in the language used by Lord Merriman, P., in Churchman v. Churchman (1) ([1945] 2 All E.R. 195) : "The same strict proof is required in a case of a matrimonial offence as is required in connection with criminal offences properly so-called."

Counsel for the husband does not dispute that that is an accurate statement of the requirements of proof of adultery in divorce proceedings, but as, apparently, there has been no pronouncement by this court on this matter we thought it desirable that the authorities should be called to our attention.

We have been referred to the ancient ecclesiastical authorities beginning with Sanchez's "Disputationum," of 1626, from which it appears that the author stated that *suspicio probabilis* is not sufficient and what is required is *suspicio violenta.* "*Quia haec sufficit ad condemnandum.*" From Oughton's "Ordo Judiciorum," in *titulus* CCXIII, paras. 3 and 4, it appears that what is required is *vehementes praesumptiones* as distinct from *suspicio probabilis.* Going on to later ecclesiastical authorities, we find, in *Rix* v. *Rix* (2), Sir George Hay stating that (3 Hag. Ecc. 74) : "Ocular proof is seldom expected but the proof should be strict, satisfactory, and conclusive." Then we have the great authority of Lord Stowell in two cases. The first is *Williams* v. *Williams* (3), in which, dealing with an undefended case, he said (1 Hag. Con. 299):

> This proves a great facility, at least, and will make the court more vigilant to see that the two main points of such cases are sufficiently proved, *viz.*, the criminal act, and that the person, against whom the proof of that act is established, was the wife.

Dealing with the requirements to establish such proof, in *Loveden* v. *Loveden* (4) he said (2 Hag. Con. 3):

> The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.

Coming down to more modern times, we were referred to *Ross* v. *Ross* (5). There is a passage in the speech of Lord Buckmaster where, in dealing with the proof of adultery, he says ([1930] A.C. 7):

> It is a matter of inference and circumstance. It is easy to suggest conditions which can leave no doubt that adultery has been committed, but the mere fact that people are thrown together in an environment which lends itself to the commission of the offence is not enough unless it can be shown by documents, *e.g.*, letters and diaries, or antecedent conduct that the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence.

Lord Atkin says (*ibid.*, 21):

> But from opportunities alone no inference of misconduct can fairly be drawn unless the conduct of the parties prior, contemporaneous, or subsequent, justifies the inference that such feelings existed between the parties that opportunities if given would be used for misconduct.

I am satisfied that the position was correctly stated by Hodson, J., when he said ([1947] 2 All E.R. 438) that adultery must be proved with the same degree of strictness as is required for the proof of a criminal offence. Adultery was regarded by the ecclesiastical courts as a quasi-criminal offence and it must be proved with the same strictness as is required in a criminal case. That means that it must be proved beyond all reasonable doubt to the satisfaction of the tribunal of fact.

In this case the Divisional Court were disposed to take the view that the stipendiary magistrate, who sat with a lay justice and delivered a reserved judgment, had misdirected himself with regard to the standard of proof required where at the end of his judgment he said:

> Well, it may be that they had not committed adultery. There is just the possibility that they had not, but the probability that they had is so very great that, in my opinion, we should hold that adultery has been proved.

I think the Divisional Court were inclined to the view that, in using that language, he was deciding the case on the balance of probability. I do not so read those words myself. They are not words which one would have chosen to use in isolation in directing a jury in a criminal case, but I think that, if a judge had directed a jury that they had to be satisfied beyond all reasonable doubt and had then added the words used by the stipendiary to explain what was a reasonable doubt, no exception could have been taken to the use of such language. Therefore, I am not satisfied merely by reference to that language that the stipendiary misdirected himself or his fellow justice as to the standard of proof required. Whether or not he applied to the facts of the case the degree of proof demanded is another matter altogether.

The functions of an appellate court, when dealing with an appeal from an inferior tribunal to whom has been committed the task of deciding questions of fact, are considerably limited. This matter has recently been dealt with—by no means for the first time—by the House of Lords in *Watt* v. *Thomas* (6). I refer to what has already become a well-known passage in Lord Thankerton's speech in which he summarises the principles. He says ([1947] 1 All E.R. 587):

> I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:—(i) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed

> to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion. (ii) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. (iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

The learned Lord goes on to observe that the value and importance of having seen and heard witnesses will vary according to the class of case and that in no class of case is it more valuable than in matrimonial disputes. So that is the angle from which the Divisional Court had to approach this appeal and it is the angle from which we have to view the judgment of the Divisional Court. Apart from the criticism directed to that part of the stipendiary's judgment in which he dealt with the degree of proof, I think it is clear from the judgments of HODSON, J., and BARNARD, J., that they regarded this case as coming under the third head of those which I have just read in LORD THANKERTON'S speech, namely, a case where the appellate court was satisfied, either because the reasons given by the trial judge were not satisfactory or because it unmistakably appeared from the evidence, that the trial judge had not taken proper advantage of having seen and heard the witnesses, and, therefore, they regarded the case as coming before them at large. Having examined the case, they came to the conclusion, without hesitation, that it did not come up to those standards of proof which are required before a charge so serious as this can be established against two persons. Our task is to examine the facts and circumstances of this case to ascertain whether the Divisional Court was right in coming to that conclusion. I approach the task with the knowledge that we are dealing with matters of frequent occurrence which came before two judges whose task it is to devote a great portion of their judicial time to the ascertainment of matters of this kind.

[HIS LORDSHIP reviewed the evidence, and continued :] The stipendiary magistrate emphasised the attractions of the wife and the other man and the position in which they were. He said :

> We have here a wife separated from her husband, against whom she made an allegation of cruelty. Here we have a young woman not in the first flush of youth ; an experienced woman, but young enough to be very charming and attractive, and the man, who, if this were a divorce case, would be called a co-respondent, a widower, not very old nor very young, a pleasant and attractive man. Both, therefore, in early middle age, both of experience and considerable charm and likely to be attracted to each other. A grass widow and a widower, and under these circumstances the grass widow becomes, first of all, shop assistant and then after a while becomes private secretary to the widower, Mr. Frank Birkett, and from that time onwards for some years it is quite clear that there is a very great friendship and affection between them. They are brought into close contact in the business, and they go out together to cinemas and dances and other things, and occasionally they walk out, for one reason or another, arm in arm. There you have inflammable material, but it does not follow that they have committed adultery, but you have opportunity and great mutual attractiveness, and under these circumstances the husband very naturally suspects something between these two . . . Having regard to the admissions of the wife and Frank Birkett that they had twice been together in the middle of the night, once in the car and once in the office, a short time or a long time, they said only a short time, and witnesses said on the contrary it was something over an hour, having very carefully considered the evidence, I accept the evidence that these people were together for a substantial length of time in the middle of the night in circumstances I have mentioned. There was a good deal of other evidence given against them by these enquiry agents, some of which may not be true, but I have put aside any evidence that I considered at all doubtful and I accept this position. Here you have two people who are inflammable, in just the circumstances that may lead to adultery, and they, knowing that they are suspected, have been together quite a long time in the dark in the very middle of the night.

It really comes to this, that the justices were drawing inferences from the fact that these two persons had been together at a time described as the "middle of the night"—but that has to be considered in relation to the fact that they had been to a dance which generally does extend to the middle of the night—

coupled with the view they took of the attractive appearance and, perhaps, demeanour of these witnesses. It is, of course, a great asset to the tribunal of fact to observe and consider the demeanour of witnesses. The principal purpose of that observation is to ascertain or test the truthfulness of their evidence. People are not to be convicted of committing adultery because in the witness box they look the kind of people who might commit adultery, unless the evidence is such as to point almost irresistibly in that direction. Then, no doubt, the appearance and demeanour, and so forth, of the witnesses A
may be very material and of great assistance. It would be a very dangerous thing, however, if the evidence falls short of what is required for proof, to fill in the gaps in the evidence merely from observation of the attractiveness of the witnesses in the witness box. It appears to me that the stipendiary placed too much reliance on those matters in guiding himself to his decision in what was obviously a difficult case. I think the appearance and demeanour of witnesses is probably of great assistance to the trial judge where the evidence B
may otherwise appear very black against them and he accepts their explanation —there I think he is probably on surer ground—but if the evidence is very weak or is non-existent then what is lacking in the evidence cannot be supplied by mere observation of the witnesses. I have come to the conclusion that the view taken by the Divisional Court in this case is the correct view, but that, looking at the whole of this evidence, this charge was not proved with that degree of proof which is required, and that the case is one which the Divisional C
Court were entitled to re-open and examine. I entirely agree with the conclusions at which they have arrived.

WROTTESLEY, L.J. : I agree. I only desire to add one thing. The *dictum* of LORD MERRIMAN, P., in *Churchman* v. *Churchman* (1) reads as follows ([1945] 2 All E.R. 195):

> The same strict proof is required in the case of a matrimonial offence as is required D
> in connection with criminal offences properly so-called.

It will be observed, therefore, that the standard of proof with which we have been dealing in this case is there said by LORD MERRIMAN to apply to all matrimonial cases. All that it has been necessary to establish in the present case is that that standard applies to the proof of adultery, and since all the authorities cited to the court are cases of adultery I only desire to say that it seems to me E
that today this court need only lay down that this standard of proof applies to cases of adultery, leaving it to other occasions to decide whether it is equally true of other matrimonial matters—in addition, of course, to connivance, which was the offence which LORD MERRIMAN must have had in mind in *Churchman* v. *Churchman* (1).

VAISEY, J. : I find myself in complete agreement with the judgments just delivered. The close similarity of the offence of adultery to acts which F
are properly to be described as criminal today is beyond question. The finding that the offence has been committed may be far more serious in its consequences both to the individual and to society than conviction of a crime. That is true even in these days when its gravity is not so widely appreciated and accepted as it used to be. On the evidence in this case I should myself regard a *suspicio probabilis* of adultery as made out. But is that enough ? I think not. Is G
there a *suspicio violenta*, as SANCHEZ puts it ("DISPUTATIONUM"), or is there a *vehemens praesumptio* which OUGHTON ("ORDO JUDICIORUM"), in the passage referred to by my LORD, lays down as the requisite standard or degree of proof. Like its English derivative, the Latin word "*vehemens*" is one of the strongest possible significance. HORACE refers to the *vehemens lupus*, the ravening wolf. There is here, in my judgment, a suspicion, but not, in my view, a violent suspicion. There is, in a sense, a presumption, but it is far from being a vehement H
presumption. I agree that the appeal fails.

Appeal dismissed with costs.

Solicitors : *Ward, Bowie & Co.*, agents for *James A. Lee & Priestley*, Bradford, (for the husband) ; *Blundell, Baker & Co.*, agents for *H. T. Manknell*, Bradford (for the wife).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

HENDON CORPORATION *v.* STANGER.

[COURT OF APPEAL (Scott and Somervell, L.JJ., and Vaisey, J.), February 9, 11, 1948.]

Town and Country Planning—Town planning scheme—Industrial building—Factory—Premises used for testing concrete—Factories Act, 1937 (*c.* 67), *s.* 151 (1).

A consulting engineer, specialising in the testing of materials used in building and engineering construction, and, in return for fees, advising builders and others engaged in constructional work, in the course of one process made and crushed concrete blocks to test their properties, for which purpose he used a laboratory concrete mixer, six feet, six inches, high and three feet wide, and a crushing machine, twelve feet high by four feet square. He employed persons in manual labour to conduct these operations. The premises on which the process was carried out were within an area designated as wholly residential by the local authority in pursuance of a town planning scheme under the Town and Country Planning Act, 1932. The scheme defined "industrial building" as "a building . . . designed for use as a factory . . . within the meaning of" the Factories Act, 1937.

HELD: although the main object of the process was the testing of materials, the building constituted "premises in which . . . the work is carried on by way of trade or for the purposes of gain," within s. 151 (1) of the Act of 1937, and it was, therefore, a factory, within the meaning of that Act and an "industrial building" for the purpose of the scheme.

Decision of the Divisional Court ([1947] 1 All E.R. 877), *affirmed.*

Nash v. *Hollinshead* ([1901] 1 K.B. 700; 84 L.T. 483), *explained.*

Per VAISEY, J.: The building might also be held to be a factory within s, 151 (1) (xii).

[FOR THE FACTORIES ACT, 1937, s. 151 (1), see HALSBURY'S STATUTES, Vol. 30, p. 295.]

Cases referred to:

(1) *Nash* v. *Hollinshead*, [1901] 1 K.B. 700; 70 L.J.K.B. 571; 84 L.T. 483; 65 J.P. 357; 24 Digest 901, *29*.

(2) *Bailey* (*Stoke-on-Trent Revenue Officer*) v. *Potteries Electric Traction Co., Ltd.* [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; *on appeal,* [1931] A.C. 151; Digest Supp.

(3) *Curtis* v. *Shinner*, (1906), 95 L.T. 31; 70 J.P. 272; 24 Digest 903, *40*.

(4) *Wood* v. *London County Council*, [1941] 2 All E.R. 230; [1941] 2 K.B. 232; 110 L.J.K.B. 641; 165 L.T. 131; 105 J.P. 299; 2nd Digest Supp.

(5) *Weston* v. *London County Council*, [1941] 1 All E.R. 555; [1941] 1 K.B. 608; 110 L.J.K.B. 332; 165 L.T. 135; 105 J.P. 213; 2nd Digest Supp.

(6) *Stimson* v. *Standard Telephones and Cables, Ltd.*, [1939] 4 All E.R. 225; 161 L.T. 387; *sub nom., Stimpson* v. *Standard Telephones and Cables, Ltd.*, [1940] 1 K.B. 342; 109 L.J.K.B. 315; 83 Sol. Jo. 941; Digest Supp.

(7) *Grove* (*Dudley Revenue Officer*) v. *Lloyd's British Testing Co., Ltd.*, [1931] A.C. 450; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; *revsg.*, [1931] 1 K.B. 385; Digest Supp.

APPEAL from a decision of the Divisional Court (LORD GODDARD, C.J., ATKINSON and OLIVER, JJ.), ([1947] 1 All E.R. 877), on May 1, 1947.

Under the Town and Country Planning Act, 1932, s. 13 (1) (c), the appellants, Hendon Borough Council, served a notice on the respondent, Stanger, that, as the responsible authority under the Hendon Planning Scheme (No. 1), they proposed to prohibit certain premises, "Summerfield House," Barnet Lane, Elstree, from being used as an industrial building within the meaning of the scheme. The respondent appealed to Hendon justices against the notice under s. 13 (4) of the Act. The justices allowed the appeal, holding that the building was not used as an industrial building as defined in the scheme. The borough council appealed, and the order of the Divisional Court allowing their appeal was now affirmed by the Court of Appeal. The facts appear in the headnote and in the judgment of SCOTT, L.J.

Capewell, K.C., H. A. Hill and *Kerrigan* for the appellant.

Rowe, K.C., and *Squibb* for the borough council.

SCOTT, L.J.: The question at issue is whether, under the Town and Country Planning Act, 1932, a building used for experimental purposes in connection with the building trade is an industrial building within the meaning of a planning scheme, so that the local planning authority can prevent it being used in a residential zone. The building with which we have to deal was equipped with certain machines, such as might normally be used in factories, for use in the work of investigating and testing the suitability of materials used in the making of concrete. The owner of the building, who appeals from a decision A of the Divisional Court, was a scientific man who had the knowledge needed to answer questions by builders as to the suitability of materials to be used for concrete, and he conducted his professional activities in this building. The local planning authority took steps under the Act of 1932 to prohibit the use by him of the house for these purposes on the ground that they resulted in the house becoming an industrial building and the area in which it was situated had been zoned as residential in a planning scheme. Under the Act an appeal B is given to the justices where an order of that kind is made. He appealed to the justices, and the justices held that the building was not an industrial building within the meaning of the scheme. On appeal, the Divisional Court held that it was an industrial building.

It should be borne in mind that a scheme under the Act of 1932, when duly approved and confirmed, is law and enforceable as such. The definition on C which this litigation depends is contained in cl. 26 of the scheme made by Hendon Corporation as local planning authority. In that clause the expression "industrial building" is defined as:

> . . . a building, other than a special industrial building, designed for use as a factory or a workshop within the meaning of the Factory and Workshop Acts, 1901 to 1929, and includes any office or other building within the same site, the use of which is incidental to and such as would ordinarily be incidental to the use of such factory or work- D shop . . .

It is common ground that the reference in the definition to the Acts of 1901 to 1929, which were the extant Acts at the time the scheme was sanctioned, should be read as references to the Factories Act, 1937, which supersedes those earlier Acts. Section 151 of the Act of 1937 provides:

> (1) Subject to the provisions of this section, the expression "factory" means any E premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely: (*a*) the making of any article or part of any article; or (*b*) . . . the breaking up or demolition of any article; . . . being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control: . . .

The last condition is clearly satisfied in the present case and no question arises F about it.

In my opinion, this litigation depends on the correct interpretation of the phrase "carried on by way of trade or for purposes of gain." In one sense, it is clear that this business of research and reporting the results of the research conducted by the owner of the premises was "for purposes of gain." He was a professional man, and he made his living by doing this type of work. If that G form of gain is within the meaning of this definition, that is an end of the appeal. In my view, it is. In some of the cases that have been cited to us it is suggested that professional gain, such as was secured here, is not "gain" within the meaning of the section. As I follow the argument, it is that the word "gain" ought to be construed as taking its colour from the previous words "by way of trade." I do not share that view. I think that the disjunctive "or" followed by the words "for purposes of gain" is put in for the express purpose of con- H trasting such gain with trade, and I see no reason for limiting those words to what counsel called "direct" gain as distinct from "indirect" gain. On the facts of this case, it seems to me that the criterion imposed by the definition in the Factories Act, 1937, s. 151, is satisfied. LORD GODDARD, C.J., in delivering his judgment in the Divisional Court, remarked truly that this is a difficult case. It is on the border line, but, in my view, the case is decided by the one point of construction with which I have dealt. I think that the appeal must be dismissed with costs.

SOMERVELL, L.J. : I agree with the conclusion at which the Divisional Court arrived, but, if I have interpreted them rightly, I do not agree with one or two of the observations made by the LORD CHIEF JUSTICE in arriving at his decision. We are dealing with a definition in a Town and Country Planning Scheme, which incorporates the definition of "factory" in the Factories Act. The LORD CHIEF JUSTICE said that, in construing the definition, the court is entitled to do so in the context of the planning scheme, and, therefore, to give A a somewhat more extended meaning to "factory" than if it were construing the words of the definition for the purposes of the Act from which they derive. I may have interpreted the LORD CHIEF JUSTICE wrongly, but, if he had that in mind in the passages to which I have referred, but which I will not pause to quote, with respect I do not feel that that is the right principle of construction in the circumstances of this case. The definition embodied that contained in the Factory and Workshop Acts, 1901 to 1929, now the Factories Act, 1937. It B seems to me, therefore, that the question we have to ask ourselves is : Is this a factory within the meaning of that Act ? If the question had arisen under the Act and the decision was that this building was not a factory, then it is not a factory for the purposes of this scheme.

Counsel for the occupier admits that the making and breaking of concrete which has been referred to was an ingredient in the activities by which the occupier made his living, but he says that, for the definition to be operative, C making an article—to take that operation first—must be the making of an article which in some form or other plays a part in the ultimate transaction by which gain passes from the customer, or whatever the appropriate description may be, to the occupier of the factory. He agrees that it need not be a direct sale of an article. It may be a component part of a larger article which is sold, or a spare part in an omnibus which carries passengers, and so on. Here he says D there is a difference which he submits is vital in that the making and breaking of the concrete is to give the occupier data on which he advises his clients as a consulting engineer. Once that information has been obtained, the article, whether in its original or demolished form, completely passes out of the transaction, but, even if it were at the bottom of the sea, the occupier would be able to get his fee provided records had been taken of the information so obtained. In *Nash* v. *Hollinshead* (1) observations were made by A. L. SMITH, M.R., E which, if they had been approved later, would, I think, have made counsel's argument successful. That case dealt with a man who was minding a steam engine on a farm. The MASTER OF THE ROLLS said ([1901] 1 K.B. 704) :

> In my opinion, the whole definition is governed by the words "by way of trade or for purposes of gain," and I think that in this case those words are not satisfied, because the county court judge finds that the meal was not intended for purposes of sale but of feeding the stock on the farm. The meal was therefore clearly not ground by way F of trade within the meaning of the Act. It was argued that, though the words "by way of trade" might not be applicable, the words "for purposes of gain" applied to this case ; because, the meal being made more suitable food for stock by the process of grinding, the profit of the farmer on his stock was thereby enhanced. I think that the "gain" intended by the section is a direct gain, and that the legislature, in using the words "for purposes of gain," contemplated the manufacturing of some article for the purpose of direct gain, and not of such an indirect gain as that suggested, namely, G the possible fattening of a bullock.

That case was considered in this court in *Bailey* v. *Potteries Electric Traction Co., Ltd.* (2) where SCRUTTON, L.J., said ([1931] 1 K.B. 491) :

> The court gave several reasons for this [decision]. The reason which commends itself most to me is that mentioned by COLLINS, L.J., and A. L. SMITH, M.R., that the detailed provisions of the Factory Acts and the enumeration of specific factories show that the legislature was not thinking of farming as a trade, of farms as non-textile H factories, or of preparing food for your own stock as "in the way of trade or for purposes of gain." A. L. SMITH, M.R., however, thought that gain was limited to direct gain by sale, though COLLINS, L.J., was not inclined to take this view. I cannot think however that where there is manufacture of articles to be employed in carrying on a trade, though that trade is one of supplying services for reward, as carriage by land or water, and not of supplying goods, the manufacture is not for purposes of trade, or that *Nash* v. *Hollinshead* (1) requires the courts to hold otherwise. If there is a trade there is no need to consider "gain." The words "profits or gains of trade" have been used together in various connections for many years . . . The Divisional Court in *Curtis* v. *Shinner* (3), where a fishing boat owner employed for reward labour

> to mend his nets, declined to hold the place of working a workshop, following *Nash* v. *Hollinshead* (1), on the ground that to repair nets for use in his own business was not "repairing for purposes of trade or gain." While *Nash* v. *Hollinshead* (1) may be justified as applicable to farming I see no reason to extend it to cases where labour is used in the manufacture of goods to enable a trade to be carried on which does not involve the sale of the goods. I think *Curtis* v. *Shinner* (3) was wrongly decided. It appears to me that a factory making printing machines would none the less be carried on for the purpose of trade because the machines were not made for purposes of themselves being sold but only to make things to be sold.

I read that as an expression of opinion by this court that the *ratio decidendi* in *Nash* v. *Hollinshead* (1) is that, looking at the Acts as a whole, they were not intended to cover farming and could not be construed as so doing, and not, as stated by A. L. SMITH, M.R., that gain meant direct gain. That process of reasoning was employed in *Wood* v. *London County Council* (4) by MACKINNON, L.J. The question there was whether a kitchen was a factory. A kitchen is, no doubt, a place in which things are made and altered. MACKINNON, L.J., based his decision on a consideration of the Acts as a whole. He said that, for instance, if the kitchen were a factory, no woman or young person could be employed later than 6 p.m. and no woman could be employed on Sunday. This and other provisions, in his opinion, made it clear that kitchens were outside the Factory Acts. That being so, there does not seem to me any case or principle laid down which is in favour of counsel's argument.

Therefore, we are free to apply the words of the definition in the Factories Act, 1937, in their ordinary meaning in their context. On the context of the Act it is, I think, relevant to say two things. First, the Act imposes penalties, and, therefore, the words must be clear. Secondly, its object is to protect workmen employed in connection with machines. So far as they are concerned it would not matter whether the process was being carried on so that an article might have a further life and be sold in the market or form part of a larger article, or whether the article was being produced to be broken up to test its strength. I think the words are plain, and that this process of making and breaking concrete was being carried on "for purposes of gain," and none the less so because the occupier made his living by making reports and giving advice to his clients. For these reasons, I agree that the appeal must be dismissed.

VAISEY, J.: I agree both with the conclusions and the reasoning of my Lords in the judgments just delivered. The signification of the word "factory" according to the dictionary or in common speech has no relevance to the present question. The relevant meaning of the word is entirely special and artificial. To my mind, this building is not a factory in the dictionary sense, nor is it a factory in the sense in which an ordinary man would use the word in ordinary speech. I am, however, satisfied that it is a factory as defined in s. 151 (1) of the Factories Act, 1937. If it had been necessary to do so, I might have rested my judgment on another ground. The latter part of s. 151 (1) provides:

> And (whether or not they are factories by reason of the foregoing definition) the expression "factory" also includes the following premises in which persons are employed in manual labour, that is to say . . . (xii) any premises in which articles are made or prepared incidentally to the carrying on of building operations or works of engineering construction, not being premises in which such operations or works are being carried on.

However, no allusion has been made to this part of the section either at the Bar or by my Lords, and I may be wrong in attributing any importance to it. The earlier part of the section, in my view, is amply sufficient to justify our decision of the case, and I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Coward, Chance & Co.* (for the occupier); *Leonard Worden*, town clerk, Hendon (for the borough council).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re EVANS' WILL TRUSTS, PUBLIC TRUSTEE *v.* GAUSBY AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), January 15th, 1948.]

Wills—Annuities—Appointment of Public Trustee as trustee after appropriation of funds for payment of annuities—Incidence of income fee.

By her will, made in 1935, the testatrix appointed two trustees and, by cl. 3, gave certain legacies. By cl. 4 she gave the following annuities "free of death duties and clear of income tax":—by cl. 4 (*a*) an annuity of £500 to two annuitants during their joint lives and the life of the survivor of them; by cl. 4 (*b*) an annuity of £300 to a beneficiary who died in 1941; and by cl. 4 (*c*) an annuity of £150, to be divided among certain charities on the death of the survivor of the annuitants. In respect of each of these annuities the testatrix directed her trustees to appropriate out of her residuary estate such amount as was necessary to provide by means of the income thereof for the payment of the annuity, and she declared that, when the appropriation had been made, each annuity should be wholly charged on the investments so appropriated in exoneration of the rest of her estate, but that the capital of the annuity funds might be resorted to in case at any time the income was insufficient to pay the annuity. She also declared that on the cesser of the annuities given by cl. 4 (*a*) and (*b*) the funds appropriated thereto should revert to and form part of her residuary estate. By cl. 5, the testatrix gave three legacies of £4,000 each, with the direction that, if her estate did not cover the setting aside of funds to meet the annuities as well as the payment of these legacies, the trustees, after setting aside funds to meet the annuities, should use the residue of the estate, so far as it would go, in payment of the legacies and any deficit should be made up out of the first moneys to be received on the falling in of an annuity. The testatrix gave certain other legacies and disposed of her residuary estate. The testatrix died in 1936, and, after payment of the legacies given by cl. 3 and the appropriation of funds for the payment of the annuities, no balance was available for payment of the other legacies. In 1939 one of the trustees died and by a deed dated Sept. 26, 1944, the surviving trustee appointed the Public Trustee as trustee of the testatrix's will in place of the deceased trustee and himself, but, since the Public Trustee was not a trustee of the will at the date of the appropriation of the annuity funds, no provision was then made for the income fee payable to him. When the funds were appropriated to provide for the annuities, income tax was allowed at the rate of 4*s.* 9*d.* in the £, that being the standard rate at the time. Owing to increases in the rate of tax the income from the appropriated funds became insufficient to meet the annuities in full and resort had to be had from time to time to the capital of the appropriated funds to make up the amounts of the annuities. On the death of the annuitant under cl. 4 (*b*), out of the balance of the fund appropriated for the payment of his annuity £3,100 of each of the legacies of £4,000, given by cl. 5, was paid, a sum of approximately £775 remaining in hand:—

HELD: out of this £775, £260 should be added to the cl. 4 (*a*) annuity fund and £80 to the cl. 4 (*c*) annuity fund, and the income of each fund, so augmented, should be applied in payment of the annuity in full and the Public Trustee's income fees in full, and, in so far as the income of either fund was insufficient to meet these payments, recourse should be had to the capital of that fund. The balance of the cl. 4 (*b*) fund remaining after these appropriations and payment of the costs of the summons taken out to determine these questions should be applied in accordance with the provisions of the will, the annuitants having no further claim therein.

[AS TO REMUNERATION OF PUBLIC TRUSTEE, see HALSBURY, Hailsham Edn., Vol. 33, pp. 342, 343, para. 605, and pp. 348, 349, para. 617; and FOR CASES, see DIGEST, Vol. 43, p. 1035, Nos. *4761*, *4762*, and Supplement.]

ADJOURNED SUMMONS to determine questions arising under the will of the testatrix.

By her will made on Aug. 6, 1935, and a codicil dated Mar. 5, 1936, the testatrix, by cl. 2, appointed two trustees (A. H. Thompson and G. A. Morgan), and by cl. 3 gave certain legacies. By cl. 4 (*a*) she gave to two annuitants during their joint lives and the life of the survivor of them an annuity of £500 "free of death duties and clear of income tax." By cl. 4 (*b*) she gave an annuity of £300 to a beneficiary who died in 1941, and, by cl. 4 (*c*), she gave an annuity of £150 to an annuitant (since deceased), and, after the annuitant's death, to the annuitant's three children during their joint lives and the lives or life of the survivors or survivor of them. Both the last two annuities were also given "free of death duties and clear of income tax." The testatrix directed the trustees to appropriate and set aside in respect of each of the annuities provided for by cl. 4 such part of her residuary estate as they considered necessary to provide by means of the income thereof the payment of the annuities. She declared that when the appropriation had been made each annuity should be wholly charged on the investments so appropriated in exoneration of the rest of her estate, but that the capital of the annuity funds might be resorted to in case at any time the income thereof was insufficient to pay the annuity. She further declared that on the cesser of any annuity the annuity fund appropriated to such annuity should, subject to cl. 8, revert to and form part of her residuary estate. By cl. 8 she directed that, on the death of the survivor of the annuitants mentioned in cl. 4 (*c*), the fund set aside to provide for that annuity should be divided among certain charities. By cl. 5 the testatrix further gave three sums of £4,000 each to three beneficiaries with the direction that, if her estate did not cover the setting aside of funds to meet the annuities as well as the payment of these legacies, the trustees, after setting aside funds to meet the annuities, should use the residue of the estate so far as it would go in payment of the legacies and any deficit should be made up out of the first moneys to be received on the falling in of an annuity. By cl. 6 the testatrix gave three legacies which were not to be paid until those given by c. 5 had been fully satisfied, and by cl. 7 she disposed of her residuary estate.

The testatrix died on Sept. 8, 1936. After payment of the legacies given by cl. 3 of the will and the appropriation of funds out of the income of which to satisfy the annuities under cl. 4 no balance was available towards satisfying the other legacies. The trustee, A. H. Thompson, died on April 19, 1939. The annuitant under cl. 4 (*b*) of the will died on July 27, 1941. The surviving trustee paid out of the investments set aside to provide for this annuity the death duties and expenses arising on the annuitant's death and he also paid £3,100 to each of the beneficiaries under cl. 5 on account of their legacies of £4,000 each and retained a balance of £784 in hand. By a deed dated Sept. 26, 1944, the surviving trustee retired from the trusts and appointed the plaintiff, the Public Trustee, to be the trustee of the testatrix' will and codicil in the place of A. H. Thompson deceased and himself.

When the funds were appropriated to provide for the annuities income tax was allowed at the rate of 4*s.* 9*d.* in the £, that being the standard rate current at the date of the appropriation. By reason of increases in the standard rate of income tax the income from the appropriated funds became insufficient to meet the annuities in full and resort had to be had from time to time to the capital of the annuity funds to make up the amounts of the annuities. The property now in the hands of the Public Trustee consisted of (i) the balance of the fund set aside to provide for the annuity under cl. 4 (*a*), of the approximate value of £19,308; (ii) the balance of the fund set aside to provide for the annuity under cl. 4 (*c*), of the approximate value of £6,787; (iii) the sum of £775, being the sum of £784 hereinbefore mentioned less income fees and other expenses paid thereout.

Owing to the fact that the Public Trustee was not a trustee of the will and codicil at the date of the appropriation of the annuity funds, no provision was then made for the income fee payable to the Public Trustee, and the question now arose how that fee ought to be borne and provided for, and, in particular, whether the said sum of £775 or any part of it ought to be applied in augmenting the annuity funds to provide for the income fee. In October, 1947, therefore, the Public Trustee took out a summons for the determination, *inter alia*, of the question whether the income fee payable to the Public Trustee in respect of the annuities bequeathed by cl. 4 (*a*) and (*c*) should be paid (i) out of the annuities, or (ii) out of the capital of the funds appropriated to provide for the annuities, or (iii) out of any other, and what, funds subject to the trusts of the will and codicil, and, if so, whether any such other funds ought to be applied in augmenting the funds appropriated to provide for the annuities, or (iv) how otherwise the income fee ought to be provided for.

Burnett-Hall for the Public Trustee.

K. E. B. Kemp, *Hewins*, *Wigglesworth*, and *W. G. H. Cook* for annuitants and beneficiaries.

VAISEY, J.: I think that the sum of £775, which the Public Trustee now has in hand should be applied in the first instance in payment of the costs of all parties as between solicitor and client. I shall direct that, of the balance, the sum of £260 shall be added by way of augmentation to the larger annuity fund [*i.e.*, for the annuity payable under cl. 4 (*a*)] and the sum of £80 shall be added by way of augmentation to the smaller annuity fund [*i.e.*, for the annuity payable under cl. 4 (*c*)]. I shall direct that each fund, as so augmented, shall be applied as follows. Out of the income thereof, the annuities shall be paid in full and the Public Trustee is to get his proper income fee. In so far as that income is insufficient to meet those two payments, recourse must be had to the capital of the particular fund. The rest of the £775 will be dealt with under the trusts of the will, the annuitants having no further claim to or interest in it.

Declaration accordingly. Costs of all parties, as between solicitor and client, out of the fund.

Solicitors: *Burn & Berridge* (for the Public Trustee); *Burn & Berridge*, agents for *Raymond Cossham*, Bristol, and *Woodcock, Ryland & Co.*, agents for *Price & Son*, Haverfordwest (for annuitants and beneficiaries).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law*.]

Re LEACH'S WILL TRUSTS, CHATTERTON *v.* LEACH.

[CHANCERY DIVISION (Vaisey, J.), February 12, 1948.]

Wills—Construction—Debts—Direction to pay debts—"Creditors"—Secured and unsecured creditors—Direction enuring for benefit of joint mortgagor and surety—Legacy—Lapse—Bequest to creditor of deceased son—Creditor predeceasing testatrix.

By her will a testatrix who died on Apr. 29, 1944, provided: "(8) My trustees shall out of the residue of my said real and personal estate pay to the creditors of my said son [W.] such sums of money as shall be owing by him to them at the time of my decease . . ." W. had both secured and unsecured debts, including a mortgage debt in the joint names of himself and H. (a son of the testatrix who had predeceased her), and a further mortgage debt for which W.'s wife had brought in an insurance policy as collateral security.

HELD: (i) the word "creditors" as used in the will included both secured and unsecured creditors, and the executors were not entitled to be subrogated to the rights of the secured creditors.

(ii) the direction in cl. 8 was to discharge the whole liability of W., and in effect, therefore, also that of H. as joint debtor, and of W.'s wife as surety.

By a codicil dated July 8, 1937, the testatrix provided "(2) Whereas on the death of my son [H.] my said son was indebted to [P.] in the sum of £1,000 now I hereby direct my executors and trustees to pay the said sum of £1,000 to the said [P.] free of any duties." P. predeceased the testatrix.

HELD: on construction of the codicil there was an intention to discharge a moral duty, and, therefore, the legacy to P. did not lapse.

Stevens v. *King*, ([1904] 2 Ch. 30; 90 L.T. 665), *applied*.

[AS TO LAPSE, see HALSBURY, Hailsham Edn., Vol. 34, pp. 134-136, paras. 173-175; and FOR CASES, see DIGEST, Vol. 44, pp. 492-495, Nos. *3111-3139*, *3149-3151*.]

Case referred to:

(1) *Stevens* v. *King*, [1904] 2 Ch. 30; 73 L.J.Ch. 535; 90 L.T. 665; 44 Digest 495, 496, *3151*.

ADJOURNED SUMMONS to determine, *inter alia*: (1) whether a direction in the testatrix's will to pay the debts of W. applied to a mortgage debt the joint liability of W. and H.; (2) (*a*) whether the said direction applied to certain other secured debts, including one which was guaranteed by a third party. and if so, (*b*) whether W. was bound to surrender certain policies by which debts were secured and apply the surrender value thereof towards the discharge of the said secured debts ; and (3) whether a direction in a codicil to the testatrix's will to pay £1,000 free of duty to P., to whom her deceased son had been indebted to that extent, lapsed owing to P.'s death in the lifetime of the testatrix. Vaisey, J., answered questions (1) and (2) (*a*) in the affirmative, and questions (2) (*b*) and (3) in the negative. The facts appear in the judgment. A

R. J. T. Gibson for the plaintiff (executor and trustee of the will).

D. S. Chetwood for the first defendant, Commander Leach.

Winterbotham, H. A. Rose and *J. G. Monroe* for other defendants.

VAISEY, J. : Brigadier-General Henry Edmund Burleigh Leach (whom I will call " Brigadier Leach "), son of the testatrix, died on Aug. 16, 1936. On Dec. 9, 1936, the testatrix made her will, to which she added three codicils. B She died on Apr. 29, 1944, and her will in due course was proved, with the codicils. By cl. 2 of her will she appointed her other son, William Robert Ronald Leach, a commander in the navy (whom I will call " Commander Leach "), and Henry Saxton Chatterton, the plaintiff, to be executors and trustees. By cl. 6 of her will she declared :

> . . . that notwithstanding anything herein contained all advances guarantees loans allowances or other payments that I have already made or shall hereafter make C to or on behalf of my said son William Robert Ronald Leach are absolutely forgiven by me and that the same shall not be deemed to be debts owing by him or brought into hotchpot by him and my executors shall not take any steps to recover any of such moneys.

Clause 8 provides :

> My trustees shall out of the residue of my said real and personal estate pay to the creditors of my said son such sums of money as shall be owing by him to them at the D time of my decease and the receipts of such creditors shall be a full and sufficient discharge to my trustees for the same.

It is possible that the motive underlying that direction was the desire to confer benefit on the creditors rather than on Commander Leach. It is possible that the testatrix desired to compensate and protect those who had given credit to her son in her lifetime and that she was not thinking of the honour of the family or anything of that kind nor intending to confer benefits on her son. That, E however, is a very unlikely view to take of the matter. I think that the aim and object of the testatrix in giving these directions was to clear the son, Commander Leach, of all his debts. How far she considered what ulterior consequences would flow from the carrying out of the direction it is very difficult to guess. My own surmise would be that she never thought of them at all.

The first question, on which I have formed a concluded view, is : Does the F direction apply exclusively to ordinary creditors, of whom in this case there were a large number, or does it extend also to secured creditors, *i.e.*, to persons who would more usually be described as mortgagees ? I have come to the conclusion that I cannot limit the use of the word " creditors " in any way and that the creditors to whom the clause refers are creditors whether secured or unsecured. The further question then arises whether the executors, on paying off the secured creditors, will be entitled to stand in the shoes of those creditors G by subrogation for the benefit of the estate, or whether the effect of carrying out the direction will be to put an end to the debts for all purposes. The latter, in my view, is the conclusion at which I ought to arrive. Commander Leach was also indebted under a mortgage jointly with Brigadier Leach, the deceased son, and the question is raised whether this direction enures only for the benefit of Commander Leach or whether, by a side-wind so to speak, it enures also for the benefit of Brigadier Leach. Further, under one of the mortgages a policy H of insurance was brought in by a third party, I think Commander Leach's wife, as collateral security for the debt. There, again, the question arises whether the carrying out of this direction will enure for the benefit of the guarantor or surety. As regards these two questions I think there is room for some considerable difference of opinion, but I take the view (which I think is the simple and straightforward way of looking at this matter) that, although the primary beneficiary under the clause was Commander Leach, the testatrix has, by conferring a benefit on him, also conferred benefit on the estate of her deceased son, Brigadier Leach, and on the lady who brought in the policy of assurance by way of collateral security.

I will declare that under the direction contained in cl. 8 of the will the executors ought to pay, for and on behalf of the debtor or debtors and of any guarantor or surety for the debt, a sum equal to the amount owing to the creditors by the debtor in respect of principle and interest calculated to the date of the testatrix's death, and that such payment ought to be made or be considered as having been A made to the respective creditors on that date. I think also that inasmuch as such notional payment was impossible, the executors ought also to pay or to be deemed to have paid such further interest as should have accrued since the date of the death of the testatrix down to the time of the payments to the respective creditors, and such further interest must, in my opinion, fall to be paid because, if the notional payment could have been made on the date of the death (as in strictness I think it ought to have been made or must be treated to B have been made), such further interest would not have accrued and would not have had to be paid. In my judgment, inasmuch as the joint debt was, so far as the creditor in question was concerned, wholly the debt of Commander Leach, I think that the whole of the debt had to be paid. I think that the result of that may be stated as having been also for the benefit of the estate of Brigadier Leach, and inasmuch as the mortgagees in that case appear to have helped themselves out of their security without waiting to be paid by the executors, C I think that the executors of the testatrix ought now to recuperate to Commander Leach and also to the estate of Brigadier Leach in equal shares the sum which they would have had to pay under the foregoing provisions of my judgment if the mortgagees had not anticipated that payment in the manner which I have mentioned.

The point raised by the last question of the summons, arises in this way. By D a codicil dated July 8, 1937, the testatrix by cl. 2 provided:

> Whereas on the death of my son Brigadier General Henry Edmund Burleigh Leach my said son was indebted to Sir Ivor Phillips in the sum of £1,000 now I hereby direct my executors and trustees to pay the said sum of £1,000 to the said Sir Ivor Phillips free of any duties.

The testatrix made two further codicils to her will, dated May 9, 1939, and Aug. 1, 1940, and a very few days after that last date, that is to say on Aug. 15, 1940, E Sir Ivor Phillips died. The testatrix, without making any further codicils, lived until Apr. 29, 1944. The question which I have to consider is whether that legacy lapses or whether it comes within the principle of *Stevens* v. *King* (1), where it was held that:

> Where on the true construction of a will the court finds that the testator's intention in giving a legacy was not merely bounty to the legatee, but to discharge a moral obligation recognised by the testator, whether legally enforceable or not, the legacy F will not lapse by the legatee's death in the testator's lifetime.

The facts of that case were much stronger than the facts of this case, but, looking at this codicil and trying to consider whether I can or ought to find in it an expression of some moral duty resting on the testatrix in pursuance of which she made this gift, I think on the whole that that is the proper way of reading it. This is not an ordinary legacy of a sum of money. It is a direction to the G executors to pay the actual sum which Sir Ivor Phillips had lent to the son of the testatrix and in respect of which the testatrix's son was indebted to Sir Ivor Phillips at the date of the codicil. I think that this case does come within the principle of *Stevens* v. *King* (1) and I will so decide. The question whether a moral obligation can be spelled out of any particular will is a matter of construction in each case, coupled, I suppose, with the consideration of the relevant circumstances. I doubt whether the facts in any particular case are the least guide to H the decision of any other case. In this case I not only find, but I think I am compelled to find, a motive of a moral kind, an intention to discharge a moral duty, which enables me to say that the principle of *Stevens* v. *King* (1) applies.

Declaration accordingly. Costs of all parties as between solicitor and client out of the estate in the course of administration.

Solicitors: *Turner, Osborn & Chatterton* (for the plaintiff and some defendants); *Bird & Bird* (for the second defendant); *Digby & Co.* (for other defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

LONDON INVESTMENT AND MORTGAGE CO., LTD. *v.* CENTRAL LONDON ELECTRICITY, LTD.

[Chancery Division (Jenkins, J.), January 30, February 6, 10, 1948.]

Electricity—Supply—Conversion from direct to alternating current—No contract between occupiers and undertakers—Right to supply of direct current—Expense of changing consumers' installation—Strand District Electric Lighting Order, 1895, *art.* 27—*Electricity Supply Regulations,* 1937, *reg.* 34 (*a*), (*b*).

On June 30, 1947, the plaintiffs acquired from S.A., Ltd., certain premises which were let off in flats to separate tenants, the plaintiffs being responsible for the electric lighting on the stairs and for the lifts which were run by electricity. The electric current for the lifts had hitherto been at the rate of 100 volts direct current, but the defendants, the electricity undertakers for the district, had been for some time past in the process of changing over to 230 volts alternating current. S.A., Ltd., on taking over the premises, had been asked by the defendants to enter into a contract and were notified that the current was to be changed. In view of the fact that the S.A., Ltd.'s, appliances on the property were adapted for 100 volts direct current, a special agreement was entered into between S.A., Ltd., and the defendants that direct current would continue to be supplied for the purpose of the appliances for 3 months from June 2, 1946, and thereafter at the will of the defendants. The defendants were not informed of the fact that the plaintiffs had taken over the premises until Aug. 11, 1947, and on Sept. 3, 1947, they wrote to the plaintiffs enclosing a form of contract and informing them that the supply would be alternating current and that the plaintiffs' appliances on the premises would have to be altered to suit it. By art. 27 of the Strand District Electric Lighting Order, 1895, undertakers, on being required to do so by the owner or occupier of premises situated within a prescribed distance from the undertakers' distributing mains, were to "give and continue to give a supply of energy for such premises" in accordance with the provisions of the Order, subject to the following conditions (*inter alia*): (*a*) that the owner or occupier should serve a notice on the undertakers specifying certain particulars, and (*b*) that, if required by the undertakers to do so, he was to enter into a written contract with them in regard to the receipt of and payment for the supply. By a proviso to the article, the undertakers were not to be compelled to supply any premises unless satisfied that the apparatus therein was in good order and not calculated to affect injuriously the use of energy by the undertakers or other persons. By the Electricity Supply Regulations, 1937, a "consumer" is defined as "any body or person supplied or entitled to be supplied with energy by the undertakers." By reg. 34 the undertakers are required to declare the type of current, frequency and voltage at supply terminals "before commencing to give a supply of energy to any consumer" and they are not to alter these, except within certain permissible variations, without the consent of the Electricity Commissioners. By reg. 35, the undertakers are required to maintain a constant supply without change of the neutral conductor unless otherwise allowed by the Electricity Commissioners. The consent of the Electricity Commissioners to the change over from direct to alternating current had been given on Jan. 19, 1937, on the conditions (*inter alia*) that a notice of their intention to carry out the change over should be served by the defendants on every consumer who would be affected and that the defendants were to be responsible for the cost of the necessary alterations to consumers' installations. It was contended by the plaintiffs that the defendants were under a statutory duty to continue to supply to them the 100 volts direct current, the fact that they themselves had not entered into a contract being immaterial because the provision in regard to a written contract applied only to the first owner or occupier who required undertakers to supply current to the premises. It was further contended that, under the conditions attached to the consent of the Electricity Commissioners to the change over, the expense of any necessary alterations to their installations was to be borne by the defendants:—

Held: (i) under art. 27 of the Strand Order, every occupier of premises was required to enter into a written contract if requested to do so by the electricity company and the fact that a previous occupier had entered into a contract did not entitle a subsequent occupier as of right to a supply. Accordingly, until the plaintiffs had entered into a contract with the defendants, they were not entitled to demand a supply, and when they did enter into a contract, they would be entitled only to the type of current declared by the defendants in accordance with reg. 34 (*a*) of the regulations of 1937. If the type of current which the defendants proposed to supply did not fit the plaintiffs' installation, the plaintiffs would have to alter their installation to fit the supply.

(ii) the condition imposed by the Electricity Commissioners requiring the defendants to pay for the cost of any necessary alterations to consumers' installations applied only in the case of consumers who had already entered into contracts with the defendants and to whom a declaration in regard to the type of current, voltage and frequency had been made in accordance with reg. 34 (*a*) of the regulations of 1937.

Stevens v. *Aldershot Gas, Water & District Lighting Co.* (*now Mid-Southern District Utility Co.*) (1932) (102 L.J.K.B. 12), *distinguished.*

Husey v. *London Electric Supply Corpn.* ([1902] 1 Ch. 411 ; 86 L.T. 166), *applied.*

[AS TO SUPPLY OF ELECTRICITY, see HALSBURY, Hailsham Edn., Vol. 12, pp. 584-586, para. 1124 ; and FOR CASES, see DIGEST, Vol. 20, pp. 204, 205, Nos. *31-39.*]

Cases referred to :

(1) *Stevens* v. *Aldershot Gas, Water and District Lighting Co.* (*now Mid-Southern District Utility Co.*), (1932), 102 L.J.K.B. 12 ; Digest Supp.

(2) *Husey* v. *London Electric Supply Corpn.*, [1902] 1 Ch. 411 ; 71 L.J.Ch. 313 ; 86 L.T. 166 ; 20 Digest 205, *34.*

MOTION by the plaintiffs, occupiers of the premises, 111 Charing Cross Road, London, for an interlocutory injunction restraining the defendants, the undertakers for the supply of electricity in the area in which the premises were situated, from discontinuing the supply of electricity to the premises.

The premises had been supplied with 100 volts direct current, but for some time past the defendants had been in the process of changing over to 230 volts alternating current and had informed the plaintiffs' predecessor in title of the proposed change. On learning that the plaintiffs had acquired the property, the defendants wrote to them enclosing a form of contract and declaring that the supply would be alternating current and that the landlord's appliances on the premises would have to be altered to suit the new supply. The plaintiffs claimed that the defendants were under a statutory obligation to continue to supply them with 100 volts direct current. JENKINS, J., held that there would be no breach of statutory duty if the defendants failed to supply current at 100 volts direct current and that the defendants were not required to supply alternating current to an installation not fitted to receive it, and he refused the injunction. The facts appear in the judgment.

Lindner for the plaintiffs.

Gerald Upjohn, K.C., and *J. P. Ashworth* for the defendants.

JENKINS, J. : The relief claimed in this action, according to the indorsement on the writ, is :

> An injunction restraining the defendants their servants or agents from discontinuing the supply of electricity to the plaintiffs' premises situate at No. 111 Charing Cross Road, London, W.C.2, and from entering the said premises for any purpose and in particular for the purpose of disconnecting the supply of electricity thereto. Costs. Further or other relief.

The proceeding now before the court is a motion by the plaintiffs for an injunction until judgment in the action or further order substantially in accordance with the relief claimed on the writ. The dispute arises in this way. Until June 30, 1947, the premises 111 Charing Cross Road were owned by a company known as Strand Automatics, Ltd. On June 30, 1947, the plaintiffs completed the acquisition of the premises from Strand Automatics, Ltd. The premises appear to be let off in flats to separate tenants, and there are certain common services such as lights on the stairs and, in particular, lifts run by electricity which the lessors, *i.e.*, the plaintiffs, look after. The electric current supplied by the defendants for the lifts and so on has hitherto been at the rate of 100 volts direct current. The defendants, however, for some time past, have been in the process of changing over to 230 volts alternating current. The present dispute concerns the question whether the defendants are now entitled to supply alternating current to the plaintiffs at 111 Charing Cross Road, and, if they are entitled to do that by way of satisfaction of their statutory obligation, at whose expense the necessary alterations in the plaintiffs' electric appliances shall be made, because, of course, appliances such as electric motors adapted to work A with 100 volts direct current are useless for alternating current. If alternating current were supplied to them, I apprehend the motors would be burnt out.

On taking over the property, Strand Automatics, Ltd., were asked by the defendants to enter into a contract, and this was done in accordance with the statutory provisions to which I shall refer in a moment. They were also notified under the statutory provisions that the current would be 230 volts alternating B current, but, in view of the fact that the company's appliances on the property were adapted for 100 volts direct current, there was a special agreement between the parties that for three months from June 2, 1946, and thereafter at the will of the defendants, direct current would continue to be supplied for the purposes of the appliances. When the plaintiffs took over the premises, no notice of the change was given to the defendants who, therefore, remained in C ignorance of it. The first intimation they received was in a letter of Aug. 11, 1947, from Strand Automatics, Ltd., to this effect:

> Dear Sirs, We enclose cheque for £7 15*s.* 10*d.* being July account for ground floor of above [*viz.*, 111 Charing Cross Road]. As regards July account for stairs and convenience, will you send your account for this to London Investment and Mortgage Co. [*i.e.*, the plaintiffs] of 39 Moorgate, E.C. 2, who are the new owners as from June 30, 1947.] D

That letter was replied to on behalf of the defendants, noting that the plaintiffs were the new owners with effect from June 30, 1947, and the letter goes on:

> It is regretted that I cannot trace any previous notification from you to terminate the existing contract for the supply. Therefore the company must look to you [*i.e.*, Strand Automatics, Ltd.] for ultimate settlement of the account which is returned herewith. The question of a new contract in the name of the London Investment and Mortgage Co. has been referred to the commercial department. E

The next letter is from the plaintiffs to the defendants, dated Aug. 20, 1947, saying:

> We have pleasure in inclosing herewith our cheque value £1 8*s.* 4*d.* in payment of current consumed for the month of July. Your formal receipt in due course will oblige. We await the new contract from your commercial department.

The defendants, thus apprised of the change, on Sept. 3, 1947, wrote to the F plaintiffs:

> We understand that you are now responsible for the supply of electricity at the above premises [*i.e.*, 111 Charing Cross Road] as from Aug. 1, 1947, and write to inform you that the supply will be given from our alternating current, 3 phase, 50 cycle, 230/400 volt mains.

A form of contract was enclosed. It was mentioned in this letter that the G motors, and so on, for the lifts would have to be altered to suit the new supply. The defendants, however, were prepared as a temporary measure to continue the supply of direct current for the appliances to give the plaintiffs an opportunity of altering them to fit the new supply. The result has been a prolonged correspondence and an interminable discussion, the plaintiffs, on the one hand, so far as I understand it, maintaining that they are entitled to continue to receive the 100 volts direct current supply for an indefinite period, and the defendants, H on the other hand, contending that their only obligation to the plaintiffs is to supply current of the new type, *i.e.*, alternating current of 230 volts.

The decision of this dispute must depend entirely on the statutory obligations of the defendants. The relevant statutory obligations appear to be contained, in the first place, in the Strand District Electric Lighting Order, 1895 [a provisional Order made under the Electric Lighting Acts, 1882 and 1888, and confirmed by the Electric Lighting Orders Confirmation (Notting Hill, etc.) Act, 1896], and, secondly, in the Electric Supply Regulations, 1937 [made by the

Electricity Commissioners in virtue of powers exercisable by them under the Electricity (Supply) Acts, 1882-1936, and Orders made thereunder and under local Acts.] Article 9 of the Strand Order says:

> Subject to the provisions of this Order and the principal Act [Electric Lighting Acts, 1882 and 1888] the undertakers may supply energy within the area of supply for all public and private purposes as defined by the said Act provided as follows: (1) Such energy shall be supplied only by means of some system which shall be approved A in writing by the Board of Trade and subject to such regulations and conditions for securing the safety of the public . . . as the Board of Trade may impose . . . (3) The system of supply shall be by continuous current only except by consent of the Board of Trade.

That section defines the character of the defendants' obligation as regards supply.

The next provision I was referred to was art. 27 of the Strand Order on which great reliance was placed on behalf of the plaintiffs. Article 27 says:

> B The undertakers shall upon being required to do so by the owner or occupier of any premises situate within 50 yards from any distributing main of the undertakers in which they are for the time being required to maintain or are maintaining a supply of energy for the purposes of general supply to private consumers under this Order or any regulations and conditions subject to which they are authorised to supply energy under this Order give and continue to give a supply of energy for such premises in accordance with the provisions of this Order and of all such regulations and conditions C as aforesaid and they shall furnish and lay any electric lines that may be necessary for the purpose of supplying the maximum power with which any such owner or occupier may be entitled to be supplied under this Order subject to the conditions following (that is to say) . . .

There is a provision as to the cost of lines of more than a certain length and then this follows:

> D Every owner or occupier of premises requiring a supply of energy shall serve a notice upon the undertakers specifying the premises in respect of which such supply is required and the maximum power required to be supplied and the day (not being an earlier day than a reasonable time after the date of the service of such notice) upon which such supply is required to commence; and enter into a written contract with the undertakers (if required by them so to do) to continue to receive and pay for a supply of energy for a period of at least 2 years of such an amount that the payment to be made for the same at the rate of charge for the time being charged by the undertakers for E a supply of energy to ordinary consumers within the area of supply shall not be less than 20 per centum per annum on the outlay incurred by the undertakers in providing any electric lines required under this section to be provided by them for the purpose of such supply and give to the undertakers (if required by them so to do) security for the payment to them of all moneys which may become due to them by such owner or occupier . . .

Then there are certain provisos including this one:

> F Provided also that the undertakers shall not be compelled to give a supply of energy to any premises unless they are reasonably satisfied that the electric lines fittings and apparatus therein are in good order and condition and not calculated to affect injuriously the use of energy by the undertakers or by other persons.

Article 30 of the Strand Order provides:

> Whenever the undertakers make default in supplying energy to any owner or occupier G of premises to whom they may be and are required to supply energy under this Order they shall be liable to a penalty not exceeding 40*s.* in respect of every such default for each day on which any such default occurs.

Article 27 of the Strand Order was very strongly relied on by counsel for the plaintiffs who said that, given premises situated within the prescribed distance from the mains, *i.e.*, premises qualifying geographically for the supply, then, once the owner or occupier of those premises has required the undertakers to H supply electricity, the obligation springs up and continues *in saecula saeculorum* to supply electric current for such premises. He maintains that the provisions about serving notice on the undertakers specifying the premises and the provision to enter into a written contract only apply to the first owner or occupier who requires any undertaker to supply the premises. Thereafter, according to the argument, each successive occupier steps into the shoes of his predecessor and is entitled for evermore to a supply of electricity without entering into any written contract at all. If that were right, the position now, I suppose, would be that the plaintiffs, in right of whoever it was who originally asked for a supply of electricity to these premises, would still be entitled to have that supply continued and, because it was originally on a voltage of direct current, to have that voltage continued for ever. In support of this argument, this passage was quoted from Studholme on Electricity Law and Practice, 1935 ed., p. 71:

> Except as mentioned above, a statutory consumer is under no obligation to sign any form of agreement before receiving a supply. The undertaker's obligation is to "give and continue to give a supply of energy for those premises," not merely to the statutory consumer on whose application the supply was first given. Thus there appears to be something in the nature of a statutory right which runs with the land and passes from vendor to purchaser and from one occupier to the next. This obligation to continue supplies is, however, subject to numerous express powers to discontinue in specified circumstances.

The exact scope which that passage is intended to have is not very clear because the learned author says "Except as mentioned above," and it is to be noted that one obligation of the consumer "as mentioned above" (*ibid.*, 70) is:

> (3) If so required, the consumer must contract in writing to receive and pay for (for at least 2 years) such amount of energy as would at the current rate produce a revenue of at least 20 per cent. per annum on the cost to the undertakers of the lines which under s. 27 [of the schedule to the Electric Lighting (Clauses) Act, 1899] they are required to provide.

I do not feel that that passage, properly understood, supports the argument which counsel for the plaintiffs adduces from it. It is true that there is a continuing obligation on the defendants to continue to supply current to the premises in their area, but that, I think, is a purely general obligation to supply energy. It means, I think, no more than that anyone who is an owner or occupier of premises is entitled by statute to have the supply on the same terms as everybody is entitled to have it. I do not think that the view that the second or subsequent occupier can refuse to enter into a written contract, if required to do so by the defendants, is tenable. It seems to me that art. 27 of the Strand Order clearly requires this to be done. Unless there is some special bargain the individual for the time being occupying the premises cannot have a right to any particular voltage or kind of current other than the general supply provided by the defendants as approved by the Board of Trade or now by the Electricity Commissioners.

In connection with this argument, counsel for the plaintiffs cited the judgment of Macnaghten, J., in *Stevens* v. *Aldershot Gas, Water and District Lighting Co.* (1). In that case the plaintiff was a hairdresser who, in 1925, took over the business from a predecessor who had applied for current from the local electricity undertaking. When the plaintiff took over she did not make any new application or sign any contract with the electric lighting company. For four years, from 1925 to 1929, the supply was continued, and, I suppose, paid for quarterly, the voltage supplied being 100, as the company had declared to the plaintiff's predecessor in the business. In 1929 the company wanted to change the voltage and an arrangement was reached by which the company should put in a transformer on the plaintiff's premises so that the current reaching her machines would remain at 100 volts pressure. The transformer was installed, but the plaintiff's machines were damaged, and an action was brought against the company for negligence in allowing the machines to be damaged in that way. That is a very different matter from the question in the present case. The actual decision seems to have been that there was no action at common law for damages for negligence, and the only remedy was to enforce penalties. Counsel for the plaintiffs relied on the case really for this passage in the judgment of Macnaghten, J., (102 L.J.K.B. 14):

> Clearly the defendants intended that the current should be supplied at 100 volts, and if, after the transformer was installed, the hairdressing machines went wrong, that might raise *prima facie* a case that the transformer was inefficient and the voltage was no longer 100. The plaintiff was a "statutory" consumer and she had no "special contract" with the defendants. She had the right by statute to call for current and the company was bound by law to supply her. The question is whether, if they have failed in that obligation, the plaintiff has a remedy at common law or is she limited to penalties in a court of summary jurisdiction?

It does not seem to me that that decision really carries the present question much further because there the plaintiff had been carrying on her business and receiving a supply of current for four years and she had never been required to enter into any express contract with the electricity company. Clearly, it was a case where the electricity company were content to supply the plaintiff without any written contract and that was what they were doing. They were supplying her at 100 volts, not under a written contract, but under a contract which was to be implied from the course of dealing between the parties. It does not seem to me that that carries the matter any further.

Far more to the point, it seems to me, is the decision in *Husey* v. *London Electric Supply Corpn.* (2), the headnote of which is this :

> Under s. 19 of the Electric Lighting Act, 1882, no person within the area supplied with electric current by an electric lighting company is entitled to a supply of current by the company unless and until he has entered into a contract with the company for the purpose. Therefore, upon a change in the occupation of premises to which current is being supplied by an electric company, there being a debt due to the company from the outgoing occupier in respect of current already supplied to him, the company are entitled to discontinue the supply until the new occupier has entered into a contract with them for a supply to him. At the instance of debenture-holders of an hotel company, the court appointed a receiver of the undertaking and property of the company. The order directed the company to deliver to the receiver possession of the hotel "so far as is necessary for the purpose of such receivership," and the receiver at once took possession of the hotel. At this time electric current for lighting the hotel was being supplied by an electric lighting company, and a large sum was due to them from the hotel company for current already supplied :—*Held*, that the electric company were entitled to discontinue the supply of current until the receiver had entered into a new contract with them for its supply.

It will be observed that in the headnote there is a reference to s. 19 of the Electric Lighting Act, 1882, but another statutory provision discussed in the case was s. 47 of the Provisional Order scheduled to the Electric Lighting Orders Confirmation (No. 2) Act, 1889. Section 47, I understand, is *verbatim* the same as s. 27 in the Strand Order in the present case. It was not definitely decided in the *Husey* case (2) whether s. 47 of the Provisional Order required every successive occupier to enter into a new contract if required to do so by the electric lighting company, though it seems to me that the members of the Court of Appeal implied fairly strongly the view (which seems to me to be right) that on a change of ownership or occupation the new owner or occupier must, if required, enter into a written contract. Whether that was the right view or not, their Lordships were of opinion that it was plain that under s. 19 of the Electric Lighting Act, 1882, a contract was necessary. In his judgment STIRLING, L.J., discussed the question whether s. 47, so far as the obligation to enter into a contract was concerned, was limited to the first owner, and he said ([1902] 1 Ch. 423) :

> I need not on the present occasion say more than that I am not satisfied that such a limitation exists, and as at present advised I am inclined to think that every owner or occupier must fulfil all the conditions imposed by s. 47. But, if I am wrong in that view, I agree entirely with what VAUGHAN WILLIAMS, L.J., has said as to the effect of s. 19 of the Act of 1882, and *quacunque via* I am of opinion that the occupier is not entitled as of right to a supply of electric current until he has entered into a contract with the defendant corporation. The plaintiff does not profess to have entered into such a contract, and therefore it seems to me that there is no ground for the injunction.

I should next refer to a few provisions of the Electricity Supply Regulations, 1937, which also apply to the defendants' undertaking. The regulations begin with definitions including a definition of "consumer" which is as follows :

> . . . any body or person supplied or entitled to be supplied with energy by the undertakers.

"General supply" means :

> . . . the general supply of energy to ordinary consumers, and includes, unless otherwise specially agreed with the local authority, the general supply of energy to the public lamps, where the local authority are not themselves the undertakers, but shall not include the supply of energy to any one or more particular consumers under special agreement.

"Supply terminals" means :

> . . . the ends of the electric lines situate upon any consumer's premises at which the supply of energy is delivered from the service lines.

Regulation 33 (*a*) provides :

> In any case where the undertakers in pursuance of these regulations decline to connect a consumer's installation or any part thereof with their electric lines or to commence or continue to give a supply of energy thereto or decline to recommence the supply of energy after the same has been discontinued, they shall serve on the consumer a notice in writing stating their reasons for so declining.

Then there is a provision for the reference of any dispute to an inspector nominated by the Electricity Commissioners. Reading the definition of "consumer" into reg. 34, that regulation provides :

> (*a*) Before commencing to give a supply of energy to any body or person supplied or entitled to be supplied with energy by the undertakers, the undertakers shall declare to that consumer (i) the type of current, whether direct or alternating, which they propose to supply ; (ii) in the case of alternating current, the number of phases and also the constant frequency at which they propose to deliver the energy to the supply terminals ; and (iii) the constant voltage at which they propose to deliver the energy to the supply terminals. (*b*) The type of current, the number of phases and the frequency in the case of alternating current and the voltage declared as aforesaid shall be constantly maintained subject as respects the frequency to a permissible variation not exceeding one per cent. above or below the declared frequency and as respects the voltage to a permissible variation not exceeding 6 per cent. above or below the declared voltage, and shall not be altered or departed from nor shall the aforesaid permissible variations be exceeded except with the consent of the Electricity Commissioners and subject to such terms and conditions as they may impose . . .

Regulation 35 is :

> From the time when the undertakers commence to supply energy through any distributing main, they shall maintain a supply of energy sufficient for the use of all consumers for the time being entitled to be supplied from that distributing main ; and that supply shall be constantly maintained without change of the neutral conductor unless otherwise allowed by the Electricity Commissioners and subject to such terms and conditions as they may impose . . .

There is a provision for discontinuance for the purposes of testing and so forth.

Regulation 34 (*a*), therefore, specifically provides that "before commencing to give a supply of energy to any consumer, the undertakers shall declare to that consumer (i) the type of current, whether direct or alternating, which they propose to supply . . ." If the plaintiffs in this case are a consumer to whom a supply had not previously been commenced within the meaning of reg. 34, it seems to me that the defendants were perfectly entitled, before commencing to supply, to declare what type of current they proposed to supply. If the type of current they proposed to supply did not fit the plaintiffs' installation, then the plaintiffs would be under the necessity of altering the installation to fit the type of supply. It is, therefore, necessary to consider whether any supply had been commenced to the plaintiffs before the defendants declared their intention as regards the type of current proposed to be supplied. The position as to that is, as we have seen, that the plaintiffs took over from Strand Automatics, Ltd., and no notice was given to the defendants of the change until Strand Automatics, Ltd., wrote to the defendants saying that there had been a change over as a result of which the plaintiffs were responsible for the July bill. I cannot regard the enjoyment by the plaintiffs of electricity from the time they took over until the time when the defendants were apprised of the position as a supply which in any way altered the rights of the parties. It seems to me that the only supply which I can take into account is that provided with the knowledge of the defendants. Therefore, it seems to me that, when the dispute arose in this case, the plaintiff company was a consumer as being a "body or person . . . entitled to be supplied with energy by the undertakers." Accordingly, before commencing to give them a supply the defendants were bound to make the declaration mentioned in reg. 34 of the Electric Supply Regulations, 1937, and, in making it, were entitled to declare that the current they proposed to supply was this particular type of alternating current. I think that result necessarily follows once one takes the view that, unless and until they entered into a contract with the defendants, the plaintiffs had no right to be supplied. They were entitled to enter into a contract, but until that were done they could not demand a supply. I should add that there is no question of the contract which Strand Automatics, Ltd., had with the defendants being assigned to the plaintiffs, and also that, even if it had been assignable, that would not have assisted the plaintiffs in view of the contract which had been signed by Strand Automatics, Ltd., to take the new type of current subject to the temporary arrangement under which the 100 volts direct current was to be supplied for three months or thereafter for such period as the defendants thought fit.

That seems to me to dispose of nearly the whole matter, because it follows A that the defendants are under no obligation to supply the plaintiffs with 100 volts direct current or with any current other than that which they declared under reg. 34 as the current they proposed to supply. The plaintiffs have not entered into any contract. If and when they do enter into a contract, they will then, in my judgment, be entitled to the declared type of current in accordance with reg. 34. I have not overlooked the fact that a contract was signed by or on behalf of the plaintiffs, but I cannot regard that as affecting the matter B because it was signed without prejudice to the plaintiffs' rights in regard to the very matters in dispute in this action. In my judgment, an agreement signed without prejudice in that way cannot have any force or effect.

There is one final point to be dealt with. It will be remembered that under reg. 34 (*b*) of the regulations of 1937:

> The type of current, the number of phases and the frequency in the case of alternating current and the voltage declared as aforesaid shall be constantly maintained C [subject to permissible variations], and shall not be altered or departed from nor shall the aforesaid permissible variations be exceeded except with the consent of the Electricity Commissioners and subject to such terms and conditions as they may impose . . .

That, in conjunction with the provisions in art. 9 (3) of the Strand Order, which provided: "The system of supply shall be by continuous current only except by consent of the Board of Trade" made it necessary for the defendants to D obtain the consent of the Board of Trade before they instituted the change to the alternating current. The consent of the Electricity Commissioners, on whom the powers of the Board of Trade in this matter had devolved, was given by an instrument dated Jan. 19, 1937, which authorised the change subject to the following conditions. (One must remember the reference to conditions in reg. 34 (*b*) of the regulations of 1937: ". . . subject to such terms and conditions as [the Electricity Commissioners] may impose . . ."). E The conditions were these:

> Unless otherwise agreed, the undertakers shall either at their own expense carry out the necessary alterations to consumers' installations to suit the change over, or pay to each consumer injuriously affected by the change over such sum as may be agreed upon or in default of agreement as may be determined in manner hereinafter provided as the reasonable cost to the consumer of and incidental to the change over including compensation for any loss or damage incurred by the consumer in consequence F of the change over; Provided that unless otherwise agreed no liability shall attach to the undertakers in respect of any additions made to a consumer's installation after notice has been served by the undertakers in pursuance of condition (11) hereof.

Condition (11) is:

> A notice of their intention to carry out the change over, together with a copy of these conditions, shall be served by the undertakers on every consumer who will be affected by the change over; and the said notice shall be served on the consumer not less than G one month and not more than six months before the undertakers carry out the change over in relation to the consumer's installation.

On this consent and the conditions annexed to it an argument on behalf of the plaintiffs is founded. It is said that the plaintiff company was a consumer, and the type of current, and so forth, could not be altered without the consent of the Electricity Commissioners who might impose such conditions as they thought fit. The conditions imposed by the consent of Jan. 19, 1937, included a H provision that the undertakers—*i.e.*, the defendants—should either at their own expense carry out the necessary alterations of installation or pay to each consumer injuriously affected by the change over such sum as might be agreed upon, and so on. Therefore, it is said that, the plaintiff company being a consumer and these conditions having been imposed, the defendants are obliged, in accordance with these conditions, to pay the expense to which the plaintiffs are put through the necessary alterations of the installation. It seems to me that that argument is based on a misapprehension. The provision which says that the consent of the Electricity Commissioners may be subject to such terms and conditions as they may impose is, as we have seen, taken from reg. 34 (*b*) of the regulations of 1937. What the commissioners are empowered to consent to in that regulation is an alteration in the type of current and the number of phases and the frequency in the case of alternating current and the voltage "declared as aforesaid." That is what is to be constantly maintained. As it seems to me, no question arises of imposing any conditions except in connection with the consent to the alteration of that which has been "declared as aforesaid," *i.e.*, declared under reg. 34 (*a*), namely, the alteration of the type of current, and so forth, as declared to a particular consumer who, *ex hypothesi*, has entered into a contract with the defendants and has received from the defendants a declaration as to those matters. Those are the class of consumers to whom these conditions apply, and none other. It appears to me that it is reasonably plain, looking at this consent as a whole and considering its subject-matter, that that must be what was meant by a consumer. Otherwise anyone living in any premises anywhere in the area of operations would have been entitled to a notice because he would be entitled to a supply if he chose to ask for it. It seems to me to be reasonably plain that the expression "consumer" here was confined to consumers who had contracted and to whom a declaration had been made in accordance with reg. 34 (*a*), and to none other.

I should, perhaps, add that I suggested by way of *modus vivendi* pending the trial of this action that the necessary alterations to the installation to receive the new alternating current might be made without prejudice to any question whether that expense ought to be borne by the plaintiffs or the defendants, but that suggestion was not acceptable, so it has been necessary for me to decide the matter at issue, though it is the type of question which would be more suitably determined at the trial of the action. Be that as it may, for the reasons which I have endeavoured to express, I am of opinion that the plaintiffs have no right to insist on the maintenance of the 100 volts direct current to their installation at 111, Charing Cross Road. They have failed to make out their case for an injunction against the defendants, who, I understand, have been and are at all times ready and willing to supply alternating current providing that the plaintiffs enter into a contract. There will be no breach of statutory duty, in my judgment, if the defendants cease to supply current at 100 volts direct current, and they will not have committed any breach of their statutory duty by not turning the new alternating current into an installation which in its present condition would simply be destroyed by that being done. Therefore, I will make no order on this motion, except that the costs be costs in the action.

Application refused. Costs to be costs in the action.

Solicitors: *R. C. Bartlett & Co.* (for the plaintiffs); *Slaughter & May* (for the defendants). [*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

CLIFFORD *v.* CLIFFORD.

[Court of Appeal (Tucker, Bucknill and Cohen L.JJ.), February 11 and 12, 1948.]

Divorce—Nullity—Insincerity—Approbation of marriage—Desire of petitioner husband to be relieved from financial liability to wife.

The parties went through a ceremony of marriage in 1919 and lived together for seventeen years. During the whole of this period the wife acted satisfactorily in the running of the home, but the marriage was never consummated owing to her incurable aversion from sexual intercourse. From time to time the husband complained about the marriage never having been consummated, and in 1936 he left his wife for a time. Through the intervention of a probation officer he returned to her on her promise to overcome her aversion from having children, but she would not allow any sexual intercourse, and in June, 1937, he left her finally, but continued to pay her an allowance. The petition was presented in November, 1946. The husband was a poor man, and gave lack of means as one of the reasons for delay in bringing the petition after he had left his wife. He also said he had decided to bring the petition because he realised that his financial position would not allow him to keep up two homes after he retired.

HELD: as the husband had shown himself dissatisfied throughout the whole of the seventeen years of married life, during which time he had done his best to bring about normal marital relations, and as the delay in bringing proceedings after he had left his wife was satisfactorily explained, there was nothing in his conduct amounting to approbation of the marriage or insincerity to bar him from relief.

Per BUCKNILL, L.J.: If a reason for the petition were the husband's desire to get rid of his financial liability to his wife, in the circumstances it would seem quite a proper one.

Per COHEN, L.J.: If that were the sole reason for the petition, I reserve the question whether it would be a ground on which, in his discretion, a judge might refuse a decree.

W. (falsely called R.) v. *R.*, (1876) (1 P.D. 405); *G.* v. *M.*, (1885) (10 App. Cas. 171; 53 L.T. 398); *and Nash* v. *Nash*, ([1940] 1 All E.R. 206; 164 L.T. 48), *applied.*

[AS TO LACK OF SINCERITY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 643, 644, paras. 942, 943; and FOR CASES, see DIGEST, Vol. 27, pp. 350-352, 353, Nos. *3338-3360, 3365-3380.*]

Cases referred to:

(1) *G.* v. *M.*, (1885), 10 App. Cas. 171; 53 L.T. 398; 27 Digest 351, *3339.*

(2) *W. (falsely called R.)* v. *R.*, (1876), 1 P.D. 405; *sub nom., Reynolds (otherwise Wilkins)* v. *Reynolds*, 45 L.J.P. 89; 27 Digest 352, *3351.*

(3) *Nash* v. *Nash*, [1940] 1 All E.R. 206; [1940] P. 60; 109 L.J.P. 60; 164 L.T. 48; 2nd Digest Supp.

(4) *M., otherwise D.* v. *D.*, (1885), 10 P.D. 75; 54 L.J.P. 68; 27 Digest 370, *3568.*

APPEAL by the husband from an order of BARNARD, J., made on July 7, 1947, refusing a decree of nullity on the grounds that the husband had by his conduct approbated the marriage. The Court of Appeal allowed the appeal. The facts appear in the judgment of TUCKER, L.J.

Horner for the husband.

H. S. Law for the wife.

TUCKER, L.J.: This is an appeal from a decision of BARNARD, J., whereby he refused to grant to the husband a decree of nullity. The husband was seeking that remedy on two grounds. He alleged that the fact that the marriage had not been consummated was due to the wilful refusal of the wife, and he further alleged, in the alternative, that at the time of the ceremony of marriage the wife was, and ever since has been, incapable of consummating the same. I think it is worth remembering that the first of these two remedies only became available to the husband on Jan. 1, 1938. The judge, but for the reasons which he indicated in his judgment, would have been disposed to grant a decree to the husband on the alternative ground, namely, the incapacity of the wife, inferred from her incurable aversion from sexual intercourse.

The marriage took place in 1919, and at the time of the hearing the parties were aged 53. They lived together for 17 years. The husband was a Post Office employee, at all times earning a small wage—£2 17*s.* 6*d.*, and, towards the end of their time together, £3 15*s.* 0*d.* He said, and the judge believed him, that throughout that period of 17 years the marriage had never been consummated. His evidence was that he had repeatedly tried to consummate it and had used every endeavour to secure consummation by persuading and courting his wife, but without avail. In 1936 he left her for a time. She appears to have gone to the probation officer for advice and help, and the probation officer endeavoured to bring them together again. It was clear from the evidence of the probation officer and that of the husband that the cause of the trouble between them, or, at any rate, one of the causes, had been the wife's aversion from having children. She promised that she would overcome that aversion and would put no obstacle in the way of the procreation of children, and on those terms her husband went back to her. He slept with her for three nights, but she still would not allow any sexual intercourse, and, in 1937, he again left her. This petition was launched in November, 1946, which is a very long time after the marriage, and, as has frequently been stated, delay is a very material matter to take into consideration in any case where there is doubt whether the petitioner has succeeded in proving the case that he sets out to prove—here that non-consummation was due to the physical defect of the wife. In cases of doubt where there has been long delay the petitioner may have to suffer as the result of the delay adding to the doubt. The judge in this case found no difficulty. In his judgment he said:

> I am satisfied on the evidence that this marriage never was consummated and that that was due to the impotence of the wife, which was caused by her uncontrollable fear of childbirth, which no doubt caused a contraction of her muscles, which made it quite impossible for the husband fully to penetrate her.

He went on, however, to say that he found himself unable to give the husband the remedy which he sought because the husband by his conduct had approbated the marriage and had thereby disentitled himself to relief. He quoted passages from *G.* v. *M.* (1) and stated his conclusions as follows:

> This husband and wife lived together until June, 1937. The husband says this: that she ran his home very well; she had mended for him; she had cooked well; she was a capable housewife, and apparently he was satisfied, at any rate to a certain extent, with that state of things up to the year 1936. It is fair to say that he was complaining from time to time about the marriage not having been consummated, but apart from that he was sufficiently content to go on living in the same house as his wife up to the year 1937. In 1936 apparently he had got to know some widow who lived nearby, and I have little doubt in my mind that he became attracted to this woman, and it was this attraction for this woman which undermined their married life in 1936, when Mr. Harding did his best to reconcile them, and which finally broke down in June 1937. After the husband separated from his wife in June 1937, he paid her a pound a week, and left her the house. That state of things went on until he started this petition in November, 1946. He has told me that he knew perfectly well that he could get relief because, as he put it, of her refusal of sexual intercourse. The real clue to this petition was the answer I think he gave to me or, at any rate, he gave when he was in the witness box. He said: "I realised a few years ago that I should be retiring in a few years time and I would not be able to keep up the two homes." Was the real reason for his petition, 27 or 28 years after his marriage, to get rid of his financial liability to his wife? Looking at the other side of the picture, I have to consider the wife. She has held the status of wife ever since August, 1919; he has kept her in the position of his wife during all the best years of her life, and now, at the age of 53, some 28 years after the marriage, he comes to this court and asks the court to say there never was a marriage. I have come to the conclusion that it would be quite contrary to public policy to allow a decree in this case. If I were to do such a thing it would inflict a substantial injustice on the woman.

The doctrine of approbation and reprobation is dealt with in *G.* v. *M.* (1) which is generally regarded as the leading authority on this matter. Lord Selborne, L.C., in his speech had been dealing with the meaning of the word "sincerity" which is often used in these cases and has been said to be a necessary requirement on the part of the petitioner. He says (10 App. Cas. 186):

> My own belief is that, to whatever criticism the phraseology of learned judges in those cases may be open (and I must say that the adoption of that particular phrase "sincerity" seems, as the learned counsel said, to suggest a psychological question rather than one of law or fact, diving into the motives of a person's mind rather than trying whether a cause of action exists or not), I think I can perceive that the real basis of reasoning which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. Well now, that explanation can be referrred to known principles of equitable, and, I may say, of general jurisprudence. The circumstances which may justify it are various, and in cases of this kind many sorts of conduct might exist, taking pecuniary benefits for example, living for a long time together in the same house or family with the status and character of husband and wife, after knowledge of everything which it is material to know. I do not at all mean to say that there may not be other circumstances which would produce the same effect; but it appears to me that, in order to justify any such doctrine as that which has been insisted upon at the Bar, there must be a foundation of substantial justice, depending upon the acts and conduct of the party sought to be barred. Further than that I do not think it necessary for the purpose of this case to go. Of course, when facts are in dispute, motive may be all important; but that is not the case here.

The argument in that case had been that delay was an absolute bar, but it had been rejected by their Lordships. LORD WATSON said (*ibid.*, 197) :

> The first plea against any consideration of the merits of this case was rested upon the rule as to "sincerity," or more correctly speaking, insincerity. I agree with the observations which have been made upon the English cases bearing upon that matter by my noble and learned friend, the LORD CHANCELLOR. It humbly appears to me that the expression is not a very happy one, and also that it has been used occasionally in circumstances which render it still more inappropriate. I think that when those cases are dissected they do shew the existence of this rule in the law of England, that in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect.

LORD BRAMWELL said (*ibid.*, 201) :

> Now, one word as to this question of "sincerity." It is a most remarkable expression, a very curious word, and I am not at all sure that it has not resulted from this, that sincerity is a very important matter in ascertaining whether the spouse complained of is impotent or not, and sincerity has been dwelt upon for that purpose till at last it has been taken to be a separate head of objection to the complaining party's proceedings. It seems to me very strange. What the complainant does in a suit of this sort is to come to the appropriate court for a declaration of the truth : "I say that this man is impotent and was so at the time of the marriage, and I ask you to declare that fact." The very words of the summons are, "Declare the truth, that this man was impotent when he married me." The court say, "No, we will not," or the argument is that the court ought to say, "No we will not—we know that it is true, but we will not say so"—why ? In my opinion, a man who has inflicted this cruel wrong upon a woman ought not to be heard to object to her complaining, when she comes forward with her complaint of this wrong that he has done her, unless in some way or another he can shew that he sustains some injury from the double matter of her not having complained earlier, and of her complaining now.

In 1876, before *G.* v. *M.* (1) was decided, in *W.* (*falsely called R.*) v. *R.* (2) SIR ROBERT PHILLIMORE, after having dealt with the question of delay and insincerity, said (1 P.D. 410) :

> The general circumstances of each case and the facilities of the parties aggrieved for obtaining legal advice and assistance will vary indefinitely, but the conditions to which I have alluded mean nothing if they do not mean this—that the petitioner is bound to have evinced impatience under a sense of wrong and a reasonable activity in complaint and redress. The court cannot recognise these features in the conduct of the petitioner. On the contrary, she appears to have lived contentedly enough with her husband, until, as she says, he ill-treated her.

In 1940 LANGTON, J., had to consider this matter in *Nash* (*otherwise Lister*) v. *Nash* (3). In his judgment he deals with the matter in these words ([1940] 1 All E.R. 213) :

> Let us return now to a consideration of the legal aspect of the plea of "insincerity." It will be remembered that, in nearly every case where this plea has been judicially considered, delay in putting it forward has been the basis upon which its sincerity has been attacked. The limitation upon the ordinary meaning of the word "sincerity," to which I have alluded above seems, therefore, to be fairly clearly defined. The petitioner must be sincere in the sense of not having wavered in her view as to the action she will take to assert her rights after she attained full knowledge of the facts and the law concerning those rights. The court will not allow a petitioner, after attaining such knowledge, to approbate the contract of marriage and obtain rights and benefits thereunder for a term of years and then subsequently reprobate the contract and claim that it is void upon the strength of those very rights which she had long elected to ignore.

That is the general principle, and I think that passage in the judgment of LANGTON, J., very conveniently summarises its application. Turning to the facts of the present case, the evidence of the husband, which appears to have been accepted by BARNARD, J., without any qualification, shows that, although it was a long period, throughout this time of 17 years he was again and again endeavouring to overcome the difficulty and seeking to persuade and coax his wife into having intercourse, so much so, indeed, that, after he had left her, he returned to her and made yet another attempt to secure the consummation of the marriage. Stopping at the year 1937 I find it impossible to take the view that up to that time the conduct of the husband amounted to an approbation of the marriage so as to disentitle him from obtaining relief from the courts. He was doing the best he could to remove this difficulty and bring about a normal married state. It is not a case in which he was acquiescing in the disability and contentedly leading a married life until some incident arose, as in the case referred to by SIR ROBERT PHILLIMORE which I quoted just now. This seems to me to be a case where throughout his married life the husband was complaining and showing himself dissatisfied with the state of affairs which existed.

Has he disentitled himself as a result of his conduct ? There, again, although there has been considerable delay before he started this petition one has to look as a whole at the explanation he gave with regard to that. It must be remembered he was a poor man earning something in the neighbourhood of £3 a week. He knew, according to his own evidence, that this remedy was open to him, but when he was asked why he had not brought these proceedings before he said that, in the first place, divorce proceedings did not appeal to him. He was asked about nullity proceedings, and replied :

> I have not finished answering your question. In the second place it had taken me that time since I left my wife to save it. I have paid £145, and there are other expenses. (*Q.*)—When did you decide that you were going to bring divorce proceedings ? (*A.*)—I decided some time ago. (*Q.*)—Can you tell us when ? (*A.*)—Not actually I cannot. (*Q.*)—What year ? (*A.*)—I realised three or four years ago that when I retire from the office in a few years time I shall not be in a position to keep my wife and myself. (*Q.*)—Is that the reason why you brought these proceedings ? (*A.*)—That is one of the reasons. (*Q.*)—You do not wish to keep your wife any more ? (*A.*)—I have no wish to keep her.

Later he referred to the fact that there was another woman whose acquaintance he had made in 1936, which the learned judge thought had contributed to the break up of his life with the respondent. She had died before his petition was put on the file and so she had receded from the picture. I think it only right to refer to that passage in the judge's judgment where he refers to this woman. The judge said :

> In 1936, apparently, he had got to know some widow who lived nearby, and I have little doubt in my mind that he became attracted to this woman, and it was this attraction for this woman which undermined their married life in 1936.

With regard to that, I would only observe that really the married life had been undermined long before that by the unfortunate attitude of the wife. I cannot see anything to his detriment in the fact that he may have found attractions elsewhere. It is not suggested that those attractions took the form of sexual intercourse, and it seems to me inaccurate to attribute to this woman the undermining of the married life. The husband had to save money. He said in evidence that he was unaware of the facilities available to poor persons until during the war years, and his income on his own showing was such that he might, at any rate at one time, have been disentitled to assistance from the Poor Persons Department. I can find nothing in his conduct after 1937 which amounted either to an approbation of the marriage or any indication of insincerity on his part in commencing these proceedings.

For these reasons I think that this appeal succeeds and that the husband is entitled to a decree of nullity. I need hardly add that I accept entirely all the judge's findings of fact. The only point on which I differ from him is as to the inferences to be drawn from those facts. I find myself unable to draw the inference, notwithstanding the long period which has elapsed since the marriage, that this man by his conduct has approbated this marriage or that there was anything insincere in his approach to the court in seeking this remedy.

BUCKNILL, L.J. : I agree that the appeal should be allowed for the reasons given by my Lord. As we are differing from the learned judge I will add a few words. I think it is material to note that when the husband left the wife after the interview with the probation officer he allowed her 27*s.* 0*d.* a week and left her the furniture and the house, although he was only earning some £3 a week. In the following year, 1937, he returned for three nights and again tried to consummate the marriage, but with complete failure. The difficulty of saving £145 for a man with these small means must account largely for the delay. As regards the reason which the judge has given for his decision, he dismissed the petition on the ground that the husband has approbated the marriage. He appears also, however, to have considered that the real reason for the petition was to get rid of the husband's financial liability to his wife. With great respect, if that were a reason for the petition, it would seem to me quite a proper one. Here was a man who was about to retire on a pension and have his income substantially reduced. He was paying money to a woman with whom he had lived for many years, but from whom he had been unable to get either children or the ordinary satisfaction of a husband. The fact that by getting his marriage annulled he would reduce his liability seems to me to be a good reason for obtaining such annulment. The cases on insincerity indicate that the motive which constitutes the proof of insincerity must be an improper one. As LORD SELBORNE, L.C., says in his judgment in *G.* v. *M.* (1) (10 App. Cas. 188):

> Can anybody say that those are motives of a fraudulent character, of a dishonest character, of a character from which there is some moral estoppel, unless there is a legal estoppel by some positive rule of law to prevent her from acting upon them, and getting the truth declared that she is not this man's wife if in truth she is not?

As SIR JOHN HANNEN, P., pointed out in *M., otherwise D.* v. *D.* (4) (10 P.D. 80):

> I can see nothing reprehensible in this motive influencing her, if, in fact, it did influence her, to bring this suit. This would only shew an additional reason for her really desiring to get rid of the mockery of a marriage at present subsisting, and would tend to establish the sincerity, not the insincerity, of these proceedings.

So far as the learned judge has based his judgment on the conclusion that the husband was actuated by some improper motive in bringing this petition, I think that ground failed.

As regard the second argument, that the husband had approbated the marriage, as I read the judgment of LORD SELBORNE, to justify the application of the doctrine of approbation there must be a foundation of substantial justice dependant on the acts and conduct of the party sought to be barred. It seems to me that the learned judge has overlooked the weight which must be put on the other side of the scale. He has omitted to bear in mind that during all these years the husband maintained the wife, provided a home for her, gave her his company, and made her an allowance after he left her. She has given him nothing more than that which any wife gives so far as domestic service is concerned. If circumstances of that kind are sufficient to defeat a decree on the ground of approbation, it seems to me that every petition based on a charge of nullity would be defeated if there had been any substantial delay, because those facts must exist in every such case. Yet, as SIR JOHN HANNEN says in *M., otherwise D.* v. *D.* (4) (*ibid.*, 77): "delay . . . has never by itself been held to be a bar to a suit of this kind." Similar words are used by LORD SELBORNE in *G.* v. *M.* (1).

There is one other point about which I should like to say a word, and that is whether this is a question of discretion. I appreciate the great reluctance that this court has in interfering with the exercise of discretion by the trial judge, and it does seem to me that this case has got what I may call a discretionary aspect. In so far as it is a matter of discretion, I think the judge—and I speak with great respect of his vast experience in these cases—has misapplied the rule laid down by LORD SELBORNE and there has been no approbation by the husband.

COHEN, L.J.: I agree. I desire to reserve the question whether, if the sole reason for a petition were the desire to get rid of a financial liability, that would be a ground on which a judge might in his discretion refuse to grant a decree, notwithstanding that the husband was *prima facie* entitled to one. I am satisfied for the reasons given by my Brethren that that was not the sole reason for this petition. On the contrary, I am satisfied as to the husband's sincerity, and that financial considerations, if a reason at all, formed only one of the reasons, and not the main reason, for the presentation of the petition.

Appeal allowed. Wife to recover her costs, limited to the amounts ordered as security in this court and below.

Solicitors: *Gustavus Thompson & Sons*, agents for *Hillier, Naish & Co.*, Bath (for the husband); *Arthur Taylor & Co.*, agents for *Titley, Long & Co.*, Bath (for the wife).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

WITHERS (H.M. INSPECTOR OF TAXES) *v.* NETHERSOLE.

[House of Lords (Viscount Simon, Lord Porter, Lord Uthwatt, Lord du Parcq and Lord Oaksey), January 19, 20, 22, 23, February 27, 1948.]

Income Tax—" Annual profits or gains "—Copyright —Assignment —Lump sum consideration—Income Tax Act, 1918 (*c.* 40), *sched.* D, *Case* VI.

In 1897 the taxpayer obtained from an author the exclusive right to dramatise one of his novels, to produce the play to be so written, and to dispose of her rights in respect of it. In 1914 it was agreed that the entire control of the film rights in both the novel and the play should be in the hands of the author of the novel and that one-third of the gross amount of all sums received by him for the film rights should be paid to the taxpayer. In 1939 an agreement was made between the personal representative of the author of the novel and a film company under which the personal representative assigned to the company for a period of 10 years from Jan. 27, 1940, " the sole and exclusive motion picture rights throughout the world " in and to and in connection with the novel and the play with the exclusive right to adapt and change this material, to reproduce by cinematograph both pictorially and audibly, to exhibit by television, to interpolate other dialogue, to make records, etc. The consideration for this agreement was £8,000 and one-third of this, *viz.*, £2,666 was paid to the taxpayer. The Special Commissioners of Income Tax found that, at the material time, the taxpayer was not carrying on the profession of dramatist, and they rejected a claim that the sum in question was " annual profits or gains " of her profession and assessable under Case II of sched. D. to the Income Tax Act, 1918. They, however, decided that the sum was of a revenue nature, being paid to her and received by her on account of royalties, and that such royalties, being income, were liable to assessment under Case VI of sched. D :—

Held : (i) the decision of the commissioners that the amount received by the taxpayer was of a revenue nature was not a decision of pure fact, but raised a question of law which could be reviewed by an appellate tribunal.

(ii) the transaction was a sale of property with a limited life by a person who was not engaged in the trade or profession of dealing in such property, and for income tax purposes the proceeds of such a sale were in the nature of capital and not of revenue and were, therefore, not taxable.

Decision of Court of Appeal ([1946] 1 All E.R. 711), *affirmed.*

[As to Annual Profits or Gains Liable to Assessment under sched. D, Case VI, see HALSBURY, Hailsham Edn., Vol. 17, pp. 202-207, paras. 419-423; and for Cases, see DIGEST, Vol. 28, pp. 81, 82, Nos. *451-462.*]

Cases referred to :

(1) *Beare* v. *Carter,* [1940] 2 K.B. 187 ; 109 L.J.K.B. 701 ; 163 L.T. 269 ; 23 Tax Cas. 353 ; 2nd Digest Supp.

(2) *Bomford* v. *Osborne,* [1941] 2 All E.R. 426 ; [1942] A.C. 14 ; 110 L.J.K.B. 462 ; 165 L.T. 205 ; 23 Tax Cas. 642 ; 2nd Digest Supp.

(3) *Usher's Wiltshire Brewery, Ltd.,* v. *Bruce,* [1915] A.C. 433 ; 84 L.J.K.B. 417 ; 112 L.T. 651 ; 6 Tax Cas. 399, H.L. ; *revsg.,* [1914] 2 K.B. 891, C.A. ; 28 Digest 56, *287.*

(4) *Constantinesco* v. *R.,* (1926-7), 11 Tax Cas. 730 ; 28 Digest 19, *97.*

(5) *Mills* v. *Jones,* (1929), 142 L.T. 337 ; 14 Tax Cas. 769 ; Digest Supp.

(6) *Desoutter Bros., Ltd.* v. *Hanger & Co., Ltd. and Artificial Limb Makers, Ltd.,* [1936] 1 All E.R. 535 ; Digest Supp.

(7) *Inland Revenue Comrs.* v. *British Salmson Aero Engines, Ltd., British Salmson Aero Engines, Ltd.* v. *Inland Revenue Comrs.,* [1938] 3 All E.R. 283 ; [1938] 2 K.B. 482 ; 107 L.J.K.B. 648 ; 159 L.T. 147 ; 22 Tax Cas. 29 ; Digest Supp.

Appeal by the Crown from an order of the Court of Appeal (Lord Greene, M.R., Somervell and Cohen, L.JJ.), dated Mar. 29, 1946, and reported [1946] 1 All E.R. 711, allowing an appeal by the taxpayer from an order of Macnaghten, J., dated Nov. 15, 1945, affirming a decision of the Special Commissioners of Income Tax that the taxpayer was assessable to income tax under Case VI of sched. D to the Income Tax Act, 1918, in respect of her share in the proceeds of the assignment of the exclusive motion picture rights in the novel and the play. The appeal was dismissed. The facts appear in the opinion of VISCOUNT SIMON.

The Solicitor General (*Sir Frank Soskice, K.C.*) and *Reginald P. Hills for* the Crown.

Heyworth Talbot and *Desmond C. Miller* for the taxpayer.

The House took time for consideration.

A Feb. 27. **VISCOUNT SIMON:** My Lords, this is an appeal by the Crown from an order of the Court of Appeal (LORD GREENE, M.R., SOMERVELL and COHEN, L.JJ.) allowing an appeal by the taxpayer from an order of the King's Bench Division (MACNAGHTEN, J.) whereby an appeal by the taxpayer on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and the decision of the commissioners was affirmed.

B The material facts to be gathered from the Case Stated and the documents annexed to it may be summarised as follows. In 1897 the taxpayer obtained from the late Mr. Rudyard Kipling the exclusive right to dramatise his novel, "The Light that Failed," to produce the play to be so written, and to dispose of all her rights in respect of it. The play was duly written and produced and it is common ground that the taxpayer has at all times been entitled to the copyright in the play. In 1914 the question of a film version arose and, C inasmuch as a grant of film rights would concern both Mr. Kipling, as owner of the copyright in the novel, and the taxpayer, as owner of the copyright in the play, it was agreed between Mr. Kipling and the taxpayer that the entire control of the film rights in both the novel and the play should be in Mr. Kipling's hands and that one-third of the gross amount of all sums received by Mr. Kipling for the film rights should be paid, as and when he received them, to the taxpayer. From 1916 onwards the film rights were granted by D Mr. Kipling, and later by his legal personal representative, to various film-producing companies and one-third of the sums received from time to time was duly paid over to the taxpayer. The transaction, however, with which this appeal is immediately concerned is the following. On June 27, 1939, an agreement was made between Mrs. Caroline Kipling, the widow and legal personal representative of the late Mr. Kipling (in the agreement called "the E seller"), and Paramount Pictures Incorporated (in the agreement called "the purchaser") under which the seller "grants and assigns" to the purchaser for a period of 10 years from Jan. 27, 1940, "the sole and exclusive motion picture rights throughout the world" in and to and in connection with the novel and the play together with the exclusive right to adapt and change this material, to reproduce by cinematograph both pictorially and audibly, to exhibit by television, to interpolate other dialogue, to make records, etc.— F rights some of which, as the MASTER OF THE ROLLS pointed out ([1946] 1 All E.R. 714, 715), went beyond what a transfer of motion picture rights necessarily involved. The consideration under the agreement was £8,000, and one-third of this, *viz.*, £2,666, was paid to the taxpayer and was the amount which the Crown claimed was assessable against her to income tax. The claim was primarily based on the view that the taxpayer was at the material time carrying on the profession of a dramatist and that the sum in question was G annual profits and gains of her profession and thus assessable under Case II of sched. D. This contention failed, as the Special Commissioners decided that the taxpayer had given up the profession many years before. The Crown, therefore, fell back on its alternative claim, under Case VI of sched. D, that the amount was "annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other schedule." Subject to the Case H Stated, the Special Commissioners decided this issue in favour of the Crown, and the first matter to be considered is whether this finding is a finding of pure fact, such as cannot be reviewed by an appellate tribunal.

The Special Case, after setting out the material facts which I have summarised, recorded that the Special Commissioners reserved judgment and later issued their decision on the alternative claim as follows:

> We hold . . . (2) That the sums received by her in respect of these rights under the terms of the agreement were of a revenue nature, being paid to her and received by her on account of royalties; (3) That on the authority of the judgment of

Macnaghten, J., in *Beare (Inspector of Taxes)* v. *Carter* (1), such royalties, being income, are liable to assessment under Case VI of sched. D.

The Crown contended that the Special Commissioners' decision "that the sums received by the taxpayer were of a revenue nature" was itself a finding of fact which could not be disturbed on appeal, but I agree with the Master of the Rolls that this is not so. As I said in *Bomford* v. *Osborne* (2) ([1941] 2 All E.R. 430):

> No doubt there are many cases in which commissioners, having had proved or A admitted before them a series of facts, may deduce therefrom further conclusions which are themselves conclusions of pure fact. In such cases, however, the determination in point of law is that the facts proved or admitted provide evidence to support the commissioners' conclusions.

Lord Sumner's speech in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (3) ([1915] A.C. 466) contains an observation to a similar effect. But here it is plain that the extract from the Special Commissioners' decision which I have quoted B is not a decision of pure fact but raises a question of law in support of which a previous decision is cited. The question of law is whether the facts set out in the Case and the documents annexed to it establish that the amount paid to the taxpayer under the agreement of June 27, 1939, is "annual profits or gains" falling under Case VI of sched. D. If the taxpayer had been carrying on a profession or vocation at the relevant time and the agreement of June C 27, 1939, had been entered into in the course of it, the figure of £2,666 would come into the calculation of her annual profits or gains under Case II, not, indeed, as the actual sum to be taxed, but as a figure entering into the computation of the amount to be charged, subject to the deductions inferentially authorised by r. 3 of the Rules applicable to Cases I and II. But when the application of Case II is negatived, can the amount received in the circumstances above set out be caught under Case VI ? D

The House has had an interesting and sustained argument from the Crown in the course of which much has been said about the taxpayer's "exploitation" (in the inoffensive sense) of her copyright and about the amount being paid in respect of the "user" of the copyright. While various phrases and illustrations are naturally employed in developing an argument about the alleged application of the words of the Income Tax Acts to a particular transaction, it is, nevertheless, necessary to have primary regard to the statutory words themselves E and to their proper judicial construction. Every part of sched. D is concerned with "annual profits or gains," and while there is not express mention of capital assets there is more than one mention of tax "in respect of income," and no one can dispute that there is implied a contrast, frequently referred to in past decisions, between receipts of a revenue nature and receipts of a capital nature. Much emphasis was laid by the Crown on r. 19 (2) of the General Rules, which begins : "Where any royalty, or other sum is paid in F respect of a user of a patent . . ." but the Solicitor-General did not dispute the Master of the Rolls' proposition (which is plainly correct) that "other sum" in the phrase quoted means other sum which is of a revenue nature and does not include a capital sum. Rule 19 (2), however, deals only with patents. In this case we are concerned not, with patents, but with copyright. Copyright is a species of incorporeal property. The Copyright Act, 1911, G which is a consolidating Act repealing earlier Acts, makes it perfectly clear that the ownership of copyright can be transferred by assignment either wholly or partially and "either for the whole term of the copyright or for any part thereof" (s. 5 (2)). So far as the property is assigned, the assignee becomes the owner instead of the assignor. The Act (*ibid.*) also provides that, in contrast with an assignment of copyright, the owner may grant a licence which, though it permits the licensee to use the copyrighted matter within H the limits of the licence without breach of copyright, does not involve any change of ownership in the copyright at all. It appears to me that the argument for the Crown does not sufficiently allow for this distinction. It is not disputed that the present case is a case of assignment. The taxpayer, under the relevant agreement, made a partial assignment of her copyright and ceased to be the owner of the portion assigned, receiving a sum of money in exchange. This amounts to a sale of property by a person who is not engaged in the trade or profession of dealing in such property, and the proceeds of such a sale are, for income tax purposes, a sum in the nature of untaxable capital and not in the nature of taxable revenue.

The Solicitor-General referred to a number of reported cases, the first of which is *Constantinesco* v. *Regem* (4). That was a petition of right in which the suppliant, who owned patents for an invention used by the Crown under s. 29 of the Patents and Designs Act, 1907, in the making of some 27,000 gears, and to whom an award was made by the Royal Commission on Awards to Inventors, with the approval of the Treasury, of £70,000, claimed that the amount was a capital receipt not subject to deduction for income tax. Rowlatt, J., and, on appeal, the Court of Appeal and the House of Lords all in turn held that the claim failed on the ground that the sum awarded was in substance a total of royalties calculated with reference to the extent of past user. All the courts emphasised that the suppliant had not parted with his patents at all, but was a licensor, albeit a compulsory one. The contrast between the *Constantinesco* decision (4) and the present case, in which there was an actual assignment of property in the copyright, is obvious. The next case is *Mills* v. *Jones* (5), which also went through all the courts, and arose out of the Crown's compulsory user of a patent in connection with the making of a definite number of bombs. An award of £37,000 was in respect of "all user past present and future." The commissioners found that future user could be disregarded as negligible. The case was, therefore, governed by the *Constantinesco* decision (4). In *Desoutter Bros., Ltd.* v. *J. E. Hanger & Co., Ltd.* (6), MacKinnon, J., had before him the reverse case of a payment of a lump sum of £3,000 paid in advance in consideration of a five-year licence for the use of a patent. The sum had no reference to any particular contemplated production under the licence. It might have been large or small or there might have been none at all. The learned judge quoted with approval Rowlatt, J.'s observation in the *Constantinesco* case (4) (11 Tax Cas. 740) as follows ([1936] 1 All E.R. 536): "I have not the least doubt that you may pay a lump capital sum in lieu of royalty, or to capitalise what is really a royalty . . . for the use of a patent." The Master of the Rolls in the present case ([1946] 1 All E.R. 716) points out that *Desoutter's* case (6) was not the case of an estimated sum to represent royalties before the patent had been used—it was a sum in gross having no reference to user, but was paid merely to acquire the right to use as much or as little as the licensee might desire.

In all these cases what was granted was a licence to use the patent—not necessarily an exclusive licence at all, and, moreover, the owner of the patent remained owner throughout, whereas in the present case the taxpayer actually transferred the ownership of her copyright to a new owner for the time being. Neither does *Inland Revenue Comrs.* v. *British Salmson Aero Engines, Ltd.* (7) assist the Crown's argument. There the company acquired a sole licence to manufacture and sell in the British Commonwealth a type of aeroplane engine and the consideration was the sum of £25,000, and, in addition, sums of £2,500 payable "as royalty" during each year of the currency of the licence. The Special Commissioners were upheld by the Court of Appeal in deciding that the sum of £25,000 was a capital payment, but that the ten further payments of £2,500 were royalties or other sums paid in respect of the user of a patent. The judgment of Lord Greene, M.R., in the present case seems to me to summarise very accurately the effect of the earlier decisions, and I would, in particular, adopt his observation ([1946] 1 All E.R. 716):

> . . . a lump sum payment received for the grant of a patent licence for a term of years may be a capital and not a revenue receipt: whether or not it is so, must depend on any particular facts which, in the particular case, may throw light on its real character, including, of course, the terms of the agreement under which the licence is granted.

The previous decisions cited by the Crown do not really assist its argument. Here we have the sale and transfer outright of an item of property which previously belonged to the taxpayer, not the licence to use it granted by its unchanged owner, and this does not give rise to annual profits or gains unless the sale takes place in the course of carrying on a trade or profession. I move that the appeal be dismissed. The Crown will pay the taxpayer's costs in this House as between solicitor and client.

LORD PORTER : My Lords, the sole question for your Lordships' decision in this case is whether certain sums received by the taxpayer in respect of film rights are capital or income receipts, or, to put it more accurately, whether they are or are not annual profits or gains within the meaning of sched. D, Case VI. Originally the Crown put forward an alternative claim that the taxpayer was carrying on the profession or vocation of dramatic authorship at the material dates and that the receipts in question were the earnings of that profession or vocation. The Special Commissioners decided A against this alternative contention, and that finding has been accepted by the revenue authorities who relied in all subsequent proceedings on the decision of the commissioners that the sums in question were of a revenue nature, being paid to and received by her on account of royalties. The fact that the Special Commissioners have held these sums to have been so paid and received, however, is not determinative of the question at issue. The agreements under which the payments were made are attached to the Case and their legal effect B can be ascertained. In my view, the sums were not received on account of royalties. They are assignments and not licences—they are in respect of a parting by the taxpayer of part of her capital assets, not a stipulation for royalties.

In dealing with this matter, it has to be remembered that copyright occupies a position and character of its own, and the effect of any dealing with it must C be judged, not merely on principles which may be applicable in other cases, but in the light of the terms of the Copyright Act, 1911. Whatever may be the result of granting rights partial in quantity or length of time in other cases, as to which I should desire to express no opinion, s. 5 of that Act permits the assignment of copyright either wholly or partially, either generally or subject to limitation of place, and either for the whole term or for any part thereof. Any such assignment is a parting with the whole rights, limited, it is true, D to a particular place or places or for a particular period, but still to that extent a complete diverting of the property in the copyright from one owner to another. The Act itself in the same section marks the distinction between such an assignment of part of the copyright and an interest in the right by licence by enacting that the owner shall also be entitled to grant such an interest. Finally, it provides that in the case of a partial assignment the assignee shall be the owner of the right in the part assigned and the assignor of the right E in that not assigned. It is true that this provision is qualified by the words "shall be treated for the purposes of this Act, as the owner of the copyright, and the provisions of this Act shall have effect accordingly," but the right is still assigned, though the assignment is only partial, and the property must pass under it. I cannot accept the view that assignor or assignee can be owner for one purpose and not for another. To my mind, such a provision divests the F owner of part of his property, not merely of the use of it and, even if the argument put forward on the part of the Crown, that the distinction between capital and income is to be tested by asking whether the owner has parted with the property itself or merely with the use of it, be accepted, I should hold that in the case of copyright it is possible to assign for a limited period of time and in so doing to part with the property itself. The owner in such a case is not granting a licence, but is selling part of the capital asset. For these G reasons which are substantially those of the Court of Appeal, I would dismiss the appeal to your Lordships' House.

LORD UTHWATT : My Lords, I agree with the views which have been expressed as to the effect of the Case Stated and do not propose to add anything on that topic.

By s. 5 (2) of the Copyright Act, 1911, the owner of the copyright in any H work is entitled to assign wholly or partially the right either for the whole term of the copyright or for any part thereof. A partial assignment can only mean an assignment of some of the rights included in the copyright. The effect of a partial assignment of copyright for a period less than the whole term is not to create any new right, but only to divide the existing right. In the result, there are two separate owners each with a distinct property. Neither holds under the other. Nothing new, except a position which may give rise to friction, has been created. The only requisite for an effective assignment in such a case is that in a document, complying as to form with the requirements of the Act, the transfer intended should be expressed to be made, the rights to be transferred and the period being stated with certainty. In this case the agreement of June 27, 1939, states with certainty the rights which are the subject-matter of the transaction. The intention to transfer that subject-matter for a definite period is apparent, and an assignment is expressed to be made. The circumstance that the document contains provisions which A state independently some of the rights necessarily involved in the assignment or which add to or subtract from those rights—however relevant that circumstance might be if the document were ambiguous as to its intended operation —cannot render it something other than an assignment. In my opinion, it is an assignment of the motion picture rights and is not a licence. The agreement dealt with motion picture rights all over the world. In the absence of evidence to the contrary I assume that the agreement had, as respects copy- B right all over the world, the same effect as it had with regard to copyright subsisting by virtue of the Copyright Act, 1911.

If I am right in the construction of the agreement the fate of this appeal as regards the sum paid under the agreement is, to my mind, obvious. The taxpayer has been found to be a person not engaged in any trade or business. The assessment is made under Case VI of sched. D on the footing that the C consideration falls within the category "annual profits and gains." The relevant fact is that an owner of an asset, entitled by law to divide it into two distinct assets, has done so by selling one of those assets for an agreed consideration payable in a lump sum. A sale, not in the way of trade, of an asset does not attract tax on the consideration. Whatever else comes within the ambit of annual profits and gains, the consideration received by the taxpayer does not. Nothing turns on the fact that the taxpayer was the D authoress of the play. The previous dealings are irrelevant—they, indeed, could bear only on the question whether the taxpayer was engaged in a trade or business—and she has been found not to be so engaged. The fact that the asset sold has a value only when put to commercial use is irrelevant. The fact that the same commercial result as that produced by the assignment might equally well have been achieved by an appropriately worded licence is irrelevant. It is irrelevant that the consideration may be assumed to represent the value E of the whole copyright so far as it relates to motion pictures for a period of years, but the consideration was paid, not in respect of the temporary use of another's property, but for the purchase of property with a limited life. The taxpayer may have exploited her property, but she did so only by dividing it and selling part of it. It is unnecessary to consider separately the position of the sum received in 1937 in respect of an option to take up a renewal of F the grant of film rights for 8 years or the sum received in 1939 as consideration for an extension of that option. Neither sum was assessable under Case VI of sched. D, for neither sum was paid or received except in relation to the grant of an option to purchase. In the view I take of the transaction, it is unnecessary to deal with the authorities to which reference is made in the judgment of the Court of Appeal, and, accordingly, I do not propose to do so. I would dismiss the appeal.

G **LORD DU PARCQ**: My Lords, I agree, and I am authorised by my noble and learned friend, **LORD OAKSEY**, who is unable to be present today, to say that, having read the opinions which have been delivered, he also agrees and has nothing to add.

Appeal dismissed with costs as between solicitor and client.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Laytons* (for the taxpayer).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MARENGO *v.* DAILY SKETCH AND SUNDAY GRAPHIC, LTD.

[House of Lords (Viscount Simon, Lord Porter, Lord Simonds, Lord Uthwatt, Lord du Parcq), January 12, 13, 15, 16, February 27, 1948.]

Injunction—Form of order—Passing-off—Action against limited company—Order against "defendants by their servants workmen agents or otherwise," not against "the defendants their staff servants and agents.

In an action for passing-off brought against a limited company the plaintiff was granted an injunction restraining "the defendants their staff servants and agents" from doing the prohibited acts:—

Held: since it was only the defendants who were before the court, and not their staff, servants and agents, the form of the order was open to objection as its language suggested that a direct order had been made against the staff, servants and agents, which was not the intention of the order. It was not necessary to refer to the staff, servants and agents at all, but it was desirable, as the defendants were a limited company and could only act through others, that the injunction should take the form of restraining "the defendants by their servants workmen agents or otherwise" from committing the prohibited acts.

[As to Form of Order for an injunction, see HALSBURY, Hailsham Edn., Vol. 18, p. 113, para. 164; and for Cases, see DIGEST, Vol. 28, p. 512, Nos. *1164-1172*].

Cases referred to:

(1) *Humphreys* v. *Roberts*, (1828), 1 Seton's Judgments & Orders, 7th ed., p. 590; 28 Digest 512, *1166*.

(2) *Hodson* v. *Coppard*, (1860), 29 Beav. 4; *sub nom.*, *Hodgson* v. *Coppard*, 30 L.J.Ch. 20; 28 Digest 512, *1167*.

(3) *Iveson* v. *Harris*, (1802), 7 Ves. 251; 28 Digest 512, *1165*.

(4) *Seaward* v. *Paterson*, [1897] 1 Ch. 545; 66 L.J.Ch. 267; 76 L.T. 215; 28 Digest 512, *1171*.

Appeal by the plaintiff from a decision of the Court of Appeal (Lord Greene, M.R., Morton and Somervell, L.JJ.), dated May 17, 1946, reversing an order of Romer, J., dated July 30, 1945.

The appellant, Kimon Evan Marengo, was a professional cartoonist who, by 1944, had acquired a considerable reputation in England for his political cartoons which he always signed "Kem." The respondents, the owners and publishers of The Daily Sketch, published in three issues of their paper in 1944 political cartoons which were not the work of the appellant, but bore a signature which, the appellant alleged, was substantially indistinguishable from his signature, "Kem." These cartoons were by Cyril Gwyn Price, a caricaturist of repute, whose work hitherto had been chiefly on sporting subjects and who had used the pseudonym of "Kim" since 1929. On the cartoons in question Price's signature consisted of three letters of which the first was clearly "K" and the last was clearly "m," but the middle letter could be taken for an undotted "i" or an unlooped "e." In an action for passing-off brought by the appellant against the defendants, he claimed an injunction to restrain the defendants from printing and publishing as and for his drawings drawings which were not produced by him and from passing-off any such drawings under or by reference to the name of "Kem" or any name only colourably differing therefrom. Romer, J., held that the signature was not "Kim," because there was no dot over the middle letter, and that, when the signature was taken in conjunction with the character of the cartoons, confusion and deception would be inevitable, and granted the appellant an injunction against "the defendants their staff servants and agents." The order of Romer, J., was reversed by the Court of Appeal, from whose decision the appellant now appealed to the House of Lords. Their Lordships, in their considered opinions, found that the signature on the impeached cartoons was capable of being read as "Kem," and, therefore, since there was reasonable possibility of misrepresentation, they allowed the appeal, with costs in the House and in the Court of Appeal, reversed the order of the Court of Appeal, and restored the order of Romer, J. The decision of the House on these matters does not call for report, but their Lordships allowed the appeal with a variation in the form of the order. At the conclusion of his opinion Lord Uthwatt, which whom the other noble Lords (Viscount Simon, Lord Porter, Lord Simonds and Lord du Parcq) agreed, dealt with the form of the order as follows.

Lloyd-Jacob, K.C., and *Stuart Bevan* for the appellant.
Slade, K.C., and *Skone James* for the respondents.

LORD UTHWATT : The injunction in this case was granted against "the defendants their staff servants and agents." For many years it has been the practice in proceedings in which an injunction is sought to ask that the injunction should issue against the defendant, his servants, workmen and agents (see van Heythuysen's Equity Draftsman, 1816 ed., p. 586), and for well over a century injunctions have gone in that form as a matter of course: see *Humphreys* v. *Roberts* (1). The inclusion of "staff" is a novelty. That inclusion recalls the unsuccessful efforts made in 1860 (*Hodson* v. *Coppard* (2)) to include "tenants" and in the early part of this century (according to the recollection of my noble and learned friend, Lord Simonds, and my own recollection) to include "contractors." The proposed inclusion was desired, as I understand it, in order that the staff as such should be restrained from committing the acts prohibited to the defendants. That is obviously wrong.

The reference to servants, workmen and agents in the common form has not the result that those persons are enjoined, for, as Lord Eldon, L.C., pointed out (7 Ves. 256) in *Iveson* v. *Harris* (3), it was not competent to the court :

> . . . to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause.

The reference to servants, workmen, and agents in the common form is nothing other than a warning against wrongdoing to those persons who may by reason of their situation be thought easily to fall into the error of implicating themselves in a breach of the injunction by the defendant. There its operation, in my opinion, ends. If they knowingly assist the defendant in a breach by him of the injunction, they may be committed for contempt of court, not because they have broken the injunction—they have not done so—but because they have so conducted themselves as to obstruct the course of justice in assisting a breach and tried to set process of the court at naught. In that respect they stand in no different position from a complete stranger who knowingly sets out to assist the defendant in committing a breach. The position of a stranger who assists a defendant in committing a breach of an injunction was dealt with by North, J., and the Court of Appeal in *Seaward* v. *Paterson* (4) and need not be elaborated. I would, however, observe that North, J., had in that case to consider whether one Sheppard should not also be committed for contempt. Without pausing to decide whether Sheppard was or was not a servant of the person enjoined—he said that was immaterial—North, J., ordered his committal on the ground that he had knowingly assisted in a breach of the injunction by the defendant. It is unfortunate that the order as made (see Seton's Judgments and Orders, 7th ed., Vol. I, p. 430) took the form that he was committed for breaking the injunction.

In my view, the common form is open to objection, for as a matter of language it suggests that a direct order has been made against servants, workmen and agents. That, as I have said, is not the intention of the order. The substance of the matter is that the defendant is to be enjoined whatever method he may use in committing the prohibited acts. It is not, indeed, necessary to refer to servants, workmen and agents at all, but it may be desirable to mark the amplitude of the order by including in it some reference to them. I suggest (my suggestion is, perhaps, a one-sided compromise with tradition) that the judges might well consider whether injunctions should not assume the form of restraining "the defendants by themselves their servants workmen and agents or otherwise" from committing the prohibited acts. In the present case the defendants are a limited company and can act only through others. I invite your Lordships, therefore, to consider whether the injunction here should not take the form of restraining the "defendants by their servants workmen agents or otherwise" from commission of the acts to be enjoined.

Appeal allowed with costs. Order varied as above.

Solicitors : *Lucien Fior* (for the appellant) ; *Theodore Goddard & Co.* (for the respondents.). [*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

BISHOPSGATE MOTOR FINANCE CORPORATION LTD. *v.* TRANSPORT BRAKES LTD.

[King's Bench Division (Humphreys, J.), February 16, 25, 1948.]

Sale of goods—Market overt—Private sale—Goods offered by auction in public market—Subsequent private sale in same market—Sale of Goods Act, 1893 (*c.* 7), *s.* 22 (1).

A let a motor-car on hire-purchase to B who put it up for auction at a public market where for 8 years motor-cars had been sold by public auction to members of the public. The bidding did not reach the reserve price and the motor-car was withdrawn, but, in the course of the same market, B sold it privately to C, who had been present at the auction, but had made no bid, and who bought it in good faith and without knowledge of any defect in B's title. C subsequently sold the car to D. In an action by A against D for the return of the car or damages :—

Held : the car was sold to C " in market overt, according to the usage of the market," within the Sale of Goods Act, 1893, s. 22 (1), and D had, therefore, derived a good title from him, with the result that A could not recover.

[As to Sale of Goods in Market Overt, see HALSBURY, Hailsham Edn., Vol. 29, pp. 107, 108, para. 130 ; and for Cases, see DIGEST, Vol. 33, pp. 560-563, Nos. *428-487*.]

Cases referred to :

(1) *Crane* v. *London Dock Co.*, (1864), 5 B. & S. 313 ; 4 New Rep. 94 ; 33 L.J.Q.B. 224 ; 10 L.T. 372 ; 28 J.P. 565 ; 10 Jur. N.S. 984 ; 12 W.R. 745 ; 33 Digest 561, *444*.

(2) *Market-Overt Case*, (1596), 5 Co. Rep. 83*b* ; 77 E.R. 180 ; *sub nom.*, *Worcester's* (*Bp.*) *Case*, Moore, K.B. 360 ; *sub nom.*, *Palmer* v. *Wolley*, Cro. Eliz. 454 ; *sub nom.*, *Anon.*, Poph. 84 ; 1 And. 344 ; 33 Digest 561, *458*

Action for the return of a car or for damages for its detention.

The plaintiffs were the owners of a motor-car which they let under a hire-purchase agreement to a person who sold it in a public market to the third party who subsequently sold it to the defendants. The court held that the plaintiffs could not recover, the property having passed by sale in market overt to the third party and through him to the defendants. The facts appear in the judgment.

Gallop, K.C., and *I. H. Jacob* for the plaintiffs.
Skelhorn for the defendants.
Bernard Lewis for the third party. *Cur. adv. vult.*

Feb. 25. **HUMPHREYS, J.,** read the following judgment. This case raises a point of law regarding the sale and purchase of goods in market overt, which is not, I think, covered by authority. The plaintiffs let on hire-purchase a motor-car to one, Bronstein, the car remaining their property. Bronstein wrongfully sold that car to the third party, Bourgein, who trades as the Winsor Garage, West Malling, Kent. The third party bought in good faith and without notice of any defect or want of title on the part of Bronstein. The third party sold the car to the defendants, Transport Brakes, Ltd. The plaintiffs sue the defendants for the return of the car, or damages. The defendants bring in Winsor Garage as third party and contend, as does Winsor Garage, that the purchase by the latter of the car on Oct. 29, 1946, was in market overt and that they thereby acquired a good title to the car by virtue of s. 22 of the Sale of Goods Act, 1893, which provides :

> (1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

The sole question is whether that sale was, in the circumstances, a sale in market overt according to the usage of the market so as to give a good title to Winsor Garage as against the true owners, the plaintiffs.

The sale took place at Maidstone in the general market. The market was established by a charter of Queen Elizabeth and continued by a charter of 1747. The Maidstone Markets Act, 1824, made certain alterations not material for the purpose of this judgment, and, finally, by para. 3 (1) of the Maidstone Order, 1933, confirmed by the Ministry of Health Provisional Orders Confirmation (Maidstone and Stockton-on-Tees) Act, 1933, it was enacted :

> Notwithstanding anything in the local Act [that is the Act of 1824] the council may

hold a corn market on Thursday in every week and a cattle and general market (for all goods and merchandise other than goods and merchandise which are brought to the corn market) on Tuesday in every week.

The corn market is no longer held, but the general market has continued regularly to be held every Tuesday. It was so held on Tuesday, Oct. 29, 1946, when Bronstein applied to a local firm of auctioneers, Messrs. Walter Forknall, to include this car in their auction sale, which was held in the market at about 11.45 on that day. The auctioneer, Mr. Forknall, gave evidence that he put up the car for sale in its turn, that the reserve price was not reached, that later in the morning Bronstein asked him to put the car up again with a lower reserve price, and that he did so, but the new reserve was not reached and the car was withdrawn from sale accordingly. Mr. Forknall paid to the corporation the toll of 1*s.* payable on every vehicle put up for sale. That sum he received from Bronstein. He said that auctions of motor-cars had been regularly held every Tuesday in the market for at least eight years to his knowledge. There was no custom or usage, to his knowledge, for dealers or owners of motor-cars to sell or offer cars for sale at the market except for sale by auction through his firm or the firm of Messrs. Parker & Sons, auctioneers. He had no doubt that sales would, at times, take place privately of cars which had been withdrawn from auction, but he had nothing to do with such transactions. There was no practice in the market of motor-car dealers or owners selling direct to members of the public. Bourgein gave evidence that he was in the market-place while the auction of cars was proceeding, but did not bid. After the car in question had been withdrawn, he was looking at it and was approached by Bronstein, who offered it to him at a price. After a little negotiation he bought and paid for the car and took delivery of it at about 2.30 p.m. The only other material evidence was to the effect that all sorts of chattels are sold on Tuesdays in the market direct from owners or dealers to members of the public as well as by auction, including livestock, agricultural implements, household goods and furniture.

There is, therefore, no doubt that the sale in question took place in a public market. It can, I think, hardly be disputed that the sale and purchase of the car in question, if it had been effected by auction, would have been a sale in market overt according to the usage of the market. There would, in that event, have been present all the element of publicity and open dealing by persons of repute to whom recourse could be had if required. The only substantial point advanced by the plaintiffs, it seems to me, is that the sale between two private persons was not such a sale. On this aspect of the matter reference may be made to the judgment of BLACKBURN, J., in *Crane v. London Dock Co.* (1) where he said (5 B. & S. 319):

> Then comes the question which it is necessary to decide, namely, whether this was a sale in market overt. It is pretty clear that the privilege given by law to a sale in market overt, of binding property against the true owner, was originally given in consequence of its policy of encouraging markets and commerce—I agree with the plaintiff's counsel so far. But I think that, for that purpose, the vendor must buy the goods under circumstances such as would induce him to think the sale a good sale in market overt;—namely, he must buy a thing which is openly exposed in market overt under such circumstances that he might say to himself no person but the owner would dare to expose them for sale here, and therefore I have a right to assume that the shopkeeper has a right to sell them. I think this principle runs through all the cases, that the goods must be corporally present and exposed in the market.

He then refers to what I think is the earliest case: *The Case of Market Overt* (2).

On the whole, I think the defendants have established that the purchase of the car was in market overt. The third party bought in a long established public market where, to his knowledge, motor-cars had been publicly sold for years. He bought a car which had been so publicly offered for sale, he paid a fair price for the car, and there was nothing in the transaction calculated to arouse his suspicion. In my view, the mere fact that his purchase was not made through an auctioneer did not operate to remove the sale from the category of sales in market overt so as to prevent his acquiring a good title to the car. The defendants, who derive their title from the third party, are entitled to judgment.

Judgment for the defendants and third party with costs of both against the plaintiff.

Solicitors: *M. & H. Shanson* (for the plaintiffs); *Rider, Heaton, Meredith & Mills* (for the defendant); *Gilbert Houghton & Son* (for the third party).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

WRIGHT *v.* BENNETT AND ANOTHER.

[Court of Appeal (Scott, Somervell and Asquith, L.JJ.), February 12, 1948.]

Costs—Taxation—Copies of documents supplied to counsel holding noting brief at trial—Same copies supplied to junior counsel on appeal -Refresher fees—Counsel holding noting brief—Shorthand note of proceedings taken—Unnecessary attendance of witness.

At the trial of an action the first defendant was represented by a junior counsel to conduct the case and another junior who held a noting brief which was delivered before the trial commenced. On the first day of the trial the parties agreed that a shorthand note should be taken. Copies of certain documents which would have been necessary for second counsel in the ordinary sense were provided for the junior who held the noting brief. In the Court of Appeal the first defendant was represented by the same counsel who had conducted the case below, but had meanwhile taken silk. He was given a leading brief and counsel who had held a noting brief was engaged as his junior. Both counsel were provided with the same copies of documents which they had used at the trial, those documents being necessary for the purpose of the appeal. On taxation of the costs of the trial the taxing master disallowed the costs of the copies of the documents provided for the junior who held a noting brief, but allowed him refresher fees and also allowed the costs of a professional expert witness for the second defendant who remained in court until the close of the plaintiff's case on the thirteenth day when it was decided that his evidence was unnecessary and he was released. On taxation of the costs in the Court of Appeal the taxing master allowed the costs of the copies of documents provided to junior counsel and his decision on this item and the other items hereinbefore mentioned was affirmed by the judge. On appeal :—

Held : (i) the costs of the documents had been incurred in respect of the proceedings below, and, therefore, could not be recovered in respect of the proceedings in the Court of Appeal, and the taxing master was wrong in allowing them.

Masson Templier & Co. v. *De Fries*, ([1910] 1 K.B. 535 ; 102 L.T. 155), *applied.*

(ii) the noting brief was not a mere alternative to a shorthand note, and, therefore, the junior who held that brief was not redundant and was entitled to refresher fees.

(iii) as there was no reason to suppose that the taxing master had not in mind the principle that costs or fees of witnesses unnecessarily kept in court should not be recoverable, his decision in respect of the costs of the expert witness should not be disturbed.

[As to Costs of Copies of Documents, see HALSBURY, Hailsham Edn., Vol. 26, p. 102, para. 192*n* ; and for Cases, see DIGEST, Practice, pp. 940-942, Nos. *4811-4825.*]

Cases referred to :

(1) *Masson Templier & Co.* v. *De Fries*, [1910] 1 K.B. 535 ; 79 L.J.K.B. 392 ; 102 L.T. 155 ; Digest, Practice 791, *3543.*

(2) *Greaves* v. *Drysdale*, [1936] 2 All E.R. 470 ; Digest Supp.

Appeal by the plaintiff from an order of Denning, J., dated May 9, 1947, on a review of taxation.

The taxing master, who was affirmed by the learned judge, had allowed costs in respect of (i) copies of documents supplied, on appeal, to junior counsel, the same copies having been prepared for and supplied to the same counsel at the trial when he only held a noting brief, the costs of the same being disallowed on taxation of the costs of the trial ; (ii) refresher fees to counsel when he held a noting brief at the trial when a shorthand note of the proceedings was taken by agreement between the parties, and (iii) expenses of an expert witness who had remained in court until the close of the plaintiff's case when it was decided that his evidence would be unnecessary and he was released. The decisions of the taxing master and the learned judge on (ii) and (iii) were upheld but were reversed on (i) on the ground that the costs had been incurred in respect of the proceedings below and not in respect of the appeal.

Salmon, K.C., and *Dare* for the plaintiff.
Fletcher-Cooke for the first defendant.
P. H. R. Bristow for the second defendant.

SCOTT, L.J : I will ask Somervell, L.J., to deliver the first judgment.

SOMERVELL, L.J. : This appeal raises questions as to the costs of proceedings which were originally taken by the plaintiff against two defendants. The case, in which fraud was alleged, went on for some 20 days before Hilbery, J., who dismissed the plaintiff's claim. He appealed, and his appeal was dismissed with costs. On taxation of costs the plaintiff took four objections to the items in the defendants' bills. Those objections came, first, before the master, and, then, before Denning, J., and it is from his judgment that the plaintiff now appeals on three points.

At the trial of the action the first defendant was represented by a junior counsel, who appeared with a counsel who had what is called a brief to take a note. Such briefs are recognised, but they do not carry the normal two-thirds fee. The counsel who had the noting brief was supplied by the solicitors with a number of documents, correspondence, etc., and the costs of those documents were included in the bill submitted by the solicitors in respect of the proceedings at the trial. No one disputes that those were proper documents for a second counsel to have if he were a second counsel in the ordinary sense, either in the court below, or, in the event of an appeal, in this court, but it was objected by the plaintiff, and his objection was upheld by the master, that counsel who has a noting brief is not entitled to copies of documents other than the pleadings. Against that decision there was no appeal and so I will say nothing about it. We must proceed on the basis of that ruling.

By the time the case went to appeal, counsel who had conducted the case in the court below was a King's Counsel, and counsel who had a noting brief had an ordinary junior brief and was entitled to—and could not, indeed, have carried out his duties without—a full copy of the documents. He was actully given in the Court of Appeal the documents which he had been given in the court below when he merely had a brief to take a note. The first defendant's solicitor then sought to charge in the bill of costs in respect of the appeal these items which had been disallowed as costs of the proceedings below. The only point we have to consider was formulated by counsel for the plaintiff in this way. He submitted that in no event can these costs be recoverable in the Court of Appeal because disbursement of costs can only be charged if actually made or incurred in respect of proceedings to which the order in question applies. He relied on *Masson Templier* v. *De Fries*, (1). To understand that case I think it necessary to go in a little detail into the facts. It started with interpleader proceedings in the county court with regard to the title of goods taken in execution. The claimant succeeded, and the county court judge gave to the judgment creditors leave to appeal to the Divisional Court on the condition that, if successful, they should not ask for the costs of the appeal. Certain copies of documents were necessary for the use of counsel and the judges on the appeal and were provided by the judgment creditors. The Divisional Court dismissed the appeal. The judgment creditors then obtained from the Court of Appeal leave to appeal from the decision of the Divisional Court, and did so appeal. As in the present case copies of documents which had been used below were necessary and were used for the purposes of the appeal. The appeal was successful and the claimant was ordered to pay to the judgment creditors the costs " of and incident to the appeal." The bill of costs delivered by the judgment creditors included an item in respect of copies of documents, the costs of copying which had been incurred in respect of the proceedings in the Divisional Court. The master disallowed that item and it was held by this court that it was rightly disallowed as not representing costs incurred for the purpose of the appeal to the Court of Appeal. This court might have said that, if that item were allowed, the judgment creditors, in effect, would be evading the condition which they had accepted in relation to their appeal to the Divisional Court, *viz.*, that they would not seek to recover costs incurred in that proceeding, but, in fact, Vaughan Williams, L.J., and Farwell, L.J., proceeded on a more general argument which had also been put forward. Vaughan Williams, L.J., said ([1910] 1 K.B. 538):

> It is the fact, no doubt, that these documents, in respect of which costs are now claimed, were used on the hearing of the appeal to this court, and the proceedings here could not have been carried through without the use of them. But, as I understand, according to the practice on taxation, no disbursements are allowed but such as have been actually made for the purposes of the proceeding in respect of which the order for costs was made.

Pausing there for the moment, the use of the word "proceeding" in that sentence in its context clearly indicates that the court were dealing with two separate and distinct proceedings. The Divisional Court hearing was a proceeding, and the appeal to this court was a proceeding. The learned Lord Justice goes on:

> The truth is that the documents here in question came into existence for the purposes of the appeal to the Divisional Court, and no fresh disbursement was necessary in order that they might be used in the Court of Appeal.

I am not sure whether the word "disbursement" is the right word if the copies were made in the solicitors' office, but the principle is the same whether it was technically a disbursement or technically a part of the costs. With regard to the point to which I have referred as a possible ground for decision in that case, VAUGHAN WILLIAMS, L.J., said (*ibid.*, 539):

> It does not seem to me to make any difference that by reason of the order of the county court judge the appellants would, if successful, have been debarred from claiming the costs of these documents on the appeal to the Divisional Court.

Clearly he was not basing his decision on the existence of that condition. FARWELL, L.J., said (*ibid.*, 539):

> I understand it to be the settled practice in the taxing office not to allow as costs of a proceeding costs of documents used on a prior proceeding.

That is stated quite generally.

On that decision counsel for the plaintiff relied in the present case. The decision seems to me to be plain, and, though, I think, there is no express reference to it, it appears to follow and construe the words of R.S.C., Ord. 65, r. 1:

> Subject to the provisions of the Act and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge . . .

Those words "of and incident to" are, in effect, the same as those in s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925, except that the words there are "costs of and incidental to all proceedings." The wording of the rule, coupled with the decision to which I have referred, shows that proceedings in the court below must be treated for this purpose as separate proceedings from the proceedings in this court. It seems to me that counsel for the plaintiff has a strong case for saying that, applying that decision, these costs were incurred in respect of the proceedings below, and, therefore, cannot be recovered in respect of the Court of Appeal proceedings.

Counsel for the first defendant pointed out what is true, but irrelevant, that, having regard to the charge made against his client, there would have been no possible objection to his being represented by one, and, possibly, two leading counsel, but he also endeavoured to distinguish *Masson's* case (1), and his main argument may be put in this way. He said there is at least one case in which costs incurred in respect of proceedings below have been allowed under an order for costs of an appeal and, therefore, the rule is not absolute. He argues that in any case these costs would have had to be incurred for the appeal and there is no reason why the plaintiff should not pay them because the solicitor actually incurred them prematurely. The earlier cases on which he relied are really of no assistance, because I think the decision depended on an agreement between the parties. He admitted that the strongest of them was *Greaves* v. *Drysdale* (2), the headnote of which is ([1936] 2 All E.R. 470):

> The rule that the cost of a shorthand transcript of the evidence given at the trial should not be allowed on appeal unless there has been an agreement in the court below that it should be taken and used as the judge's note is not a hard and fast rule but only a ground for asking the court to exercise its discretion in the matter. Where

the shorthand transcript has been used without objection and the appeal could not be properly presented without it, such costs ought to be allowed to a successful party.

No point was taken based on the principle in *Masson Templier* v. *De Fries* (1). It was not clear from the facts whether, as is possible, the main part of the costs did not arise for the first time when transcripts of the shorthand notes were made for the proceedings in the Court of Appeal. If and in so far as what was said covered the costs incurred for the purpose of the proceedings below, A it was, it seems to me, inconsistent with the decision in *Masson Templier* v. *De Fries* (1), but, the point not having been taken or argued, I do not think we should regard it as overruling that case or as introducing an exception to the construction of the rule laid down in it.

I would like to say a word or two on how the master and the learned judge dealt with this matter. The learned master said this: "It does not appear equitable that the plaintiff should escape liability for these costs merely on the B ground that the documents were in existence and, therefore, available for use in the Court of Appeal." With respect to the learned master, it seems to me that is just the ground on which in *Masson's* case (1) it was held that the costs could not be recovered in respect of an appeal to this court. The learned judge distinguished *Masson Templier* v. *De Fries* (1) and said: "There the party was precluded from claiming the cost of the documents by the condition under which he obtained leave to appeal to the Divisional Court." I agree that C that is so, and, if the Court of Appeal had decided the case on that ground, the matter would have been at large. I would like to say that, assuming the matter had been at large for us, I should have come, I think, to the same conclusion on the rule as it was framed, as was come to in *Masson's* case (1). Therefore, in my opinion, on that point, the plaintiff succeeds.

Counsel for the plaintiff took two other points. The first was this. The D noting brief was delivered before the case started, and on the first day of the hearing the parties agreed that there should be a shorthand note and that the costs of the shorthand note, presumably with any transcript required, should be costs in the cause. Counsel has submitted that from that moment counsel with the brief to take a note became redundant, and, therefore, the refreshers which he was paid from day to day should not be regarded as admissible items of costs. I cannot accept that view. The phrase "brief to take a note," E on which I do not want to enlarge, is, no doubt, a convenient way of describing the duties of counsel who have such a brief, but I cannot regard them as a mere alternative to a shorthand note. As was pointed out in argument, for one thing it may be important to have counsel taking a note who can be in court all the time and follow the proceedings and so be able to inform his senior, if he has to be absent for a brief period, what has been going on. That point, in my opinion, fails.

F The other point, with which the second defendant was concerned, related to the costs of an expert witness for whom £150 was claimed and allowed. He remained in court for 13 days and was never called. Objection was taken to this item on the main ground that there was no necessity for his attendance for 13 days as the second defendant's case did not commence until the sixteenth day of the trial. The master's note, dealing with that objection, is this:

> G It was intended to call this expert witness, but at the close of the plaintiff's case it was decided that his evidence would be unnecessary and he was released. In the case to which I am referred the question was the expense of experts in the Court of Appeal who were in court to assist counsel and whom it was never intended to call, and the case does not apply.

It was said that we ought to draw the inference that the master had failed to apply the recognised principle that in the case of witnesses who are improperly I and unnecessarily kept in court any costs or fees claimed in respect of the period during which they are unnecessarily kept in court should not be recoverable. As it happens, in this case, apparently, HILBERY, J., made an observation on this very well known principle which applies not only to expert witnesses, but to other witnesses, *viz.*, that on every ground they should not be brought to court except when it is necessary to bring them there, and certainly if they are unnecessarily brought the costs of paying them for attending are inadmissible items. That statement having been made in this case, there is no reason to suppose that it was not drawn to the attention of the master, but, even if it had not been, the principle is a perfectly well known one, and it is a very important one for application, as I have no doubt it is applied, by taxing masters. The mere fact that the master does not make an express reference to it in his answer does not, in my view, justify our drawing the conclusion that he had not such a well known and familiar principle in mind. Apparently some case had been cited to him and he thought it necessary to deal with that case in his answer and unnecessary to refer to the general principle.

For these reasons, it seems to me that it is impossible to interfere in respect to this third point. Counsel's argument for the plaintiff, therefore, succeeds on the first point, and fails on the other two points.

SCOTT, L.J : I agree.

ASQUITH, L.J. : I also agree.

Appeal allowed with costs against the first defendant ; the plaintiff to pay to second defendant costs of the appeal.

Solicitors : *H. S. Wright & Webb* (for the plaintiff) ; *George C. Carter & Co.* (for the first defendant) ; *Wilkinson, Howlett & Moorhouse* (for the second defendant).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

NUGENT-HEAD *v.* JACOB (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Viscount Simon, Lord Porter, Lord Uthwatt, Lord du Parcq, Lord Oaksey), January 26, 27, 29, February 27, 1948.]

Income Tax—Married woman—Income from property abroad—" Living . . . separate from . . . husband "—Husband on military service overseas—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 16.

The Income Tax Act, 1918, All Schedules Rules, r. 16, provides : " A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried : Provided that—(1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name . . . ; and (2) a married woman living in the United Kingdom separate from her husband, whether the husband be temporarily absent from her or from the United Kingdom or otherwise, who receives any allowance or remittance from property out of the United Kingdom, shall be assessed and charged as a *feme sole* if entitled thereto in her own right, and as the agent of the husband if she receives the same from or through him, or from his property, or on his credit."

The taxpayer, a married woman, owned in her own right property in the United States from which she derived an income, part of which was remitted to her in the United Kingdom. In 1941, her husband, who was then in the army and with whom since the marriage she had lived a happy married life, was ordered overseas on military duties and remained away for 3 years. There was, however, a marital home maintained in London at all material times and no change in the marital relations except that necessarily caused by the husband's physical absence :—

HELD : the provisos to r. 16 dealt with contrasted situations, and proviso (1) was in no way qualified by proviso (2). Proviso (1) dealt with the case where there had been no matrimonial rupture. A wife was " living with her husband " within its meaning although he was away from her for a considerable time. Proviso (2) dealt with the contrasted case where there had been a rupture in marital relations and the wife was living separate from her husband. The present case, therefore, fell within proviso (1), and the income received by the taxpayer from the United States was not within proviso (2), but, under proviso (1), was to be " deemed the profits of the taxpayer's husband " who was chargeable to tax in respect thereof.

Derry v. *Inland Revenue* (1927 S.C. 714), *criticised.*

Decision of the Court of Appeal ([1946] 2 All E.R. 390 ; 176 L.T. 231), *reversed.*

[AS TO LIABILITY IN RESPECT OF INCOME OF MARRIED WOMEN, see HALSBURY, Hailsham Edn., Vol. 17, pp. 373-375, paras. 767-769 ; and FOR CASES, see DIGEST, Vol. 28, p. 96, Nos. *570-573.*]

Cases referred to:

(1) *Eadie* v. *Inland Revenue Comrs.*, [1924] 2 K.B. 198; 93 L.J.K.B. 914; 131 L.T. 350; 9 Tax Cas. 1; 28 Digest 113, *702*.

(2) *Derry* v. *Inland Revenue*, 1927 S.C. 714; 13 Tax Cas. 30; Digest Supp.

APPEAL from an order of the Court of Appeal, made on July 25, 1946, and reported [1946] 2 All E.R. 390, reversing a decision of MACNAGHTEN, J., ([1946] 1 All E.R. 198), made in favour of the taxpayer. The House of Lords now reversed the order of the Court of Appeal and restored the decision of MAC- A NAGHTEN, J. The facts appear in the opinion of VISCOUNT SIMON.

Grant, K.C., and *Donovan, K.C.*, for the taxpayer.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. H. Stamp* and *R. P. Hills* for the Crown.

The House took time for consideration.

Feb. 27. **VISCOUNT SIMON:** My Lords, this is an appeal from the Court B of Appeal (SCOTT, BUCKNILL and SOMERVELL, L.JJ.) which reversed the decision of MACNAGHTEN, J., in favour of the appellant. The question of law is raised by Case stated by the Commissioners for the Special Purposes of the Income Tax Acts and is whether the appellant, who is a married woman living with her husband, is rightly assessed to income tax under Case V of sched. D for the year 1942-3 in respect of remittances amounting to £7,082 which she received in London in the previous year from property in America. The balance of her C American income for that year, *viz.*, £6,533, was retained in America. It is not disputed that the whole of her American income was assessable as "income arising from possessions out of the United Kingdom." The question is: Who is liable to pay the tax on it, the appellant, or her husband? The Court of Appeal, in agreement with the Special Commissioners, held that in the circumstances of the case the appellant was rightly assessed for the amount D remitted, *viz.*, £7,082, while her husband, Lieut.-Colonel Nugent-Head, should be assessed for the amount not remitted, *viz.*, £6,533.

It is much to be regretted that the present statute law defining in what cases a married woman is herself liable to income tax and in what cases the liability to tax on her income falls on her husband instead is not stated in plain and unambiguous language. Even if the heavy task of re-enacting the whole of our income tax law in less complicated terms is too great to be undertaken E at present, it would be well worth while to revise and re-express that part of it which deals with married women. As it is, the words now in operation are largely borrowed from Acts of 1803, 1805 and 1806, at which dates the effect of marriage on the property of the wife was very different from what it is today. Income tax came to an end after Waterloo, and from 1816 there was no income tax in this country till 1842. Nevertheless, the relevant provisions of the Act of 1842 are plainly modelled on the repealed sections and now reappear F practically unaltered in r. 16 of the All Schedules Rules in the consolidating Act of 1918. The result is that the judiciary has to interpret and apply, as best it can, the following words:

> 16. A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that—(1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and G charged in his name, and not in her name or the name of her trustee; and (2) a married woman living in the United Kingdom separate from her husband, whether the husband be temporarily absent from her or from the United Kingdom or otherwise, who receives any allowance or remittance from property out of the United Kingdom, shall be assessed and charged as a *feme sole* if entitled thereto in her own right, and as the agent of the husband if she receives the same from or through him, or from his property, or on his credit.

H The relevant circumstances, as found by the commissioners, are as follows. The taxpayer, who was an American citizen, and her husband, who is an Englishman, were married in 1933 and lived together in London. At all material times she was ordinarily resident in the United Kingdom. Her husband was in business in this country, but in 1939 he joined the army. Until November, 1941, he was stationed at various places in this country, and his wife continued to live in London, but frequently went to stay at hotels near where her husband was from time to time stationed. The husband spent all his periods of leave with his wife. In November, 1941, he went on active service overseas, and up to the hearing by the Special Commissioners (September, 1944) was still abroad, and had not on account of such service been able to return to this country at all. His wife continued to reside in London in a flat which she acquired in her own name in July, 1940, the husband's personal effects were left in her care, and the flat constituted the marital home which was at all times available to the husband should he be able to return to it. The parties frequently and regularly corresponded, and the marriage had been and remained a very happy one. It was admitted on behalf of the Crown that, as already stated, the taxpayer was " living with her husband " within the meaning of proviso (1) to r. 16. The Crown contends (and this contention prevailed in the Court of Appeal) that the taxpayer, in the relevant year, while admittedly " a married woman living with her husband " under the first proviso of the rule, was at the same time " a married woman living in the United Kingdom separate from her husband " within the meaning of the second proviso of the rule. The taxpayer, on the other hand, argues that such a contention does violence to the structure of the rule and that the two provisos deal with contrasted situations both of which cannot exist at the same time. In other words, the taxpayer says that if a married woman is " living with her husband " she cannot at the same time be said to be " living . . . separate from her husband," and that, as it is admitted that she satisfies the condition in which the first proviso operates, none of her income can be assessed and charged in her name, and the circumstance that she and her husband were, owing to his war duties, in different places, does not and cannot involve the proposition that she is " living separate " from him.

There can be little doubt that, if the form in which the two provisos appear is the governing consideration, a distinction between two opposed conditions is indicated. The Crown's argument that proviso (2) should be read as a qualification of proviso (1) is *prima facie* opposed to the natural construction of two provisos connected by the word " and," and, apparently, dealing with contrasted situations, but the Solicitor-General points to the words in the second proviso " whether the husband be temporarily absent from her or from the United Kingdom or otherwise " and urges that temporary absence of the husband is consistent with the fact that the wife was " living with her husband." The argument, then, is that temporary absence is a form of separation dealt with in the second proviso, and that it is, therefore, quite possible, and, indeed, necessary to read proviso (2) as a qualification of proviso (1). If this is not the correct interpretation, why, it is asked, is temporary absence mentioned at all ? A further argument used to support the Crown's view is that, if proviso (2) applies only in cases where proviso (1) does not apply, then it is surplusage, since the first words of the rule in themselves make a married woman who is not living with her husband assessable and chargeable to tax if she is entitled to any property or profits to her separate use. This second argument can, I think, be disposed of at once, for the language of proviso (2) is not in terms addressed to property or profits to which a married woman is entitled to her separate use, but deals with the special case of allowance or remittance from property out of the United Kingdom. Moreover, the last words of proviso (2) dealing with receipts from the husband are not under any construction surplusage. The second argument, therefore, fails.

The first argument, however, raises a difficult point. The considerations on either side are set out in the contrasting judgments of MACNAGHTEN, J., and of the Court of Appeal. I have reached the conclusion that the two provisos deal with contrasted situations and that the second ought not to be read as a qualification of the first. The first deals with the case where there has been no rupture of marital relations and the parties are living together in the ordinary way of man and wife. The fact that one of them is physically away from the other for a time, even for a long time, whether from duty or illness or other cause, is no reason for saying that the wife is not " living with her husband." The finding of the commissioners that the taxpayer in this case was ordinarily resident in the United Kingdom involves this, that her husband was also a resident here in the income tax sense, although he may have been for a time physically abroad. The marital home was here and it was the home of both of them. The commissioners, therefore, rightly found, and the Crown rightly admitted, that the taxpayer was, notwithstanding her husband's absence, " living with her husband." The second proviso, in my opinion, deals with the contrasted case where there has been a rupture in normal matrimonial relations. This may arise from a decree of judicial separation, or from the parties executing a deed of separation, or from a more informal agreement between the spouses that they will not live together. In such circumstances proviso (2) applies, and the operation of the opening words of the rule do not nullify anything in the first proviso. I do not find so much difficulty in construing the words in proviso (2) specially relied on by the Crown as appears to have been felt in the Court of Appeal. The case may arise in which a husband and wife, who have not been getting on well together, may agree that they will live separate from one another for a time, say a couple of years, and will then see whether it would not be better to come together again and live in a common home as an ordinary man and wife. I should suppose that such an arrangement is not infrequently brought about by the intervention of parents or other friends as a way of obviating more serious steps. It may be the means of saving the marriage in the long run. As for the words " or otherwise " to which SCOTT, L.J., said he could give no meaning, I think they cover a case where the separation is permanent and the husband's absence has no set limit. If the phrase about temporary absence was not included in proviso (2), a married woman whom it was sought to assess and charge under that proviso might argue that the proviso did not apply because her husband would be returning to her after a time, or that, though he was physically absent, he was still in the United Kingdom. The phrase which is supposed to create so much difficulty would, at any rate, meet that argument. But there is a further point. As proviso (2) stands the Crown must contend that without any rupture of marital relations the wife can be charged in a case where her husband has never left the United Kingdom at all, but is detained at work at some place within it other than the marital home. Inasmuch as the husband would be resident in this country and would be regarded as living with his wife, though physically absent, there seems no reason why proviso (2) should be needed to apply in such a case.

The conclusion at which I arrive can, therefore, be broadly stated as follows. Proviso (1) deals with the case where there has been no matrimonial rupture and the wife is " living with her husband," albeit that her husband for one reason or another is away from her for a considerable period of time. Proviso (2) deals with the contrasted case where there is a rupture in marital relations and the wife is " living in the United Kingdom separate from her husband." The word, it will be noted, is " living " not " being." This view accords with what was said by ROWLATT, J., in *Eadie* v. *Inland Revenue Comrs.* (1). In *Derry* v. *Inland Revenue* (2) Mrs. Derry was held to be rightly assessed in respect of her Canadian income received here when her husband was necessarily away from her for a long period in Cairo. The grounds on which the three Lords of Session arrived at this conclusion differed. LORD SANDS and LORD ASHMORE held that proviso (2) applied, and that the wife was *de facto* living in the United Kingdom separate from her husband within the meaning of that proviso ; LORD BLACKBURN reached his conclusion on the ground that the principal words of the rule applied, and that there was ample evidence to justify a finding that the terms of proviso (1) do not apply. It will be observed, therefore, that none of the judges sought to read proviso (2) as a qualification on proviso (1). In so far as the decision involves the view that prolonged absence in itself proves that the spouses are not living together, I respectfully dissent from it. The construction which I put on this crabbed and involved piece of legislation avoids the necessity of discussing other difficulties which might have to be dealt with if the Crown's main contention were right. If a married woman who is living with her husband can at the same time be a married woman living separate from her husband on the ground that he is physically absent from her, for how long has this absence to persist ? It was suggested, I understand, that the absence must be for a whole year, though I see nothing in the words to say so. And which year, the year of assessment or the previous year ? These difficulties, however, do not now arise. I move that the appeal be allowed with costs, and that the judgment of MACNAGHTEN, J., be restored.

LORD PORTER : My Lords, I have had an opportunity of reading the speech just delivered by my noble and learned friend on the Woolsack, and find myself so much in agreement with it that I have not thought it necessary to add any observations of my own.

LORD UTHWATT: My Lords, the provision contained in r. 16 of the Rules to All Schedules has a long history which is set forth in the judgment given by Scott, L.J., in the Court of Appeal. That part of it which is now embodied in the second proviso made its first appearance in the Income Tax Act, 1805, and its present form does not in any material respect differ from its original form. Research inspired by curiosity has failed to reveal the reasons which led to the introduction made in 1805. It may be that the Solicitor-General is right in his conjecture that the new part, when first introduced, was designed as a collecting provision to deal with the case where the husbands were in India or the plantations and their wives were living in Great Britain. Other conjectures may, however, be made. I venture one. The opening part of the provision dealt only with married women who were sole traders or who were entitled to property for their separate use. No reference to separate use is contained in the new part introduced in 1805. Property received by a married woman from her husband would certainly not be property held to her separate use, and property received from abroad by her from other sources might well not be either property held to her separate use or property belonging to her husband by marital right. It may, therefore, be that this new provision was then intended to catch property which otherwise would escape charge, but the matter is one of historical interest only. Whatever be the reasons which led to the passing in 1805 of the new provision, those reasons cannot be of any relevance on the question of the construction of the provision as it appears in the Income Tax Act, 1918. That Act must be construed as it stands by reference to its contents.

Rule 16 is in the following terms:

> 16. A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that—(1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee; and (2) a married woman living in the United Kingdom separate from her husband, whether the husband be temporarily absent from her or from the United Kingdom or otherwise, who receives any allowance or remittance from property out of the United Kingdom, shall be assessed and charged as a *feme sole* if entitled thereto in her own right, and as the agent of the husband if she receives the same from or through him, or from his property, or on his credit.

Your Lordships are asked by the Crown to hold that, as a matter of construction of the rule, a married woman living with her husband within the meaning of the first proviso may at the same time be a married woman living separate from her husband within the meaning of the second proviso. The Crown contends that, on the facts of the case, Mrs. Nugent-Head fills both descriptions.

Rule 16, one may agree, is a curious rule. The married woman who was a sole trader in 1918 stood in no different position as respected her property from any other married woman, and property held to the separate use of a married woman as that phrase is technically understood was in 1918 uncommon. The provision does not in terms take any notice of the capacity given to married women to hold property conferred by the Married Women's Property Acts, and property held by virtue of the capacity so conferred was the common form of married women's property in 1918. Again, married women who live with their husbands are treated as exceptional persons—relegated for treatment to a proviso. Lastly, a married woman living separate from her husband who receives remittances from abroad—not I imagine a common case—is treated as one whose position demands detailed treatment. In respect of remittances from her husband or his property, she is to be taxed as his agent, and in respect of remittances from other property as a *feme sole*. Neither the selection of remittances from abroad for separate treatment, nor the distinction between the two cases marks any intelligible taxing principle. Astonishing conclusions may, indeed, be expected to emerge from a rule so conceived and framed, but I am unable to come to the conclusion that it is rounded off in the way the Crown suggests.

On two matters the taxpayer and the Crown are agreed. It is common ground that r. 16 is a collecting section and not a charging section, and the question at issue is, therefore, not whether certain profits are to be charged to income tax, but whether it is the husband or the wife who is to be assessed in respect of those profits. It is, again, common ground that a married woman is living with her husband within the meaning of the first proviso to r. 16 when they are sharing their matrimonial life, although they may for the time being be geographically separate. There agreement stops. The case for the taxpayer is that the second proviso has no application to a married woman who is living with her husband. The case for the Crown is that such a married woman may also be a married woman living in the United Kingdom separate from her husband within the meaning of the second proviso, and that where such a married woman emerges for consideration, the second proviso operates as a qualification of the first proviso with the result that in respect of allowances or remittances received by her from property out of the United Kingdom, she and not her husband is to be charged and assessed. The argument for the Crown may be put concisely. Due weight must be given to the words "whether the husband be temporarily absent from her or the United Kingdom or otherwise" and the word "temporarily" is to be emphasised. If that be done, it is apparent that the proviso envisages a case where the wife is living separate from the husband by reason only of a temporary absence from her of the husband—a state of affairs which is consistent with the wife living with her husband in the sense of the first proviso. The matter does not rest there. It is apparent (and the Crown is clearly right in this) that, unless there can be a married woman who is living with her husband within the meaning of the first proviso and living separate from him within the meaning of the second proviso, the first limb of the second proviso does nothing. It merely reiterates as regards all women (not being women living with their husbands within the meaning of the first proviso) a liability to tax which has already attached to them under the opening part of the rule. Some content must be given to the first limb of the second proviso, and that can only be done by accepting the Crown's contention as to the meaning of the phrase "living separate" and reading the second proviso as a proviso either to the first proviso or to all the preceding parts of the rule. Logic must reign.

My Lords, I am not prepared, in light of the peculiarities of the rule to which I have adverted, to attach much weight to the argument of the Crown based on the lack of content of the first limb of the second proviso if his construction be not accepted. If that construction be not required by other considerations, the first limb of the proviso may be taken as directed to pointing the contrast between the foreign remittances to which a married woman is to be assessed as a *feme sole* and the foreign remittances to which she is to be assessed as agent of her husband. Taking the lay-out of the rule, the two provisos are governed by the one set of words "Provided that" and they are connected by the word "and." The natural reading is that each proviso is independent of the other and that each modifies only the substantive rule. That expectation is borne out by the circumstance that the first proviso deals with the case of a married woman living with her husband and the second proviso with a married woman living separate from her husband. In the normal use of language to say of a married woman that she lives separate from her husband is to contradict the proposition that she is living with her husband. The weight of the argument for the Crown lies in the appearance in the second proviso of the phrase "whether the husband be temporarily absent from her or the United Kingdom or otherwise." Absence in some rational sense there must be, but, subject to this, that phrase includes within its embrace any form of marital absence, however long or short in point of time and however great or small the geographical distance between the spouses. Resort to the words "living separate" is not legitimate in order to modify the meaning of the phrase, but, in construing the proviso, the sentence must be read as a whole. The leading idea, to my mind, is that the wife is to be living separate from her husband, and there is added the phrase in question dealing with one and only one of the matters involved in "living separate"—physical absence. The outstanding fact is that the phrase is put in as a parenthesis. Surely the effect of the sentence is that, given that the married woman is living in the United Kingdom separate from her husband, nothing else matters. Enquiry into the affairs of the matrimonial life is to be confined to the one fact: "Is the wife living in the United Kingdom separate from her husband?" Further delving into her matrimonial life is to be irrelevant. Taking that view of the effect of the parenthetical words, I am of the opinion that the two provisos deal with separate cases and that it is not right to treat the second proviso as in any way qualifying the first proviso.

I find it unnecessary to deal with many of the matters covered in argument. I would only say that the difficulties in the way of the Crown are increased by the circumstance that, until 1927, the assessment on allowances and remittances from abroad was based on an average of the receipts for the previous three years, and that it is not necessary to express an opinion on the point whether the enquiry on the question whether the wife is living separate is to be addressed A to the date of receipt of remittances or to the year of assessment. It is not reassuring that on this point both these views—the one by way of alternative to the other—were put forward for your Lordships' consideration by the Crown. The Act, apparently, in this regard does not bear a clear meaning to those whose duty it is to administer it consistently. It is not for lack of respect for the opinion of those who in this and other cases have taken a contrary view as to the effect of the rule that I do not deal with the reasons that have been B given by them. I may, I trust, be forgiven for saying that it does not diminish my confidence in my own view to recall that some three not entirely consistent reasons have been given in support of the opposite conclusion. On the facts of the case Mrs. Nugent-Head was a married woman living with her husband at all possibly relevant dates. I would, therefore, allow the appeal.

LORD DU PARCQ: My Lords, the taxpayer and the Crown are agreed C that the phrase " living with her husband," which qualifies the term " married woman " in proviso (1) to r. 16, is apt to describe a wife living in amity with her husband, although she may be compelled by circumstances temporarily, and it may be for a long time, to live apart from him. If there had been any argument to the contrary effect the problem before your Lordships might have presented a different aspect, but, even so, I see no reason to think that your Lordships' scrutiny of this perplexing rule would, in the end, have produced D a different result. I am content to assume that both the parties, in so far as they are agreed, are right. If that be granted, it seems to me to be reasonably plain that, unless there is something in the context which points unmistakably to a contrary conclusion, the words " living . . . separate from her husband " in proviso (2) must be read as expressing the antithesis of " living with her husband." The Court of Appeal found a reason for rejecting this E construction in the words " whether the husband be temporarily absent from her or from the United Kingdom or otherwise " and in the reference to " any allowance or remittance " which the wife may receive " from or through " her husband, " or from his property, or on his credit." I do not myself feel that these words are any less in harmony with the construction adopted by MACNAGHTEN, J., than with that which commended itself to the Court of Appeal. Few judges who have had to deal with cases in which marital relations have F come under review can have failed to observe that separations which are caused by a rift in the marriage are by no means inevitably permanent. Not every " desertion " (for instance) endures for the full three years which make it a sufficiently grave matrimonial offence to be ground for a divorce. As for allowances and remittances, I should have thought that nothing was more common than for a husband who has agreed with his wife that she should live separate and apart from him to perform his legal obligation and maintain her. G He can only maintain her by somehow supplying her with money, which will certainly come " from or through him," and may in many instances be properly described as coming " from his property " or " on his credit." I agree with those of your Lordships who have preceded me that MACNAGHTEN, J., came to the right conclusion, and I would allow this appeal.

LORD PORTER: My Lords, my noble and learned friend **LORD OAKSEY**, H who is unable to be present, has asked me to say that he has had an opportunity of reading the opinion of the noble Lord on the Woolsack and he agrees with it.

Appeal allowed with costs.

Solicitors: *Gordon, Dadds & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Affirmed. P.C. [1950] 2 All E.R. 219.

THE UNITAS.

[Probate, Divorce and Admiralty Division (Lord Merriman, P.), February 2, 3, 4, 5, 20, 1948.]

Prize Law—Condemnation—Ship—Enemy flag—Duress—Ship built in Germany by German subsidiary of Dutch company under agreement with and subsidised by German government.

N.V., two Dutch companies, were, through their Dutch subsidiaries, the sole shareholders in a German company, Verkaufs, the control of which before the war was exercised from Rotterdam, although there was a German board of directors to carry out the policies decided in Rotterdam. In 1931, as a result of a decree by the German government affecting remittances from Germany, debts (amounting to about £7,500,000), due from N.V.'s subsidiary companies in Germany to N.V. and their subsidiaries in Holland, were frozen and became "blocked marks," and in the next few years, owing to the accumulation of fresh trading profits inside Germany, the amount of "inland marks" held by N.V. greatly increased. In order to get some of the "blocked marks" out of Germany, an arrangement (referred to as the "extraction process") was entered into with the consent of the German government in 1934 whereby N.V. (whose interests hitherto had not included shipbuilding) were to place contracts in German shipyards for the building of ships for export, to be paid for in reichsmarks in Germany. In 1935, N.V. were asked by the German government to build a whaling fleet in Germany for operation under the German flag. At first they refused to do so, but in 1936 they agreed as they feared that economic pressure would be brought to bear on them and steps taken to confiscate or render valueless their assets in Germany. The conditions were that the fleet, when built, should be chartered to a new company in which N.V. would not have more than a 50 per cent. interest and that the fleet should not be transferred from the German flag without the consent of the German government. A subsidy towards its construction was granted by the German government and the whole of the cost of building was provided out of "inland marks." In September, 1937, the Unitas, a whaling factory ship and the chief unit of the fleet, was constructed and delivered to Verkaufs, and by them delivered to the newly-formed Unitas Co., to which it was chartered and in which Verkaufs did not have a controlling interest. The Unitas was registered, on completion, at Bremen, as a German ship, the property of German owners. Other vessels of the fleet were similarly handed over in October, 1937. Under the charterparty (dated Feb. 24, 1938), by art. 9, no voyage should be undertaken that exposed the vessels to danger of confiscation, seizure or capture, and, by art. 10, areas endangered by war were to be avoided, and Verkaufs was entitled to demand that the vessels be used in a way that precluded any war risks affecting them, the provisions of art. 9 being made particularly applicable to perilous areas and war risk. The charter for the entire fleet was to end on Sept. 20, 1940. After the outbreak of the second world war, but while Holland was still neutral, N.V. did nothing to dissociate themselves from the activities of their subsidiaries in Germany, nor did they insist on strict compliance with arts. 9 and 10 of the charterparty. The Unitas was captured by the Allied invading forces in Wilhelmshaven in June, 1945, and was seized in prize. No change had been made in her registration at the time of her capture. N.V. claimed the release of the vessel on the grounds (*a*) that the Unitas was placed under the German flag involuntarily and under duress, because it was built only as the result of pressure by the German government, and (*b*) that the principle of *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* (*Gt. Britain*), *Ltd.*, applied and that "the whole and sole ownership" of the Unitas "in every real and business sense" was in them:—

Held: (i) in English law duress of goods, as distinct from duress of person, did not avail to avoid a contract: *Atlee* v. *Backhouse* (1838) (3 M. & W. 633), *followed*, but, assuming that duress of goods would suffice in prize law, no duress was proved, because N.V. had failed to prove that the building of the Unitas was not entered into voluntarily with the object of protecting their economic interests in Germany (*e.g.*, continuing the "extraction process" without interruption), and that it was not a sound business proposition, and, therefore, there was no particular circumstance which took the case out of the general rule that the character of the ship was determined by her flag.

Rule laid down by Sir William Scott in *The Vrow Elizabeth,* (1803) (5 Ch. Rob. 2, 4, 5), *and observations of* Sir Samuel Evans, P., *in The Hamborn,* ([1918] P. 19, 22), *applied.*

(ii) although the principle of the *Daimler* case (*supra*) was applicable in favour of the Crown, there was no authority for applying it in favour of claimants in prize and it would be contrary to settled principle to do so, and the claim that the whole and sole ownership of the Unitas resided in N.V., by reason of the fact that N.V. indirectly held all the shares in Verkaufs, was untenable.

Principle in Daimler Co., Ltd. v. *Continental Tyre & Rubber Co.* (*Gt. Britain*), *Ltd.*, ([1916] 2 A.C. 307 ; 114 L.T. 1049), *not applied.*

(iii) assuming that the principle of the *Daimler* case (*supra*) was applicable in favour of the claimants, Verkaufs was a house of trade of N.V. in Germany, and N.V. had done nothing while still neutral to dissociate themselves from the activities of their subsidiaries in Germany or to dissociate their organisation in Germany from the taint of enemy character, and must, so far as concerned Verkaufs, be deemed an enemy.

[As to Enemy Character of Ship, see HALSBURY, Hailsham Edn., Vol. 26, p. 216, para. 489 ; and for Cases, see DIGEST, Vol. 37, pp. 577-580, Nos. *87-128.*]

Cases referred to :

(1) *The Baron Stjernblad,* [1918] A.C. 173 ; 87 L.J.P. 11 ; 117 L.T. 743 ; 37 Digest 632, *828.*
(2) *Shacht* v. *Otter, The Ostsee,* (1855), 9 Moo. P.C.C. 150 ; 2 Ecc. & Ad. 170 ; Spinks 174 ; 2 Eng. Pr. Cas. 432 ; 25 L.T.O.S. 45 ; 37 Digest 614, *586.*
(3) *The Sidi Ifni,* (1945), 1 Lloyd, Pr. Cas., 2nd series, 200.
(4) *Conservas Cerqueira Limitada* v. *H.M. Procurator-General* (*The Monte Contes*), [1944] A.C. 6 ; 113 L.J.P.C. 28 ; 170 L.T. 104 ; 2nd Digest Supp.
(5) *The Hakan,* [1918] A.C. 148 ; 87 L.J.P. 1 ; 117 L.T. 619 ; 37 Digest 630, *792.*
(6) *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* (*Gt. Britain*), *Ltd.*, [1916] 2 A.C. 307 ; 85 L.J.K.B. 1333 ; 114 L.T. 1049 ; 2 Digest 145, *195.*
(7) *The St. Tudno,* [1916] P. 291 ; 86 L.J.P. 1 ; 115 L.T. 634 ; 37 Digest *579, 111.*
(8) *The Vigilantia,* (1798), 1 Ch. Rob. 1 ; 1 Eng. Pr. Cas. 31 ; 37 Digest 577, *87.*
(9) *The Fortuna,* (1811), 1 Dods. 81 ; 1 Eng. Pr. Cas. 193*n* ; 37 Digest 649, *1019.*
(10) *The Vrow Elizabeth,* (1803), 5 Ch. Rob. 2 ; 37 Digest 577, *88.*
(11) *The Tommi, The Rothersand,* [1914] P. 251 ; 84 L.J.P. 35 ; 112 L.T. 257 ; 37 Digest 580, *119.*
(12) *The Hamborn,* [1919] A.C. 993 ; 88 L.J.P. 174 ; 121 L.T. 463 ; 37 Digest 579, *112* ; *affg.*, [1918] P. 19.
(13) *The Palme,* (1872), Dalloz, Jurisprudence Generale, Pt. III, 94.
(14) *The Taxiarchis,* (1913), R.G.D. 1 P. xx, 518.
(15) *Maskell* v. *Horner,* [1915] 3 K.B. 106 ; 84 L.J.K.B. 1752 ; 113 L.T. 126 ; 79 J.P. 406 ; 12 Digest 558, *4635.*
(16) *Atlee* v. *Backhouse,* (1838), 3 M. & W. 633 ; 7 L.J.Ex. 234 ; 12 Digest 95, *587.*
(17) *Oates* v. *Hudson,* (1851), 6 Exch. 346 ; 20 L.J.Ex. 284 ; 17 L.T.O.S. 65 ; 12 Digest 557, *4632.*
(18) *The Endraught,* (1798), 1 Ch. Rob. 19 ; 37 Digest 581, *151.*
(19) *Glenroy, Part Cargo, ex M.V., H.M. Procurator-General* v. *M. C. Spencer, Controller of Mitsui & Co., Ltd.,* [1945] A.C. 124, 303 ; 114 L.J.P.C. 49 ; 172 L.T. 326 ; 2nd Digest Supp.
(20) *The Primus,* (1854), 1 Ecc. & Ad. 353 ; 2 Eng. Pr. Cas. 290 ; Spinks 48 ; 24 L.T.O.S. 15 ; 37 Digest 579, *107.*
(21) *The Pedro,* (1899), 175 U.S. 354.
(22) *The Friendschaft,* (1819), 4 Wheaton, 105.
(23) *The Ariadne,* (1817), 2 Wheaton, 143.
(24) *The Cheshire,* (1865), 3 Wallace, 231.
(25) *The Marie Glaeser,* [1914] P. 218 ; 84 L.J.P. 8 ; 112 L.T. 251 ; 37 Digest 654, *1106.*
(26) *The Anglo-Mexican,* [1918] A.C. 422 ; 87 L.J.P. 33 ; 118 L.T. 260 ; 37 Digest 583, *187.*

Motion for the condemnation of S.S. Unitas and her cargo.

The Unitas, a whaling factory ship which was registered as a German vessel and was the property of German owners, was captured by the Allied invading forces in Wilhelmshaven in June, 1945, and seized in prize. The claimants were Dutch companies, Lever Brothers and Unilever N.V., and two of their Dutch subsidiary companies. The ship had been built, as the result of an arrangement between the claimants and the German government, by a subsidiary company of the claimants incorporated in Germany. On completion in September, 1937, she was chartered to a newly-formed German company, more than half the capital of which was subscribed by German interests and the A remainder by the German subsidiary of the claimants. The claimants contended that the ship was placed under the German flag involuntarily and under duress and asserted that the real ownership of the Unitas was in them. LORD MERRIMAN, P., dismissed the claim on the ground that duress was not proved and the flag of the ship was decisive of her enemy character. The facts appear in the judgment.

B *Sir William McNair, K.C.*, and *E. W. Roskill* for the claimants.
Le Quesne, K.C., and *Quintin Hogg* for the Procurator-General.

Cur. adv. vult.

Feb. 20. **LORD MERRIMAN, P.**, read the following judgment. In this case the Crown seeks condemnation of the whaling factory ship, Unitas. The vessel was captured in Wilhelmshaven when that port was taken by Allied invading forces in June, 1945. She was transferred to Methil under British C naval control, and was there formally seized in prize on July 1, 1945. The writ was issued on July 17 and was served on July 18, 1945. Appearances were entered by two Dutch companies, Lever Brothers and Unilever N.V. (referred to throughout as "N.V.") and two subsidiary Dutch companies referred to as "Marga" and "Saponia," engaged respectively, as their names imply, in the production of margarine, soap and kindred products. Save in so far as the D character of Marga and Saponia indicate the normal activities of their subsidiary companies in Germany, to which more detailed reference must later be made, they require no separate consideration. The real claimants are N.V. All the claimants, as parties interested in or as sole beneficial owners of the vessel, claim not only for the said ship, but for all losses, costs, charges, damages, demurrage and expenses which have arisen or may arise by reason of her seizure and detention.

E The order for the construction of the vessel was placed in May, 1936, as the result of arrangements between N.V. and the German government, by a subsidiary company of the claimants incorporated in Germany, whose name has been conveniently abbreviated to "Verkaufs." The vessel was completed by September, 1937, and delivered to Verkaufs on Sept. 23, on or about which date she was chartered to another German company, named "Unitas," which had been formed, in circumstances which I shall describe more particularly F later, to operate the vessel as the principal unit in a whaling fleet, the whale catchers of which were constructed and delivered, in pursuance of the same arrangement, about the middle of October, 1937. The Unitas was registered, on completion, at the port of Bremen, as a German ship, the property of German owners. As appears from the ship's papers found on board, no change had been made in her registration at the time of her capture at Wilhelmshaven.

G It appears to be necessary at the outset to refer to two elementary principles of prize law. The first is laid down in *The Baron Stjernblad* (1). The Privy Council, in an appeal directed solely to this issue, re-stated the principles on which a claimant who has succeeded in obtaining an order for the release of the subject-matter is also entitled to damages and costs, in the following terms ([1918] A.C. 175, 176):

> The law on the subject is reasonably certain. It is clearly stated in the letter H of Sir William Scott and Sir John Nicholl, printed pp. 1-11 of PRATT's edition of STORY, J.'s NOTES ON THE PRINCIPLES AND PRACTICE OF PRIZE COURTS, and in the case of *The Ostsee* (2). If there were no circumstance of suspicion, or, as it is sometimes put, "no probable cause" justifying the seizure, the claimant to whom the goods are released is entitled to both costs and damages. If, on the other hand, there were suspicious circumstances justifying the seizure, the claimant is not entitled to either costs or damages. The reason is clear. It would be obviously unjust to compel a belligerent to pay damages or costs where he has done nothing in excess of his belligerent rights, and those rights justify a seizure of neutral property when it is in nature contraband and there is reasonable suspicion that it has an enemy destination. This may

be thought hard upon the neutral owner, who will not be fully indemnified by a mere release of his property. So it is; but war unfortunately entails hardships of various kinds on neutrals as well as on belligerents. It follows that the real question to be decided on this appeal is whether, when the goods were seized, there were circumstances of suspicion justifying the seizure.

Applying these principles, it is, in my opinion, clear that, whatever view may be taken about the claim for release, the facts already stated as to the ownership and flag of this vessel alone provide "probable cause" justifying the seizure. A In my opinion, the claim for damages and costs, which was seriously maintained at the very end of the argument, is untenable, and I propose to say no more about it.

The second principle is that, once probable cause for seizure is established by the captors, the burden of proof lies on the claimants. In support of this principle it is only necessary to cite the most recent re-statement of it by the Privy Council in *The Sidi Ifni* (3). After referring to *The Monte Contes* (4), B LORD ROCHE, delivering the opinion of the Privy Council, said (1 Lloyd, Pr. Cas., 2nd series, 204):

> As their Lordships point out in that case, it is sufficient in prize law for captors seeking condemnation by the Prize Court of seized property to establish that there is reasonable ground for suspicion that the property is subject to be condemned. The claimants whose property has been seized must show to the satisfaction of the court by affirmative evidence amounting to positive proof that the reasonable suspicion C is unfounded (see also *The Hakan* (5)).

The present case was tried on the affidavits filed by the claimants and the exhibits thereto, supplemented by certain further information provided at my own request. In so far as the affidavits deal with events and figures, their accuracy has not been challenged by the Crown, but the Crown does not, of course, admit the inferences which it is sought to draw therefrom. More than D once, in the course of the argument for the claimants, it seemed to be assumed that they were entitled to the benefit of any doubtful inferences. I have, therefore, thought it necessary to re-state this elementary principle at the outset. Apart from the formal evidence in proof of the capture, the seizure, the particulars of the ship's papers, and the service of the writ, no evidence was filed on behalf of the Crown. The evidence on behalf of the claimants is contained in two affidavits and the documents exhibited thereto. The whole is conveniently E set out in an agreed bundle, supplemented by the further documents put in at the hearing, the statements in which, so far as they go, though not supported by affidavit, are not challenged by the Crown.

In summarising the facts, I propose so far as possible to follow the chronological order rather than the order in which events are dealt with in the affidavits. It would be well in the first place, however, to refer to the diagram of the Unilever organisation. From this it appears that at all material times, so F far as the German structure is concerned, N.V. through their Dutch subsidiaries, Marga and Saponia, were the sole shareholders of the German company, Margarine Union, which, in turn, held all the shares in Verkaufs. The diagram also records the existence between the N.V. group and the British company, Lever Brothers and Unilever, Ltd., and its subsidiaries, of an agreement for the equalisation of profits. The details of the structure of N.V. in relation to G Germany are set out in paras. 2-9 of the affidavit of Paul Rykens. From para. 9 it appears that the Margarine Union did not, in fact, come into existence until 1942, when it replaced former subsidiary companies in Germany, but this detail is immaterial. Before the war the control of the German businesses was exercised from Rotterdam, if necessary after full consultation with the British company which was interested by reason of the equalisation agreement, and, although the German subsidiary companies had German boards of directors, H it appears that these boards met solely for the purpose of giving effect to decisions on policy or management matters taken in Rotterdam, and had no independent authority. There was in Berlin a body known as the "*praesidium*," the members of which were appointed by N.V., and which controlled the German business on their behalf so as to ensure that the policies decided on in Rotterdam were effectively carried out. On Aug. 1, 1931, N.V.'s subsidiary companies in Germany were indebted in respect of the purchase of raw materials, and for other reasons including the granting of considerable loans, to N.V. and to N.V.'s subsidiary companies in Holland, in sums in Dutch florins, sterling or reichmarks amounting in all, at the then official rates of exchange, to the equivalent of £7,500,000 sterling. On that date a decree was issued by the German government affecting remittances from Germany, the effect of which was that these debts were frozen, and the amounts involved became " blocked marks." At the same time fresh trading profits were accumulating inside Germany, which are stated by the end of 1933 to have amounted to Rm. 40,000,000, and by the end of 1936 to have amounted to Rm. 61,000,000. These reichmarks were classified as " inland marks." These increases in " inland marks " had occurred notwithstanding the decision of N.V. to direct their German subsidiaries to spend large sums thereout on the acquisition of yet further businesses in Germany. Meanwhile, there remained the serious problem of getting out of Germany the very considerable sum of " blocked marks." An arrangement was made with the German government designed to effect this purpose, which I will call the " extraction process." I have not been informed whether any similar arrangements were made with other holders of " blocked marks," or whether this was a special privilege accorded to N.V. Suffice it to say that not only in its inception, but, more particularly, as events have turned out, it was manifestly to N.V.'s advantage. The arrangement is set out in Mr. Rykens' affidavit and may be summarised as follows. With the consent of the German government, N.V., whose business had not hitherto included shipbuilding, began to place contracts in German shipyards for the building of ships for export. At first these ships appear to have been built for the British company and its subsidiaries, but, when their requirements had been satisfied, they were built for independent purchasers of Dutch and other nationalities. They were built in the name of N.V. or one of its associated companies outside Germany, and provided for the payment to the shipyards in reichmarks in Germany. I have not seen the details of these contracts, but it is stated that the German government usually imposed the condition that a portion of the building price should be paid out of the proceeds of sale of certain commodities which N.V. were specifically required to import into Germany for this purpose, which meant, in effect, that part of the purchase price was found in foreign currency and that the German government effected a corresponding saving in foreign exchange. The proportion of the building costs thus provided is stated to have risen from 20 per cent. at first, though I am not informed when or by what stages, to as high as 45 per cent. or 48 per cent., at which rate the loss on the reichmarks provided by N.V. became so heavy that the transactions were uneconomic and the policy was discontinued. When the ship was delivered by the shipyards, N.V. was allowed to export her from Germany for delivery to the eventual buyer against payment outside Germany in guilders or sterling as the case might be. An example is given showing that on a ship sold for £160,000, in respect of which the proportion paid in imported commodities was 30 per cent., the net proceeds in sterling were £97,000. Having regard to a certain vagueness in the details of the " extraction process " as described in Mr. Rykens' affidavit, and, more particularly, having regard to the distinction drawn between this shipbuilding programme and the building of the Unitas, a distinction even more emphatically insisted on in the argument of the claimants' case, I asked, as I have already said, for further information. Although no detailed analysis of the stages of the " extraction process " was given, a point to which I shall be obliged to refer later, I was provided with a list of the contracts for the building of ships for export. From this (although it is stated in the affidavit that the programme began at some unspecified date in 1935) I now know that, in fact, the first contract was placed on Nov. 15, 1934, and that by the end of 1934 contracts had been placed for two tankers of 14,500 tons each as well as for five cargo ships of 8,000 tons each and for two trawlers of 475 tons each. I also know that the last contract was placed nearly two years later, on Oct. 31, 1936. I was also informed by the claimants that, taking the rates of exchange prevalent in 1931, the equivalent of £7,500,000 in " blocked marks " was Rm. 120,000,000, and, taking the same rate of exchange throughout, there remained to be extracted as at Dec. 31, 1938, only 5,000,000 " blocked marks," which a further statement showed had been reduced by Dec. 31, 1939, to 3,000,000 marks. *Prima facie*, therefore, it would seem that at the date of the placing of the last contract at the end of October, 1936, the " extraction process " had not yet become wholly uneconomic, as it is said eventually to have become. In view of the great importance which, for obvious reasons, the claimants attach to the absence of any connection between the " extraction process " and the circumstances in which the Unitas herself was built, one would have expected that they would provide the court with a detailed statement showing, month by month and contract by contract, the state of progress of the " extraction process." It would have been valuable as showing, periodically, what in terms of sterling or guilders yet remained to be extracted, and, consequently, what inducement there was to avoid any untimely interruption of the benefits of the " extraction process." In the absence of any such detailed analysis, it is possible only to draw inferences in general terms.

This brings me to the building of the Unitas. The circumstances are described in the concluding paragraphs of Mr. Rykens' affidavit. It appears that about April or May, 1935, Dr. Schacht, at all material times Reichsminister of Economy, spoke to Mr. Rykens and Mr. Hendriks, both Dutch nationals, respectively the chairman of N.V. and the principal Dutch member of the *praesidium*, with a proposal that N.V. should build a whaling fleet in Germany for operation under the German flag. Mr. Rykens states expressly that he was opposed to this because it was a proposition which could not result in N.V. being able to remit money or money's worth from Germany. In other words, it was not part of the " extraction process." The chairman succeeded in staving off this proposal for the time being. He was able to use the argument that the successful operation of such a whaling fleet involved the recruitment of a substantial number of Norwegian officers and seamen, experienced in such work, and that the Norwegian government were unwilling to allow Norwegian officers and seamen to sail under the German flag. I pause here to observe that it is manifestly impossible for Mr. Rykens to speak with certainty about the considerations which were passing in the mind of Dr. Schacht or any other member of the German government, but I find it difficult to draw the inference, which I was pressed to draw, that the proposal that N.V. should spend part of their accumulation of " inland marks " from trading profits in Germany on the building of a whaling fleet in Germany was wholly disconnected in the minds of Dr. Schacht and others with the fact that the German government had permitted N.V. to undertake the business, hitherto foreign to their trading activities, of building ships for export for the purpose of the " extraction process." However that may be, it appears that at the beginning of 1936 Mr. Rykens and Mr. Hendriks learned that Dr. Schacht, meanwhile, had made a similar proposal to certain German concerns interested in the margarine or soap business, and, therefore, presumably rivals of N.V., that these two concerns, namely, Rau and Henkel, had agreed to build whaling fleets, and that the Norwegian government's opposition to the recruitment of Norwegian officers and seamen had been overcome. Dr. Schacht than made a fresh approach to N.V. It is not suggested that Dr. Schacht actually used any threats in this connection, but it is stated that in connection with another proposal made in 1935 by Dr. Schacht, that N.V. should supply raw materials to the German government on credit terms instead of for cash as theretofore, certain high officials of the Ministry of Food had openly threatened that, unless N.V. agreed to the proposal, the production quotas of their subsidiary companies in Germany would be cut. Dr. Schacht and Herr von Ribbentrop had disclaimed all knowledge of such threats, although Mr. Rykens states that he did not accept the truth of these disclaimers. Be that as it may, N.V. had resisted the pressure brought to bear on that occasion and refused " to make any raw materials available to the German government on terms which would lead to any increase in Dutch or British investment in Germany."

Reverting to the proposal about the whaling fleet, Mr. Rykens says that it became apparent—though, as I have said, no overt suggestion was made to this effect—that, unless N.V. were prepared to participate in the construction of the whaling fleet, consequences such as those indicated might, and probably would, be extremely serious. To quote his own words, he says :

> I have no doubt whatsoever that, had N.V. not complied with Dr. Schacht's demands, the production quotas would have been cut still further and other steps adverse to the interests of N.V. taken.

Let me say at once that, in examining, as I shall do later, the extent to which economic pressure was responsible for the decision to participate in the building of the Unitas and the rest of the whaling fleet, I do not doubt at all that the German government were in a position to bring economic pressure to bear on foreign concerns trading in the country through German subsidiaries, nor that they would hesitate to bring to bear any such pressure as they thought would serve their purpose. But it is not unimportant to consider, in light of the information available, what, apart from the virtual confiscation of N.V.'s German businesses, may be implied in the phrase " other steps adverse to the interests of N.V."

The schedule giving the list of contracts for the building of ships for the purposes of the " extraction process " shows that, by the end of 1935, twenty contracts had been placed for the construction of forty-seven ships of a total tonnage of 249,710 tons. From the beginning of 1936 to Oct. 31, 1936, when the last contract was placed, thirteen more contracts were placed for the building of twenty-one ships, no less than thirteen of which were tankers of 14,500 tons or more. The total tonnage covered by these last thirteen contracts was 213,757 tons. I shall return to this matter later. For the moment, I say no more than that it appears to me to be a reasonable inference that the interruption of the " extraction process " at this point would have been a " step adverse to the interests of N.V." Before the proposal was accepted in principle, Mr. Rykens was made aware of two other points on which the German government insisted: (i) that the whaling fleet, when built, should be chartered to a new company to be formed, in which N.V. would have no more than a 50 per cent. interest, and (ii) that the fleet should not be transferred from the German flag without the consent of the German government. Dr. Schacht had refused to agree to N.V.'s proposal that the whaling fleet should be registered under the Dutch flag. Mr. Rykens was also aware that the German government was prepared to grant a subsidy towards its construction. Again, to quote his own words, Mr. Rykens says:

> This subsidy it was decided to accept because otherwise the cost of construction in Germany would have been wholly uneconomical.

This appears to imply that with the subsidy, the amount of which is given as Rm. 2,295,570 as against the gross total of Rm. 9,767,921, both figures being in " inland marks," the proposal was not " wholly uneconomical," but here again no detailed information is vouchsafed, and, as will be seen, the gross figure included a sum of about £7,000 which N.V. were enabled to recoup themselves in sterling. The proposal having been accepted in principle, the formal contracts were dealt with by Mr. Thomas, a Dutch national, one of the principal Dutch members of the *praesidium*, who was in Germany at all material times until he was compelled to leave in 1940. The formal documents relating to the Unitas herself appear in the exhibits to his affidavit, beginning with a letter of May 8, 1936, written by Mr. Thomas and another director on behalf of Verkaufs, the building owners, and ending with a letter of confirmation dated May 27, 1936. The formal contract was not signed until Jan. 26, 1939. Again, I observe in passing that at the beginning of May, 1936, there were still unplaced seven contracts involving twelve ships, to be built for the purpose of the " extraction process," of a tonnage of 137,816 tons.

It is unnecessary to go through these documents in detail, but there are certain salient features to which I must refer. The Unitas was to be of 29,000 tons dead weight, and was to be built by shipbuilders at Bremen, with the expectation that the fleet was to be ready for the 1937-38 whaling season. The subsidy was to be for the same amount as had already been granted to the German rival concerns. The letter of May 8 contains two proposals to which I attach considerable importance. The first was that one of the foreign Unilever companies was prepared to advance amounts of foreign currency which might be required as part of the actual building costs for items supplied from abroad on condition that Verkaufs was allowed to replace such advances, plus a fair rate of interest, by deliveries of whale oil from the first whaling season at the world market price. In fact, it was admitted that no foreign currency at all was thus required for the actual construction of the vessel, and that the amount required for equipment purchased abroad was accurately estimated not to exceed £7,000. It is, of course, admitted that this sum would be amply covered by the proceeds of the first season's whaling. It follows that this programme was undertaken without any risk of losing sterling or guilders, and at a time, as has already been pointed out, when the " extraction process " was still in operation. Next, Verkaufs undertook that its foreign companies were prepared to advance such costs of running the whaling expeditions as had to be paid in foreign currency, which likewise might be recouped by deliveries of whale oil from each year's catch at the world market price. It was also stipulated that, in general, Verkaufs should in no way be treated less favourably than their rivals already referred to. In accordance with the arrangement that the whaling fleet should be chartered to a new company, in which Verkaufs had not a controlling interest, the Unitas company was formed on Sept. 24, 1937, to carry on whaling, to undertake all business connected with whaling, and to process and utilise all products obtained from whaling. The capital was Rm. 1,000,000, subscribed as to Rm. 486,000 by Verkaufs and as to the balance by German interests. Mr. Thomas was one of the directors appointed by Verkaufs. The chairman, J. H. Mohr, was a Hamburg merchant. The charterparty is actually dated Feb. 24, 1938, but shows that, in fact, the Unitas was handed over to the Unitas company immediately she was delivered to Verkaufs on Sept. 23, 1937, and that the other vessels of the fleet were similarly handed over on Oct. 10, 1937. In this sense, as Mr. Thomas says, N.V., through Verkaufs, parted with the actual possession and control of the fleet, on completion, about two years before war broke out. The charter was for ordinary whaling operations in Antarctic waters, with permission to the charterers to use the fleet temporarily for the transport of soft oils and for storage of soft oils, or to allow a similar use by third parties. They were not, however, permitted to allow the fleet to be used by third parties for whaling purposes. Article 9 provided that the vessels should not be used except for legally permitted voyages, and that no voyage should be undertaken that exposed the vessels to danger of confiscation, seizure or capture. By art. 10, areas endangered by war were to be avoided at all costs, and Verkaufs was entitled to demand that the vessels be used in a way that precluded any war risks affecting them, and the provisions of art. 9 were made particularly applicable to perilous areas and war risk. The charter for the entire fleet was to end on Sept. 20, 1940.

In the two concluding paragraphs of his affidavit Mr. Rykens contends that the building of the whaling fleet was undertaken involuntarily. He says that, although his conferences with Dr. Schacht and Herr von Ribbentrop were conducted in a courteous manner, he was never left in any doubt as to the reality of the threats lying behind their proposals, and that he has no doubt at all that, if N.V. had not agreed to the building of the whaling fleet in Germany for operation under the German flag, steps would have been taken to confiscate or render valueless N.V.'s assets in Germany and to restrict to the minimum any further carrying on of business by N.V. in Germany. He submits that N.V. was forced by the German government into a position in which they had no alternative but to comply with the German government's demands. He draws attention to the difference between the circumstances in which the Unitas and the whale catchers came to be constructed in Germany and those in which the ships for export were constructed under the " extraction process." The latter, he admits, were built voluntarily by N.V. as part of a consistent policy of restricting and reducing N.V.'s interests in Germany, but he says that the whaling fleet was built " *only* as the result of the direct pressure by the German government." The rival arguments may be summarised shortly as follows. For the Crown it is argued (i) that in the case of a ship the enemy flag is *prima facie* decisive of her enemy character, and that, if there be special exceptions to this rule, there is nothing in the facts of this case to warrant the making of an exception ; (ii) that the ship is condemnable as enemy property. The claimants, while admitting that the flag under which she sailed is an important consideration, argue that the Unitas was placed under the German flag involuntarily and under duress. Secondly, they seek to apply in their favour the principle of *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co. (Gt. Britain), Ltd.* (6), and assert that " the whole and sole ownership " in the ship " in every real and business sense " was in N.V. : see *The St. Tudno* (7) *per* Sir Samuel Evans, P. ([1916] P. 297). To this second contention the Crown replies, first, that the allegation of duress is inconsistent with the allegation of " whole and sole ownership in every real and business sense." Apart from this allegation of inconsistency, it submits as a matter of principle that the decision in the *Daimler* case (6) is applicable in prize only in favour of the Crown and not of the claimants, and that the argument of the claimants would mean allowing the nationality of shareholders in the company owning the vessel (and in this case shareholders twice, thrice, or even, as regards N.V., four times removed) to determine her character and ownership, and, further, that, if the decision in the *Daimler* case (6) is applicable as the claimants contend, the result would be that Verkaufs was a house of trade of N.V. in Germany, that the Unitas was a concern of that house of trade, and that N.V. on the outbreak of war did nothing whatever to dissociate themselves from that house of trade or its concerns.

I will deal first with the question of the flag. In PRATT'S edition of STORY ON PRIZE COURTS the proposition is thus stated at p. 61 :

> Ships are deemed to belong to the country under whose flag and pass they navigate, and this circumstance is conclusive upon their character.

But at p. 62 the author adds :

> When, however, it is said that the flag and pass are conclusive on the character of the ship, the meaning is this : that the party who takes the benefit of them, is himself bound by them ; he is not at liberty, when they happen to turn to his disadvantage, to turn round and deny the character which he has worn for his own benefit, and upon the credit of his own oath or solemn declarations ; but they do not bind other parties as against him ; other parties are at liberty to show that these are spurious credentials, assumed for the purpose of disguising the real character of the vessel ; and it is no inconsiderable part of the ordinary occupation of a Prize Court, to pull off this mask, and exhibit the vessel so disguised in her true character of an enemy's vessel.

The Vigilantia (8) is cited in support of both propositions, and the later passage is taken from *The Fortuna* (9). In *The Vrow Elizabeth* (10) SIR WILLIAM SCOTT said (5 Ch. Rob. 4, 5) :

> . . . I hold the claim to be also against the established rules of law ; by which it has been decided that a vessel, sailing under the colours and pass of a nation, is to be considered as clothed with the national character of that country. With goods it may be otherwise, but ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character, with which they are so invested, to the exclusion of any claims of interest, that persons living in neutral countries may actually have in them.

In laying down the rule, SIR WILLIAM SCOTT said that there might be cases of such particular circumstances as to raise a reasonable distinction. He instanced the case where, because the governments of France and Holland had refused, in breach of the Treaty of Amiens, to allow British property to be withdrawn from certain islands otherwise than in ships of France and Holland, and on destination to those countries, the British government had permitted British ships to put themselves under the Dutch flag for this particular purpose. He added that in such cases the particular situation of affairs arising out of this refusal to execute the treaty might have entitled such parties to a relaxation of the general rule (*ibid.*, 7, and note (*a*) thereto). The same principles were applied by SIR SAMUEL EVANS, P., in the first world war : see *The Tommi* (11), and *The Hamborn* (12). In *The Hamborn* (12) SIR SAMUEL EVANS, P., stated the rule thus ([1918] P. 22).

> It is a settled rule of prize law, based on the principles upon which courts of prize act, that they will penetrate through and beyond forms and technicalities to the facts and realities. This rule, when applied to questions of the ownership of vessels, means that the court is not bound to determine the neutral or enemy character of a vessel according to the flag she is flying, or may be entitled to fly, at the time of capture. The owners are bound by the flag which they have chosen to adopt ; but captors as against them are not so bound.

He then cited the passage from STORY already referred to. The criticism of this passage on appeal ([1919] A.C. 995), when SIR SAMUEL EVANS, P.'s judgment was affirmed by the Privy Council, does not affect the validity of the principle, but only its applicability to the facts of the particular case. The only two exceptions to which my attention has been drawn are *The Palme* (13) and *The Taxiarchis* (14), both referred to in WHEATON'S INTERNATIONAL LAW, Vol. II, 7th ed., pp. 152, 153. These were both cases of vessels whose country had no maritime flag, a particular circumstance which bears no resemblance to the present case. With regard to such cases, however, the editor of WHEATON, Professor Keith, says (*ibid.*, 153):

> It is not at all clear that even in such a case as this English law would have deviated from its rule that the flag is decisive against the owners.

The editor of OPPENHEIM'S INTERNATIONAL LAW, 6th ed., says (Vol. II, p. 223, note 1), that the circumstance that the vessel was compelled to fly the flag of a maritime state would make no difference to the general rule. A

Admittedly, the case of alleged duress has never arisen as a "particular circumstance" to raise a reasonable distinction. It is manifestly unnecessary to consider whether the handing over of a ship to be sailed under an enemy flag by reason of duress to the person of the true owner would be a particular circumstance, because nothing of the sort is alleged to have occurred. What is asserted is that the building of the Unitas as a German ship was brought B about by duress of goods under the threat, unexpressed but by no means imaginary, of the confiscation of N.V.'s German property. In support of this contention, reliance was placed on the decision of the Court of Appeal in *Maskell* v. *Horner* (15) *per* LORD READING, C.J. ([1915] 3 K.B. 118) citing *Atlee* v. *Backhouse* (16), and it was argued that the same principle should be applied in prize. But that was a case of payment of money under duress of goods; this is a case of making a series of contracts, and it is well settled in English law that C duress of goods, as distinct from duress of person, does not avail to avoid a contract: see BULLEN AND LEAKE, PRECEDENTS OF PLEADINGS, 3rd ed. (1868), p. 49.

In *Oates* v. *Hudson* (17) PARKE, B., said (6 Exch. 348):

> In *Atlee* v. *Backhouse* (16) it is correctly laid down, that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; but that D where a sum of money is paid simply to obtain possession of goods which are wrongfully detained, that may be recovered back, for it is not a voluntary payment.

Even assuming, however, that duress of goods would suffice in prize law as distinct from municipal law, I will examine, first, by themselves, the arrangements for the construction of the Unitas. It is said that there was nothing to be gained by N.V., but I would observe that it was their deliberate policy, with a view to restricting the accumulation of "inland marks," to invest them E through their subsidiaries in the purchase of German businesses. Regarded solely as an investment of "inland marks" in a German business, I have been given no reason to suppose that the building of a whaling fleet was not a sound business proposition. One fact which admittedly had some influence with N.V. was that their trade rivals, presumably because it was to their advantage to do so, had undertaken to build whaling fleets. Moreover, save for the equipment to be paid for in sterling, for which, as has already been stated, F they could very easily recoup themselves in sterling, only "inland marks" were to be employed in the construction. I have not been informed whether the fleet was, in fact, completed in time for the 1937-38 season, a point on which the German government laid great stress and for which they offered every facility, and, therefore, whether there were two seasons, or only one, with, perhaps, part of another, before the outbreak of war made whaling in the G Antarctic impossible. Nor have I had any evidence whatever to suggest that the whaling operations were anything but satisfactory and profitable. Seeing that almost the whole of the cost of building the Unitas was provided out of "inland marks," that the German government contributed a subsidy of 30 per cent., and that it was stipulated that in general Verkaufs were not to be treated any less favourably than the whaling companies founded by their rivals, either as regards the carrying out of operations or the utilisation of the H profits obtained—and there is no evidence that these conditions were not faithfully observed in peace-time—it does not seem to me that there was anything inherently unreasonable in the German government requiring that the ship should be a German ship, that she should be chartered to a German company in which German nationals held a controlling interest, and that the whaling fleet should not be sold or chartered outside Germany without the Ministry's consent. Even if the project is to be considered on its own merits, I am far from convinced that it bore signs of being concluded under duress.

I am, however, unable to accept the submission that it is to be treated in
isolation, or that, as Mr. Rykens asserts, the fleet was built "only as the result
of direct pressure by the German government." On the contrary, it seems
to me that the decision to accept the proposal of the German government
must have had a close connection with the "extraction process." In one sense,
of course, they were essentially different projects, in that the one did, while the
other could not, result in the extraction of "blocked marks" from Germany,
A but, as I have already shown, at the beginning of 1936, when the project of
building a whaling fleet became the subject of serious consideration, the building
of ships under the "extraction process" was very far from complete. Having
regard to the proportion of tonnage for which contracts were yet to be placed,
namely, 213,757 tons, out of a total tonnage of 463,467 tons, it seems to me
to be a reasonably plain inference that a large part of the £7,500,000 yet remained
to be extracted, and the fact that it is admitted that 2,000,000 "blocked marks"
B were extracted between Dec. 31, 1938, and Dec. 31, 1939, which presumably
must have occurred during the eight months before the outbreak of war, appears
to show that the "extraction process" never wholly ceased to be effective.
It was argued that I had no right to draw any such inference because other
methods of extracting the "blocked marks" might be in operation. I offered
the claimants the opportunity of proving that any other effective method was
C in operation, but the offer was declined. I do not hesitate, therefore, to draw
the inference that early in 1936 the advantage of continuing the "extraction
process" without interruption must have been in the minds of those directing
the policy of N.V., and that the risk of this benefit being withdrawn cannot
fail to have been a potent inducement to accept the proposal of building the
whaling fleet. Putting it at its very lowest, the claimants have provided no
evidence which satisfies me that this was not the case. In my view, there
D is no particular circumstance which takes this case out of the general rule that
the enemy character of the ship is determined by her flag.

Mr. Rykens complains that from the first introduction in 1931 of restrictive
financial legislation the freedom of N.V. to exercise unfettered control over
their businesses in Germany was seriously jeopardised, but traders, whether
in foreign countries or in their own, are subject to the restrictive financial
legislation of the country in which they trade, nor is there anything novel
E in the idea of some measure of discrimination in favour of native as against
foreign traders or in the attempt to overcome such difficulties by setting up an
organisation in accordance with the municipal law of the country concerned. I
do not doubt that, with the coming of a totalitarian regime in Germany, trading
conditions became more precarious for foreigners carrying on business there,
nor, as I have already said, that the German government would hesitate to
F bring any such pressure to bear as they thought would serve their purpose,
but when it is insisted that this is a case of extreme hardship I feel obliged to
say that I am concerned, not with that, but with the strict administration of
the law of prize. Hardship is a matter for the bounty of the Crown, but, after
all, it is quite clear from the evidence that, after the advent of the Nazi regime,
N.V., so far from curtailing their trade in Germany, were expanding it by
investing their accumulated profits in "inland marks" in what are described
G as "comparatively safer investments" in Germany. Presumably, they did
so because they thought it was the best policy for themselves, and, incidentally,
for their British associates, who were equally interested, so to do. This policy
still prevailed in 1936. In that year they were, as has been seen, still engaged
in the "extraction process," a scheme which, while it was of considerable
advantage to N.V., was also saving the German government foreign exchange.
If, therefore, the desire to continue this process provided, as I infer that it did,
H some part at least of the inducement to participate in the German government's
whaling schemes, which would not only provide that government with a whaling
fleet without the expenditure of foreign currency, but would necessarily result
in augmenting the provision of substitutes for the butter which they were
openly proclaiming to the world was, figuratively speaking, being turned into
guns, it is hardly a matter for surprise that the Crown should insist on its strict
rights when the fortunes of war brought about the capture of this ship in a
German port. But, however that may be, I am prepared to decide this case
on the basis that the flag is decisive of her enemy character. In *The Endraught*

(18) one of the group of cases governed by *The Vigilantia* (8), SIR WILLIAM SCOTT said (1 Ch. Rob. 20):

> If the claimant from views of interest chose to engage himself in the trade of a belligerent nation, he must be content to bear all the consequences of such a speculation.

That sentence seems to me to apply to this case.

Nevertheless, out of deference to the argument on the other points raised, I will express my opinion about them. As regards the principle of the *Daimler* case (6), it was argued that this must be applicable in favour of the claimants because otherwise the Unitas could have been condemned in a German prize court after the German conquest of Holland on the ground that in every real and business sense the whole and sole ownership of the vessel was Dutch: *The St. Tudno* (7); while, at the same time, the Crown seeks to obtain condemnation in a British prize court. To this curious argument there seem to me to be two answers: (i) that the German government, having taken every precaution to ensure that the Unitas was owned, registered and managed in Germany and that no change should be made in this respect without their express consent, could have no object in bringing her before a German prize court, nor is there the slightest suggestion that they did so. On the contrary, the evidence is that she was treated during the war as a German ship. It is true that on July 5, 1941, a Reich commissioner for the management and control of N.V. was appointed, but this does not affect the point. (ii) if the Unitas had duly been condemned by a German prize court, her status would thereby have been determined in face of the world. Therefore, if she subsequently came before a British prize court, her case would fall to be dealt with, not in spite of, but in light of, the fact that she had already been condemned to the German government by a court of competent jurisdiction. In my opinion, there is no authority for applying the principle of the *Daimler* case (6) in favour of claimants in prize, though it is clearly applicable in favour of the Crown: *The Glenroy* (19) ([1945] A.C. 137). Moreover, it seems to me that it would be contrary to settled principle to do so. The allegation that the " whole and sole ownership " of the Unitas resides in N.V. depends on the fact that N.V. indirectly hold all the shares in Verkaufs. In my opinion, this claim is untenable. In *The Primus* (20) DR. LUSHINGTON, during the Crimean War, said (1 Ecc. & Ad. 354):

> . . . not only the authority of LORD STOWELL, but every argument he used, go the whole length of saying, that whoever embarks his property in shares of a ship, is bound by the character of that ship, whatever it happen to be. If he reap the benefit accruing during peace, he must also take the consequence of war.

In *The Pedro* (21) FULLER, C.J., delivering the judgment of the majority of the court, said (175 U.S. 367, 368):

> It was argued that the Pedro was not liable to capture and condemnation because British subjects were the legal owners of some and the equitable owners of the rest of the stock of La Compania La Flecha, and because the vessel was insured against risks of war by British underwriters. But the Pedro was owned by a corporation incorporated under the laws of Spain; had a Spanish registry; was sailing under a Spanish flag and a Spanish licence; and was officered and manned by Spaniards. Nothing is better settled than that she must, under such circumstances, be deemed to be a Spanish ship and to be dealt with accordingly. STORY ON PRIZE COURTS (Pratt's ed.), pp. 60, 66 and cases cited. *The Friendschaft* (22); *The Ariadne* (23); *The Cheshire* (24). HALL ON INTERNATIONAL LAW, para. 169.

Moreover, this principle was recognised by SIR SAMUEL EVANS, P., in *The Marie Glaeser* (25). It was suggested in the course of the argument that the word " shareholders " was used in that case to describe the part-owners of the vessel. I have now seen the record and it is clear that the claim was made on behalf of shareholders in the company owning the vessel. The confusion may have arisen from the fact that, as the share certificate of one of the claimants shows, the limited liability company owning the ship was named after her. See also the BRITISH YEAR BOOK OF INTERNATIONAL LAW, 1927, p. 164, to the same effect. As I do not find that duress is proved, I need not deal with the argument that it is inconsistent with the allegation that the whole and sole ownership resided in N.V.

That brings me to the last point, the position of Verkaufs as a house of trade. The principle is stated in STORY ON PRIZE COURTS, pp. 60, 61, as follows:

> So if the agency [*i.e.*, an agent stationed in a belligerent country] carry on a trade from the hostile country, which is not clearly neutral, and if a person be a partner in a house of trade in an enemy's country, he is, as to the concerns and trade of that house, deemed an enemy; and his share is liable to confiscation as such, notwithstanding his own residence is in a neutral country, for the domicile of the house is considered in this respect as the domicile of the partners.

But a neutral having such a commercial domicil in a country which becomes an enemy is, on the outbreak of war, according to the views held by British courts, allowed a reasonable interval during which he can discontinue or dissociate himself from the business in question: *The Anglo-Mexican* (26) ([1918] 2 A.C. 425, 426). See also *The Glenroy* (19), where LORD PORTER, delivering the opinion of the Privy Council, said ([1945] A.C. 141):

> In a sense it is a hardship, but the neutral is given a *locus pœnitentiae* if he withdraws from the business carried on in the enemy country, and he may well be called on to elect not to continue to assist the trade of the enemy as the price of rescuing his goods from condemnation.

It is argued that there was nothing that N.V. could do, and that prize law, like English law, does not compel the doing of the impossible. Reliance is placed on the fact that all the German directors resigned from N.V. after the outbreak of war between Germany and this country. So, apparently, did the British directors—at any rate, the chairman did so. Admittedly, N.V. could do nothing after the invasion of Holland, but it is clear that during the time when Holland was neutral Mr. Thomas, a principal member of the *praesidium*, was still in Germany. But although he has sworn an affidavit in support of this claim, there is not the slightest suggestion that he, or anyone else on behalf of N.V., did anything to dissociate N.V. from the activities of their subsidiaries in Germany, even, for instance, by insisting on a strict compliance with arts. 9 and 10 of the charterparty quoted above. During the war it is true that on Oct. 26, 1943, the British company wrote a letter to the Ministry of War Transport claiming that this whaling fleet, and another with which I am not concerned, were not German owned and should not be considered as available for reparations, but that does not seem to me to affect the point that at the time when N.V. were still neutral they did nothing to dissociate their organisation in Germany from the taint of enemy character or to make plain to the British government where they stood.

For these reasons this claim, in my opinion, fails, and the Unitas should be decreed to be good and lawful prize, and I give judgment accordingly.

Judgment accordingly. No order as to costs.

Solicitors: *Simpson, North, Harley & Co.* (for the claimants); *The Treasury Solicitor* (for the Procurator-General).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

EDWARD H. LEWIS & SON, LTD. *v.* MORELLI & ANOTHER.

[KING'S BENCH DIVISION (Denning, J.), February 12, 13, 16, 1948.]

Landlord and Tenant—Lease—Determination—Forfeiture—Lessee enemy alien abroad—No person authorised to pay rent or perform covenants—Re-entry by grant of weekly tenancy to another tenant.

In 1926 the landlord let to A, an Italian, for a period of 21 years, certain premises, consisting of a restaurant and dwelling-rooms, which were occupied by B, who managed the business as A's agent or partner. In 1939 A went to Italy and was resident there on June 10, 1940, when war broke out between Great Britain and Italy. The premises were then let by the landlord to B on a weekly tenancy. In 1945 the landlord gave B notice to quit, but B continued in possession. A returned from Italy in 1946, and, on the expiration of the term of years originally granted to him, the landlord brought an action against A and B for recovery of possession of the premises:—

HELD: on the outbreak of war with Italy, A became an alien enemy and the contract between him and B, whether it was one of agency or one of partnership, was dissolved and there was no one in this country authorised to pay the rent or perform on behalf of A the covenants in the lease;

the landlord, therefore, was in a position to forfeit the lease and his action in granting and continuing a tenancy to B was in law a re-entry which effected a forfeiture; but, as between the landlord and B, there was a tenancy which was protected by the Rent Restrictions Acts and the landlord was not entitled to recover possession from her.

[As to Forfeiture of a Lease, see HALSBURY, Hailsham Edn., Vol. 20, pp. 246, *et seq.*; paras 278, *et seq.*; and for Cases, see DIGEST, Vol. 31, pp. 460, *et seq.*, Nos. *6077*, *et seq.*] A

Cases referred to:

(1) *Wallis* v. *Hands*, [1893] 2 Ch. 75; 62 L.J.Ch. 586; 68 L.T. 428; 31 Digest 518, *6656*.

(2) *Morton* v. *Woods*, (1869), L.R. 3 Q.B. 658; 9 B. & S. 632; 37 L.J.Q.B. 242; *affd.*, (1869), L.R. 4 Q.B. 293; 38 L.J.Q.B. 81; 21 Digest 250, *752*.

Action tried by Denning, J.

B In 1926 the landlords, Edward H. Lewis & Son, Ltd., let premises known as 39, Floral Street, Covent Garden, and consisting of a restaurant and living accommodation to the first defendant, Guilio Morelli, an Italian, for 21 years from Mar. 25, 1926, at a rent of £325 a year, the lease containing a proviso for re-entry in the event of breach of covenant by the tenant. Morelli did not occupy the premises himself, but he let into occupation one Cura who conducted the restaurant business as Morelli's agent or partner and lived in the rooms C above the restaurant. Cura paid the rent to the landlords. In 1931 Cura died and his widow, the second defendant, in his place conducted the business and paid the rent of the premises on behalf of Morelli. In 1939 Morelli went to Italy and he was residing there on June 10, 1940, when war broke out between Great Britain and Italy. Business being difficult at that time Mrs. Cura approached the landlords who purported to grant her a weekly tenancy of the premises commencing on June 24, 1940, at a rent of £4 14*s*. 9*d*. (later reduced to £4 4*s*) D a week. In 1945 the landlords gave Mrs. Cura notice to determine "your tenancy." She, however, remained in possession. In July, 1946, Morelli returned to England and claimed that his lease was still in existence. The lease having expired on Mar. 25, 1947, the landlords brought this action, claiming possession of the premises. Morelli did not defend and judgment was entered against him. Mrs. Cura resisted the claim on the ground that she was protected by the Rent Restrictions Acts. The landlords, in reply, pleaded that Mrs. Cura E had never had a tenancy of her own at the conclusion of which she had held over and so could not claim the protection of the Acts.

Rees-Davies for the landlords.

The first defendant did not appear.

Jukes for the second defendant.

F **DENNING, J.,** stated the facts and continued: The real question is whether the lease granted by the landlords to Morelli remained in existence after June 1940. If it did, the tenancy which the landlords purported to grant to Mrs. Cura would be invalid, because the landlords had no estate which would entitle them to grant such a tenancy, but, if the lease did not remain in existence, there is no reason to impeach the validity of the tenancy. Counsel for Mrs. Cura has argued that the lease to Morelli came to an end in June, G 1940, there being, on the grant of a tenancy to Mrs. Cura, a surrender by operation of law of the lease granted in 1926 to Morelli. I do not think that it came to an end on that ground, if for no other reason than that there was no assent by Morelli, which would be essential for such a surrender: see *Wallis* v. *Hands* (1); but I do think that the outbreak of war with Italy made a great difference in the legal position. Morelli became an alien enemy, and the outbreak of war dissolved the contract between him and Mrs. Cura, for, whether H it was a contract of partnership or of agency, its continuance would involve communication with an alien enemy. Once that contract was dissolved, there was no one in this country authorised to pay the rent or perform the covenants in the lease on behalf of Morelli, and any attempt by him to authorise someone to do so would be illegal because that also would involve communication with an alien enemy. The landlords, therefore, after the outbreak of war with Italy, became in a position to forfeit the lease and their action in granting and continuing a tenancy to Mrs. Cura was in law a re-entry which effects a forfeiture.

They ought, it is true, to have obtained the leave of the court under the Courts (Emergency Powers) Act, 1939, and to have made the Custodian of Enemy Property a party to the application, but I think that no one except the Custodian could raise that point. At any rate, as between the landlords and Mrs. Cura, there was an estoppel preventing that point being raised: see *Morton* v. *Woods* (2), *per* BLACKBURN, J. (L.R. 3 Q.B. 670). In my judgment, therefore, as between the landlords and Mrs. Cura there was a tenancy, Mrs. Cura is protected by the Rent Restrictions Acts, and judgment must be entered for her.

Judgment for the second defendant with costs.

Solicitors: *Burton, Yeates & Hart* (for the plaintiffs); *Cochrane & Cripwell* (for the second defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

KAFTON *v.* KAFTON.

[COURT OF APPEAL (Tucker, Bucknill and Cohen, L.JJ.), February 12, 13, 16, 1948].

Divorce—Cruelty—Condonation—Revival—Desertion for less than 3 years—Condonation and desertion not pleaded—Adjournment of hearing and amendment of pleadings—Corroboration of cruelty.

Cruelty which has been condoned may be revived as a matrimonial offence by subsequent desertion, and for this purpose desertion for 3 years need not be established.

Beard v. *Beard* ([1945] 2 All E.R. 306; 174 L.T. 65), *applied.*

Per TUCKER, L.J.: (i) It is not necessary that condonation should always be pleaded, but failure to plead condonation does not relieve the judge of the duty of investigating that question if there is any material indicating the possibility of the existence of condonation. Where condonation has not been pleaded, but it appears from the evidence that there are matters which will require investigation in that connection, and still more so when it becomes apparent that there may be an answer to the allegation of condonation in the shape of a revival of the condoned offence, it is highly desirable that the judge should indicate to counsel the nature of the issues which appear to him to be arising, and, if necessary, adjourn the case or allow the pleadings to be amended so as to raise those issues.

(ii) The requirement by the court of corroboration where cruelty is alleged is merely a matter of practice, and not a rule of law, and it has never been decided that the court is not entitled in a proper case, where it is in no doubt where the truth lies, to act on the uncorroborated testimony of the petitioner.

Per COHEN, L.J.: the need of corroboration is necessarily greater in an undefended case than in a defended case where the evidence of the petitioner, though uncorroborated, is tested by cross-examination and can be measured against the evidence given on the other side.

[AS TO REVIVAL OF OFFENCES AFTER CONDONATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 680, 681, paras. 1006, 1007; and FOR CASES, see DIGEST, Vol. 27, pp. 343-347, Nos. *3236-3285*.]

Cases referred to:

(1) *Beard* v. *Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 2nd Digest Supp.

(2) *Lloyd* v. *Lloyd and Hill*, [1947] 1 All E.R. 383; [1947] P. 89; [1948] L.J.R. 85.

(3) *Beer* v. *Beer* (*Neilson cited*). *Beer* v. *Beer and Neilson*, [1947] 2 All E.R. 711; [1948] P. 10.

(4) *Judd* v. *Judd*, [1907] P. 241; 76 L.J.P. 120; 98 L.T. 59; 27 Digest 292, *2678*.

APPEAL by the husband from an order of MR. COMMISSIONER BLANCO WHITE, K.C., made on July 10, 1947, granting the wife a decree *nisi* of divorce. The wife alleged acts of cruelty extending from 1931 to 1940. From 1940 to 1943 sexual intercourse regularly took place between the parties, but in January, 1944, less than 3 years before the presentation of the petition, the husband deserted the wife. Neither condonation nor desertion were pleaded. The husband appealed on the grounds (*a*) that desertion for less than 3 years did not revive the condoned acts of cruelty; (*b*) as condonation and desertion were not pleaded, counsel had not been afforded adequate opportunity of arguing those matters; (*c*) the commissioner had not given sufficient weight to the desirability of corroboration of the evidence of cruelty. The Court of Appeal held that (*a*) the acts of cruelty had been revived; (*b*) condonation and desertion had been thoroughly investigated at the trial; (*c*) there was sufficient corroboration; and dismissed the appeal. The facts appear in the judgment of Tucker, L.J.

Gallop, K.C., and *Simon* for the husband.
R. F. Levy, K.C., and *C. Lawson* for the wife.

TUCKER, L.J.: The parties were married on June 21, 1931, and on Aug. 28, 1934, a son, Eric, was born. On Apr. 26, 1946, the wife lodged this petition in which she charged her husband with cruelty. The learned commissioner found that there had been acts of cruelty from 1931 down to and including 1940. The year 1940 brought a marked change in the married life of these two people, because, owing to the air attacks, the wife and her son went to Buxton, where she appears to have carried on her dressmaking business. She remained at Buxton from 1940 until 1944. She used to visit her husband in London about once a month and during those visits sexual intercourse took place regularly between them until October, 1943, when she did not come to London. The husband appears to have been suspicious and a few days before Christmas he went to Buxton and had an interview with her at which, he says, she admitted that she had been associating with men, as she said, "merely for company's sake." There was a scene. He accused her of consorting with prostitutes, and he left her and intimated that he would never make a home for her again. It would appear from that recital of the facts that all the cruelty down to 1940, if established, had been condoned by the regular intercourse that the parties had in 1941, 1942 and 1943, and, therefore, to avail herself of the previous acts of cruelty, it was necessary for the wife to establish fresh acts after October, 1943, which amounted to cruelty taken in conjunction with the husband's previous conduct. Only two incidents of that kind were alleged and it is clear from the evidence that it was left in considerable doubt whether one of those episodes took place in January, 1943, or January, 1944. There is no finding by the commissioner as to the date at which that incident took place, and no finding by him that the condoned cruelty was revived by any act of cruelty after October, 1943. The commissioner, however, came to the conclusion that the husband had deserted his wife from January, 1944, down to the date of the petition and that that breach of matrimonial duty revived the previous acts of cruelty which he had found proved.

The first ground for this appeal was that we ought to order a new trial because neither condonation nor desertion was pleaded and counsel were given no opportunity either to call evidence relevant to those issues or to argue those points before the commissioner. The commissioner, in his judgment, said:

> I am satisfied that the respondent was guilty of cruelty substantially as alleged in paras. 10, 11, 12, 13, 14 and 15 of the petition. Then one comes to the later stage, [January, 1944] when the husband was not so much guilty of cruelty as of desertion, but at that time I am satisfied that the husband deserted the wife and that revived the cruelty which the wife had long ago condoned.

It has been decided by this court in *Beard* v. *Beard* (1) that to revive a previous matrimonial offence which has been condoned it is not necessary to establish desertion for the full period of 3 years, but that desertion for a shorter period will suffice. *Beard* v. *Beard* (1) dealt with the revival of condoned adultery and counsel for the husband formally took the point that it was wrongly decided so that he might argue the point elsewhere. I think it is clear that no distinction can be drawn between the present case and *Beard* v. *Beard* (1), and that the reasoning of the judges in that case applies equally to a case of cruelty as to a case of adultery.

Counsel for the husband asked in the alternative for a new trial in order that the issues of desertion and condonation should be gone into. As I have said, desertion was not alleged in the petition, and I deal with the case on the basis that neither desertion nor condonation was pleaded. It is not necessary that condonation should always be pleaded, but failure to plead condonation does not relieve the judge of the duty of investigating that question if there is any material indicating the possibility of the existence A of condonation. It is his duty to be satisfied, before he grants a decree, that there has been no condonation. I think that what was said by HODSON, J., in *Lloyd* v. *Lloyd and Hill* (2) represents a practice which should be followed wherever this question arises. He said ([1947] P. 91):

> When the case came to be heard it became apparent that it would be the duty of the court to ascertain whether or not condonation existed so as to be a bar to the relief claimed, and that the court at any rate could not be confined to the pleadings. B There was a good deal of ground to be covered, because since January, 1946, until today many months have passed and a good many things have happened which, it now appears, have a bearing on this question of condonation and revival. Therefore, through their counsel, I invited the parties to investigate these facts on my behalf, indicating that if anything arose in the nature of new matter I would deal with it, if necessary, by adjourning the case so that the new matter might be considered if it came as a surprise. But no application of that kind has been made, and the ground C has been covered, not only up to the date of the petition, but right up to the date of the hearing, by evidence on both sides. When the situation became plain to the co-respondent's advisers the co-respondent and the respondent themselves came and gave evidence, the latter on behalf of the co-respondent. So, as I say, I have had evidence on both sides.

That, I think, is the proper course to be taken. When condonation has not been pleaded, but it appears from the evidence that there are matters which D will require investigation in that connection, and still more so when it becomes apparent that there may be an answer to the allegation of condonation in the shape of a revival of the condoned offence, it is highly desirable that the judge should indicate to the counsel concerned in the case the nature of the issues which appear to him to be arising and calling for his decision, and, if necessary, adjourn the case or allow the pleadings to be amended so as to raise those issues. It is unfortunate that that course was not taken in this E case. None the less, it is necessary to investigate the evidence that was called at the trial, because it would be idle for this court to order a new trial if it was apparent that on all the available evidence there was only one conclusion which could be reached.

[HIS LORDSHIP considered the evidence, said that, in his opinion, in view of that evidence it would be wrong to order a new trial, and continued:—] Counsel for the husband has argued that, in any event, the judgment of the F commissioner ought not to stand. He said that this court could intervene on the ground, *inter alia*, that the commissioner had fallen into the error of not having sufficient regard to the desirability of corroboration in a case of this kind, and had treated as matters of corroboration things which did not amount to corroboration. It is true that in cases of cruelty it is the practice of the court to require corroboration, but it is not a rule of law. It is merely a matter of practice. There may be many cases in which it would be unsafe G to act without corroboration, but it has never been decided that the court is not entitled in a proper case, where it is in no doubt where the truth lies, to act on the uncorroborated testimony of the petitioner. I do not desire to be understood as saying anything to weaken the requirement that corroboration in these cases is highly desirable, but there may be cases in which the court feels that it can safely act without corroboration. In the present case, however, H I think there was some corroboration of some of the incidents spoken to by the wife and I can find no trace of the commissioner having misdirected himself as to what is required by way of corroboration or as to what amounts to corroboration. I have come to the conclusion that it would be impossible for this court to interfere with the finding of fact at which the commissioner has arrived, namely, that cruelty down to 1940 had been established, and for these reasons I think this appeal fails.

BUCKNILL, L.J.: I agree. The only point which has caused me some doubt during the hearing of the appeal is whether the husband really had a sufficient opportunity of dealing with the charge that he had deserted his wife without cause. After hearing all the evidence read on that point this morning, and after reading what the commissioner has said, I think that the matter was thoroughly thrashed out and I cannot see how, on the information —if one can call it information—which the husband had in January, 1944, as to his wife's conduct, he could possibly hope to establish that he had good grounds for leaving her. That he did leave her and that he meant to leave her in December, 1943, is clear from his own evidence and I think WILLMER, J., is correct in his judgment in *Beer* v. *Beer* (3) where he says that in cases of this kind the burden is on the husband of proving that his belief in his wife's guilt was sufficient to absolve him from the charge of desertion. This case illustrates once more the great importance of having issues defined carefully before a case comes on for trial. As regards the lack of corroboration, I think it is material to point out that, as the commissioner says in his findings, the wife never wanted to divorce her husband on the ground of cruelty. She wanted him to come back to her. It seems odd, if he was cruel to her, that there was no attempt on the part of the wife's family to build up a case against him. They were not thinking about divorce for cruelty at all and that may well explain the fact that nobody remembers exactly what happened with regard to some incidents.

COHEN, L.J.: I agree. I only desire to add one word on the question of corroboration. Accepting that it is the practice of the Divorce Division to require corroboration in cases of cruelty, as my Brother has pointed out, it is not a rule of imperative application. It is a matter within the discretion of the court or jury, if properly directed, in each case to convict even without corroboration. The need of corroboration is necessarily greater in an undefended case, such as *Judd* v. *Judd* (4), than in a defended case where the petitioner's evidence, though uncorroborated, is tested by cross-examination and can be measured against the evidence that is given on the other side. It is not necessary, however, to go into that point at length since I entirely agree with what has fallen from my Brethren, that there is a sufficient measure of corroboration to justify the conclusion to which the commissioner came. For these reasons I agree that the appeal fails.

Appeal dismissed with costs.

Solicitors: *Albin Hunt* and *Stein* (for the husband); *Thornton, Lynne* and *Lawson* (for the wife).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

R. *v.* GOVERNOR OF WORMWOOD SCRUBBS PRISON AND ANOTHER. *Ex parte* BOYDELL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Denning, JJ.), February 26, 27, 1948.]

Army—Emergency commission—Release from military duty during emergency subject to recall—Duration of subjection to military law—"Officer of regular forces"—"On active list"—Army Act, ss. 158 (1), 190 (8)*—Royal warrant for Pay, Appointment, Promotion and Non-Effective Pay of the Army,* 1940, *art.* 21*—Army Order* 83 *of* 1945.

By s. 175 (1) of the Army Act, the "persons subject to military law as officers" are "officers of the regular forces on the active list within the meaning of any royal warrant for regulating the pay and promotion of the regular forces . . ." Clause 21 of the royal warrant for regulating pay, promotion, etc., dated Feb. 29, 1940, defines "officers on the active list" as "officers of the regular forces whether on full pay, half pay or otherwise, before their retirement," and excludes "officers who have retired and are subsequently recalled . . . or re-employed . . ."; and s. 190 (8) of the Army Act, defines "regular forces" as "officers and soldiers who by their commission, terms of enlistment, or otherwise, are liable to render continuously for a term military service to His Majesty in every part of the world . . ." A royal warrant, Army Order 83 of 1945, authorised the release from military duty and transfer to the unemployed list (before the termination of the "present emergency") of an officer granted an emergency commission in the land forces for service with the regular army, with liability to be recalled, if and when required, until the end of the emergency. The order provided: "... an officer so released shall remain on the active list of our regular army while on the unemployed list, but shall not ... be entitled to army pay or other emoluments ... neither shall he be eligible to count any period served on such unemployed list towards increment of pay or promotion ... nor shall he be eligible for promotion during such period." Section 158 (1) of the Army Act provides that where an offence under the Act has been committed by any person while subject to military law, the offender may be taken into and kept in military custody and tried and punished even if he has since the commission of the offence ceased to be subject to military law, provided his trial (if for an offence other than mutiny, desertion or fraudulent enlistment) commences within three months after he has ceased to be subject to military law.

An officer holding an emergency commission was released from military duty on Dec. 15, 1945, and returned to his civilian employment. On Dec. 2, 1946, he was arrested by a provost officer, taken in custody to Germany, tried, convicted and sentenced to imprisonment by court-martial on a charge of conversion alleged to have been committed by him while subject to military law. On an application for a writ of *habeas corpus*:

HELD: (i) an officer released from military duty is not liable, during his release, to render military duty continuously, and, therefore, after such release he is not an "officer of the regular forces" within s. 190 (8) of the Army Act;

(ii) even if such a released officer could be held to be "an officer of the regular forces," to be subject to military law he must, under s. 175 (1) of the Army Act, be "on the active list" within the meaning of a royal warrant regulating pay and promotion, and the test whether or not an officer of the regular forces is "on the active list" is whether or not he receives pay;

(iii) Army Order 83 of 1945 was not a warrant for regulating pay and promotion, and the provision in it which declared that an officer, released as therein provided, should remain on the active list of the regular army was ineffective and contrary to the Army Act; and at the time of his arrest and trial, therefore, the applicant was not an officer of the regular forces on the active list and he was not subject to military law, and a writ of *habeas corpus* must issue to the governor of the prison in which he was detained and an order of *certiorari* made to bring up the conviction to be quashed.

[AS TO SUBJECTION TO MILITARY LAW, see HALSBURY, Hailsham Edn., Vol. 28, pp. 591, 592, paras. 1218, 1219; and FOR CASES, see DIGEST, Vol. 39, p. 325, Nos. *121, 122*.]

APPLICATION for *habeas corpus*.

On June 15, 1940, the applicant was granted an emergency commission for service in the regular army under reg. 159 of the King's Regulations and Appendix xxvi thereto. On Dec. 15, 1945, he was released from military duty under Army Order 83 of 1945 and returned to his civilian occupation. On Dec. 2, 1946, he was arrested and taken to Germany and there he was tried and sentenced by court-martial on a charge of conversion. He applied for an order of *certiorari* and for a writ of *habeas corpus* directed against the respondents, the governor of Wormwood Scrubbs prison and the Secretary of War, but leave was given only to apply for *habeas corpus*. The court now held that at the times of his arrest and trial the applicant was not an officer of the regular forces on the active list and so was not subject to military law. Accordingly, an order was made for the writ of *habeas corpus* to issue and the applicant was discharged. Leave was also given him to apply for an order of *certiorari*, and a peremptory order of *certiorari* was granted to bring up the conviction and quash it.

Peter Lewis for the applicant.

H. L. Parker for the respondents.

Cur. adv. vult.

Feb. 27. **LORD GODDARD, C.J.,** read the following judgment. Counsel for the applicant applied, on Feb. 12, for a writ of *habeas corpus* to bring up the body of Thomas Andrew Boydell, a prisoner in one of His Majesty's prisons, on the ground that he was illegally detained. The court adjourned the application for notice to be given to the governor of the prison and to the Secretary of State for War, both of whom appeared by counsel to oppose the issue of the writ. The prisoner is detained by virtue of the order and sentence of a court-martial which sat at Luneburg, in Germany, on May 19 and 20, 1947, and convicted and sentenced him to two years' imprisonment, a sentence which was afterwards reduced by the confirming officer to eighteen months. The question is whether the court-martial had jurisdiction to try the prisoner. He was granted an emergency commission on June 15, 1940, having previously served in the ranks of the army, pursuant to reg. 159 of the King's Regulations and appendix xxvi thereto. On Dec. 15, 1945, he was released from military duty under the terms of a Royal Warrant known as Army Order 83 of 1945, and from that date and in accordance with the terms of the warrant, all pay ceased and he was no longer allowed to wear uniform. He returned to his civilian occupation, but on Dec. 2, 1946, he was arrested at his house by a provost officer, taken in custody to Germany and there detained till sentenced by court-martial, as already stated. In the circumstances of his arrest he had no opportunity of applying either for bail, or, at that time, for a writ of *habeas corpus*. He contends that at the time both of his arrest and of his trial he was not subject to military law.

The case raises a question of the highest constitutional importance and affects a large number of His Majesty's subjects who were granted emergency commissions and who, if the contention of the Crown is correct, are still in this present year subject to military law and will remain so until the emergency, which, it is said, still exists, is terminated in some lawful manner. The court approaches this case fully conscious of the gravity of the issues raised.

The offences for which the prisoner was convicted were said to have been committed, and the court so assumes, while the prisoner was subject to military law, and it is, therefore, necessary, first, to refer to s. 158 of the Army Act, which reads as follows:

> (1) Where an offence under this Act has been committed by any person while subject to military law, such person may be taken into and kept in military custody, and tried and punished for such offence, although he, or the corps or battalion to which he belongs, has ceased to be subject to military law in like manner as he might have been taken into and kept in military custody, tried or punished, if he or such corps or battalion had continued so subject: Provided that where a person has since the commission of an offence ceased to be subject to military law, he shall not be tried for such offence, except in the case of the offence of mutiny, desertion, or fraudulent enlistment, unless his trial commences within three months after he had ceased to be subject to military law: but this section shall not affect the jurisdiction of a civil court in the case of any offence triable by such court as well as by court-martial, and the limitation of time imposed by this proviso shall not apply in the case of a person who has been attached to or seconded for service with His Majesty's military forces and has ceased to be subject to military law by reason only of the termination of such attachment or seconding.

The offence for which the prisoner was tried was not mutiny, desertion or fraudulent enlistment. The prisoner contends that he ceased to be subject to military law on his release in December, 1945, and, therefore, as more than three months had elapsed before his arrest and trial, the court-martial had no jurisdiction to try him.

Part V of the Army Act deals with persons subject to military law and by s. 175 (1) it is provided:

> The persons in this section mentioned are persons subject to military law as officers, and this Act shall apply accordingly to all the persons so specified; that is to say (1) Officers of the regular forces on the active list, within the meaning of any Royal Warrant for regulating the pay and promotion of the regular forces . . .

The royal warrant for Pay, Appointment, Promotion and Non-Effective pay of the Army, dated Feb. 29, 1940, by art. 21, defines officers on the active list in these terms:

> "Officers on the active list" shall mean officers of the regular forces, whether on full pay, half-pay or otherwise, before their retirement, and shall not include officers

who have retired and are subsequently recalled to service under art. 522 or re-employed under art. 495.

It thus becomes necessary to look at the definition of "regular forces," which is to be found in s. 190 (8) of the Army Act, but before examining the provisions of this section I will refer to Army Order 83 of 1945 under which the prisoner was released from the army. The preamble states that His Majesty deems it expedient to provide that officers granted emergency commissions in the land forces for service with the regular army may be released from military duty before the termination of the "present emergency," and then provides that an officer may be released from military duty, in accordance with Army Council instructions, and placed on the unemployed list, with liability to be recalled if and when required until the end of the "present emergency." Then follows this most important clause:

> Our further will and pleasure is that an officer so released shall remain on the active list of our regular army while on the unemployed list, but shall not after the effective date of such release, as may be determined by our Army Council, be entitled to army pay or other emoluments, other than any non-effective award for which he may be eligible or may become eligible. Neither shall he be eligible to count any period served on such unemployed list towards increment of pay or promotion, or for the purposes of any non-effective award; nor shall he be eligible for promotion during such period.

It is this clause providing that an officer released from military duty who is to receive no further pay and whose service on the unemployed list is to count neither for increment of pay nor for pension, who is not eligible for further promotion, and who, according to the Army Council's instructions [appearing as a footnote to the Order] is not to wear uniform, shall yet remain on the active list which is challenged. It is challenged on the ground that it conflicts with the statute, and if it is not authorised by the statute it is clearly ineffective and *ultra vires.*

Section 190 (8) of the Army Act is in these terms:

> The expressions "regular forces" and "His Majesty's regular forces" mean officers and soldiers who by their commission, terms of enlistment, or otherwise, are liable to render continuously for a term military service to His Majesty in every part of the world, or in any specified part of the world, including soldiers of the reserve forces when called out on permanent service . . .

Counsel for the respondents contended that by the terms of his commission an officer is liable to render continuously for a term military service to His Majesty. We have been given a copy of an officer's commission, and it appears to us that it relates solely to the military duty of the officer to whom the commission is granted. If His Majesty is pleased to release an officer from all military duty, unless and until he is recalled to duty, in our opinion, he is not liable, during his release, to render military duty continuously. The latter word implies continuity, and the period of release breaks the continuity. The words "or otherwise" must have some meaning attached to them, and if His Majesty, who has granted the commission, is pleased to absolve the officer from the obligations thereof and to discontinue the pay which the holding of a commission would otherwise entitle him to receive, it seems to us that it would be a misuse of language to say that the officer is, during the period of release, liable continuously to render military duty. In our opinion, therefore, after Dec. 15, 1945, the prisoner was not an officer of the regular forces, and that part of Army Order 83 of 1945 which declares that an officer so released shall remain on the active list of the regular army is ineffective and contrary to the statute.

Counsel for the respondents contended that Army Order 83 of 1945 was a royal warrant for regulating pay and promotion. One short answer is that it does not purport to be. It purports to be a warrant providing for the release of officers holding emergency commissions, and the fact that it says that during the period of release the officer shall be paid nothing and receive no promotion is not, in our opinion, any ground for saying that it is a warrant which regulates either of those matters. This opinion is reinforced by the cases referred to by counsel for the applicant, although, apart from authority, we should be of the opinion that we have expressed. But, even if a released officer could be held to be an officer of the regular forces, to be subject to military law he must be on the active list within the meaning of any royal warrant for regulating pay and promotion. This at once calls attention to the close and natural connection between pay and the active list. The one would seem complementary to the other, for while there may well be cases of an officer receiving pay, though not called on to perform services, for instance, those on half-pay due to medical unfitness, it would be remarkable indeed if an officer was on the active list and yet not entitled to any pay. We have already rejected the submission A that Army Order 83 of 1945 is to be regarded as a warrant for regulating pay. In our opinion, the effective warrant is that of Feb. 29, 1940. That, in fact, is the warrant which regulates all sorts and descriptions of pay and its comprehensive character can be seen by a glance at the table of contents. We have already referred to and read art. 21 and the words which require consideration are "whether on full pay, half pay, or otherwise." The words "or otherwise" in a pay warrant, especially when read either in conjunction with or in B contrast to "full pay" or "half pay" must, in our opinion, mean "or any other kind of pay." If pay has nothing to do with the question, so that a regular officer is on the active list whether he receives pay or not, why should the statute refer to the pay warrant to find out if an officer is on the active list or not, and what concern has the pay warrant with officers who receive no pay? In our opinion, the test whether an officer of the regular forces is on the active C list, is whether he receives pay or whether he does not.

It follows that, in our opinion, the prisoner was not, at the time either of his arrest or of his trial, an officer of the regular forces on the active list and so was not subject to military law. While this court is not concerned with results, it would certainly be surprising to find that men holding emergency commissions are in a different category in this respect from officers of the Reserve or the Territorials, or, indeed, from any other warrant officers, non-commissioned D officers, or private soldiers who may be released under the terms of any warrant and who, it was conceded, are not subject to military law after release. It would be no less surprising to find that hundreds, and probably thousands, of officers released and returned to civilian life and occupation for over two years are none the less now, while going about their everyday life, still subject to military law and discipline. Were this the case, it would seem that one of these released officers who might be seen consorting with private soldiers in a E public-house could be charged with conduct prejudicial to good order and military discipline, or if he misbehaved in public could, instead of being dealt with by justices, be taken before a court-martial and charged with conduct unbecoming an officer and gentleman. The paragraph in Army Order 83 of 1945, which purports to retain the prisoner on the active list, is, in the opinion of this court, void as in conflict with the Act of Parliament. It follows that the prisoner is illegally in custody. The writ will issue. Let the prisoner be F discharged.

Writ of habeas corpus issued with costs. Leave granted to apply for order of certiorari and peremptory order to quash the conviction granted.

Solicitors: *A. Kramer & Co.*, (for the applicant); *Treasury Solicitor* (for the respondents).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*] G

ASSOCIATED LONDON PROPERTIES LTD. *v.* WILLIAMS (INSPECTOR OF TAXES).

[COURT OF APPEAL (Tucker and Somervell, L.JJ., and Vaisey, J.), February 23, 24, 1948.] H

Income Tax—Schedule A—Valuation of property—Air-raid shelter constructed by landlord—Tenant to pay 8 per cent of cost each year for 12 years—"Rent or other consideration"—Finance Act, 1938 (c. 46), *s.* 17 (1) (*a*) (*proviso*).

The Finance Act, 1938, s. 17 (1) provides: "In estimating for the purposes of income tax under sched. A the annual value of any building, no regard shall be had—(*a*) to any room or other part of the building which has been added at any time after the building was first assessed to tax, or was included in the building before it was so assessed, solely for the purpose of affording protection in the event of hostile attack from the air, and is not occupied or used for any other purpose . . . Provided that this subsection shall not apply if the building or any part thereof is let and the rent or any other consideration for the lease is greater than it would have been if the room or other part referred to in para. (*a*) had not been added or included . . ."

In 1937 and 1938, by seven separate underleases, each for 21 years, the taxpayers, as landlords, demised certain premises to certain tenants, who, in 1940, requested the taxpayers to construct or cause to be constructed an air-raid shelter for their protection. On June 4, 1940, the taxpayers entered into an agreement with the tenants by which they undertook to construct an air-raid shelter under a garage at the rear of, but forming no part of, the premises demised under any of the seven underleases, and in due course the air-raid shelter was erected. In consideration of the erection of the shelter and the right, in common with other tenants, of access to and use thereof as an air-raid shelter, the tenants agreed to pay to the taxpayers by quarterly instalments each year for 12 years a sum equal to 8 per cent. per annum of the capital cost of the shelter, such annual sums to be " deemed to be in addition to the aggregate rent reserved by the leases and to be recoverable as rent paid thereunder." In further consideration the tenants agreed to waive and surrender certain options to determine contained in the leases :—

HELD : the sums in question were annual payments for the enjoyment of the right, in common with others, to make use of the air-raid shelter under an agreement designed substantially to reimburse the taxpayers over a period of years for the cost of its construction, and were not " rent or other consideration " for the underleases within the meaning of the proviso to s. 17 (1) of the Finance Act, 1938, and, therefore, the air-raid shelter should not be taken into account in assessing the annual value of the premises for the purpose of income tax under sched. A.

Westminster (Duke) v. *Store Properties Ltd.* ([1944] 1 All E.R. 118 ; 171 L.T. 7), *applied.*

Decision of Macnaghten, J. ([1947] 2 All E.R. 474), *reversed.*

[AS TO ANNUAL VALUE FOR SCHED. A TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 35-42, paras. 63-74 ; and FOR CASES, see DIGEST, Vol. 28, pp. 7, 8, Nos. *17-26*.]

Cases referred to :

(1) *Westminster (Duke)* v. *Store Properties Ltd.*, [1944] 1 All E.R. 118 ; [1944] Ch. 129 ; 113 L.J.Ch. 157 ; 171 L.T. 7 ; 2nd Digest Supp.

(2) *Donellan* v. *Read*, [1832] 3 B. & Ad. 899 ; 1 L.J.K.B. 269 ; 31 Digest 218, *3565*.

(3) *Property Holding Co., Ltd.* v. *Clark*, [1948] 1 All E.R. 165.

APPEAL by the taxpayers from an order of MACNAGHTEN, J., dated July, 28, 1947, and reported [1947] 2 All E.R. 474, affirming a decision of the General Commissioners of Income Tax that the value of an air-raid shelter should be taken into account in assessing, for the purposes of income tax under sched. A, the value of premises let by the taxpayers. The appeal was allowed. The facts appear in the judgment of TUCKER, L.J.

Millard Tucker, K.C., and *Borneman* for the taxpayers.

The Solicitor-General (Sir Frank Soskice, K.C.) and *R. P. Hills* for the Crown.

TUCKER, L.J. : This is an appeal by the taxpayers from a judgment of MACNAGHTEN, J., whereby he upheld the decision of the General Commissioners of Income Tax for the division of St. Margaret and St. John in the county of Middlesex, who, by their decision, had reduced the assessment on the taxpayers to the sum of £40,018, it having been contended by the taxpayers before the commissioners that their assessment should be reduced to the sum of £37,186. There is no dispute with regard to the figures. It was agreed that, if the contention of the taxpayers were right, their assessment should be reduced to £37,186. If, on the contrary, the contention of the Crown were correct, the assessment would stand at the figure of £40,018.

The assessment in question was made on the taxpayers under sched. A in respect of premises known as Great Westminster House, and the year in question is the financial year 1943. By seven separate underleases the taxpayers had demised separate parts of these premises to H.M. Commissioners of Works and Public Buildings. The first of these leases was dated Dec. 30, 1938, and expired on Sept. 29, 1958 : the second was dated Jan. 6, 1938, and also expired on Sept. 29, 1958: the third was dated Nov. 2, 1937, and expired on June 24, 1958: the fourth was dated Dec. 10, 1937, and expired on June 24, 1958: the fifth was dated Aug. 19, 1937, and expired on Mar. 25, 1958: the sixth was dated Dec. 10, 1937, and expired on June 24, 1958: the seventh was dated Dec. 10, 1937, and expired on June 24, 1958. The Commissioners of Works, holding under those leases, having requested the taxpayers to construct or cause to be constructed an air-raid shelter for their protection, on June 3, 1940, the taxpayers entered into an agreement with the commissioners by which they undertook to construct an air-raid shelter under the garage at the rear of Great Westminster House, which formed no part of the premises demised under any one of the seven leases to which I have referred. In due course that air-raid shelter was erected.

General Rule No. I of sched. A to the Income Tax Act, 1918, provides:

> In the case of all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value (except the properties mentioned in No. II and No. III of this schedule) the annual value shall be understood to be:—(1) The amount of the rent by the year at which they are let, if they are let at rackrent, and the amount of that rent has been fixed by agreement commencing within the period of seven years preceding the fifth day of April next before the time of making the assessment . . .

Rule 8 of No. VII of sched. A, provides:

> The assessment and charge shall be made upon the landlord in respect of . . . (c) any house or building let in different apartments or tenements and occupied by two or more persons severally. Any such house or building shall be assessed and charged as one entire house or tenement . . .

It was under that rule that the assessment was made on the taxpayers as the landlords of the premises. By s. 17 of the Finance Act, 1938:

> (1) In estimating for the purposes of income tax under sched. A the annual value of any building, no regard shall be had—(*a*) to any room or other part of the building which has been added at any time after the building was first assessed to tax, or was included in the building before it was so assessed, solely for the purpose of affording protection in the event of hostile attack from the air, and is not occupied or used for any other purpose . . . Provided that this subsection shall not apply if the building or any part thereof is let and the rent or any other consideration for the lease is greater than it would have been if the room or other part referred to in para. (*a*) had not been added or included . . .

It is agreed that the air-raid shelter comes within s. 17 (1) (*a*) as being a "room or other part of the building which has been added . . . after the building was first assessed to tax . . . solely for the purpose of affording protection in the event of hostile attack from the air." The question in this appeal is whether it does or does not come within the proviso.

I turn to the agreement of June 4, 1940, made between the taxpayers and the tenants of these seven separately demised premises in view of the intended construction of this air-raid shelter. After reciting the underleases and the request to the landlords to construct the air-raid shelter, the agreement provides in cl. 1: "The landlords undertake forthwith to construct an air-raid shelter under the garage," and they agree to proceed with reasonable despatch with the construction and that, on the completion thereof, they will "procure their said architects to notify the tenants of such completion." Clause 2 provides:

> As soon as the works referred to in cl. 1 hereof have been completed by the landlords the landlords will grant to the tenants for so long as the said underleases or any of them shall be subsisting the right in common with the landlords and their tenants of other portions of Great Westminster House aforesaid and their tenants of Stanley House, Millbank, to use the said shelter for the purpose of an air-raid shelter with full rights of access thereto.

Clause 3 provides:

> In consideration of the undertakings contained in cls. 1 and 2 hereof the tenants agree to pay to the landlords in each year during the period of twelve years commencing on the date of the notification mentioned in cl. 1 hereof a sum equal to 8 per cent. of the capital cost of the said shelter or of £49,000 (whichever shall be the less . . .). The said yearly sum shall be payable by equal quarterly instalments the first of such payments being in respect of the period from the date of such notification to the quarter day then next following to be made in advance immediately after the said notification and so long as the said underleases shall be subsisting but without prejudice to the

> obligation of the tenants to pay the said annual sums during the whole of the said period of twelve years such sums shall be deemed to be in addition to the aggregate rent reserved by the said respective underleases and be recoverable as rent payable thereunder.

Clause 6 provides :

> As a further consideration for the undertakings contained in cls. 1 and 2 hereof the tenants hereby waive and surrender to the landlords as from the date of these presents the option contained in each of the underleases mentioned in the first part of the said schedule to determine the terms thereby granted on the expiration of the seventh year of the said term and the options contained in the underlease mentioned in the second part of the said schedule to determine the term thereby granted on the expiration of the fifth and tenth years respectively of the said term.

The first six of the underleases contained options enabling the tenant to determine the underlease at the expiration of the seventh year, and the seventh of those underleases contained a similar option exercisable at the end of the fifth and tenth years. It is those options that the tenants are agreeing by that clause to waive and surrender. Clause 7 provides :

> The landlords will so long as any of the said underleases shall be subsisting maintain and keep in good and tenantable repair the structure of the said shelter and the electrical and ventilating plant connected therewith. The tenants will until Sept. 29, 1951, maintain and keep in good and efficient repair the internal decoration of the said shelter and be responsible for the supply of electrical current thereto.

Clause 8 provides :

> If any of the said underleases shall be subsisting after Sept. 29, 1951, the landlords will so long as the same or any of them are subsisting maintain and keep in good and efficient repair the internal decoration of the said shelter and be responsible for the supply of electrical current thereto.

Clause 10 provides :

> The landlords will take all reasonable means to obtain from tenants of parts of Great Westminster House aforesaid other than those demised by the said underleases such annual contributions as may be properly payable by such tenants under the said Act and will credit to the tenants towards reduction of their liability under cl. 2 hereof the net amounts so received after deduction of all costs of such collection and any notices in connection therewith.

That agreement was made under seal. The question for decision is whether its result was to bring about that " the building or any part thereof is let and the rent or any other consideration for the lease is greater than it would have been if the room or other part referred to had not been added or included." MACNAGHTEN, J., in his judgment said ([1947] 2 All E.R. 475) :

> Before them [the commissioners] the question seems to have been debated whether the payment of £2,889 for the shelter should be regarded as rent, but, to my mind, it does not matter whether it is rent or not. I am disposed to think it is rent. There is no difficulty about the parties to a lease, after the lease has been executed, agreeing that the rent should be increased or reduced. It is common for a tenant to ask a landlord to do something to the demised premises which is going to cost money, and to agree to pay during the rest of the term a percentage of the cost of doing the work. That appears to me to be exactly what was done here. If that is not the correct view, it would not seem to matter, because the words of the proviso are : " This sub-section shall not apply if the building or any part thereof is let and the rent or any other consideration for the lease is greater than it would have been if the room . . . had not been added or included " [in the building]. If this payment of £2,889 is not to be deemed rent, it is a consideration other than rent, and it is a consideration which is greater than it would have been if the room had not been constructed, because, if the room had not been constructed, not a penny of it would have been payable.

It is to be observed that the words of the proviso are " is let and the rent or any other consideration for the lease is greater than it would have been." Putting on one side the question whether these payments were rent or not, the argument for the taxpayers is that the agreement to make these payments was no part of the consideration for the underleases. The consideration for each underlease is to be found in the terms of that underlease and those terms are completely silent with regard to these payments and any countervailing benefits received in respect thereof because at the time of the underlease the construction of this air-raid shelter was not contemplated. It is said that, when one looks at this agreement of June 4, 1940, the consideration for it is

to be found in its terms and appears in the clauses that I have read. For instance,
cl. 3 states that : " In consideration of the undertakings contained in cls. 1 and 2
the tenants agree " to make to the landlords the payments therein specified. The
undertakings contained in cls. 1 and 2 are undertakings by the landlords under
cl. 1 to construct or cause this shelter to be constructed and under cl. 2 to allow the
tenants in common with other persons to use the shelter. That is the considera-
tion for the agreement on the part of the tenants to make these payments,
and for the further agreement on the part of the tenants in cl. 6 to surrender A
and waive the option to determine contained in these seven underleases. It is
to be remarked that this agreement does not purport, on the face of it, to
contain any consideration for the continuance of these existing underleases.
The consideration is entirely separate and new and is given for the erection
of this shelter and for the right to use it. Therefore, it seems to me that the
learned judge was wrong in coming to the conclusion that, if these sums were
not properly speaking rent, they could be regarded as " other consideration B
for the lease." In my view, they were no part of the consideration for the
underleases, and no part of the consideration for their continuation.

That brings me to the question, which has been principally argued in this
case, whether or not these payments are rent within the meaning of the proviso.
Clause 3 does not provide for any apportionment of the aggregate sum referred
to as between the seven separate underleases. There is nothing to show by
what amount the rent reserved by any one of the underleases shall be increased. C
It seems to me impossible to ascertain what the rent of any one of these demised
premises is if these additional payments are to be considered as part of the
rent. Accordingly, it is difficult to see what practical effect, apart from contract,
the words " and be recoverable as rent payable thereunder " can have. If one
or more of the underleases were assigned, what portion of the aggregate sum
would remain as the rent payable under the remaining underleases for which D
the landlords could distrain, assuming that these words would give them power
to distrain ? Furthermore, there is nothing in the agreement to suggest that
non-payment of the agreed annual sum, or any part of it, would imperil any
one of the underleases of the seven separately demised premises so as to
render them liable to forfeiture. In short, the continued enjoyment of the demised
premises is in no way conditional on the performance by the taxpayers of their
obligation to make these annual payments, which obligation, it is to be observed, E
continues for a period of 12 years, irrespective of whether some or all of the under-
leases shall have previously determined, *e.g.*, by forfeiture. In my view, these sums
were annual payments for the enjoyment of the right, in common with others, to
make use of the air-raid shelter under an agreement designed substantially
to reimburse the landlords over a period of years for the cost of its construction.
But for the concluding words of cl. 3 of the agreement, these sums could not
possibly be regarded as " rent or other consideration for the lease." In my F
view, the words of that clause are inapt to alter the character which they would
otherwise have.

I have arrived at that conclusion on a construction of the terms of this
particular agreement, and I should have reached that conclusion quite apart
from the authorities to which we have been referred as to the meaning of the
word " rent " in different statutes. I think, however, that, in any event, the G
Crown would have been in a great difficulty in this case by reason of the
decision of Bennett, J., in *Duke of Westminster* v. *Store Properties Ltd.* (1),
which dealt with the meaning of certain words in s. 50 (1) of the War Damage
Act, 1943. The words which fell to be construed were these : " There shall
also be ascertained the proportion which the rent reserved for the period in
which the relevant date falls." In 1908 a lease was granted of premises for a
term of 90 years at a yearly rent of £125. In 1936 the lessor modified the lease H
by granting a licence to convert the house into office premises, it previously
having been subject to a covenant not to use the premises for any trade or
business. The consideration for the licence to convert the premises was a
covenant by the licensees to pay a yearly rent of £50 in addition to the rent
reserved by the lease so long as the premises so converted were used as office
premises. The language of the licence in that case was stronger in favour of
the contention of those who contended that it amounted to rent than the
words of the agreement in the present case. The licence was under seal, and

it provided that, in consideration of the covenants as to the alteration of the premises and of the rent covenanted to be paid, the plaintiff granted to the defendants full licence and permission to use the premises for offices, and, in consideration of the licence, the defendants covenanted with the plaintiff during such part of the residue of the term as the premises were used for offices to pay the yearly rent of £50 in addition to the rent of £125 reserved by the lease of 1908, to be charged on the premises and to be payable on the same days. The licence also provided that the proviso for re-entry and the covenant for quiet enjoyment should extend to the premises as altered under the licence. BENNETT, J., in giving judgment, having observed that the War Damage Act contained no definition section defining the word "rent," said ([1944] 1 All E.R. 118):

> I was not referred to any provisions in the Act which indicate that the word is used in any special sense, and, therefore, I see no ground on which I can properly base a decision that the word "rent" is to have attributed to it a meaning other than its technical meaning. It is clear, I think, that the annual sum payable under the licence is not rent in the technical meaning of that term. A money rent is a sum reserved by a lessor on the occasion of a demise of land: see *Donellan* v. *Read* (2). The licence of Nov. 12, 1936, does not purport to create a new demise in consideration of an additional rent of £50 per annum. The terms of the licence are inconsistent with the idea that the parties intended it to operate as a surrender of the premises comprised in the lease of May 30, 1930, and to create a new demise thereof . . . The truth is that the sum in question is not the consideration for the demise of the land comprised in the original lease, but is the consideration payable under a collateral agreement to enable the tenant to do on the land then vested in him an act which otherwise he could not lawfully do. The language of s. 50 seems to me to confirm the view I have formed, that the word "rent" is used in the section in its technical sense, because in the three places in the section in which the word is used, namely sub-ss. (3), (7) and (8), the word is used in connection with the word "reserved." This connection indicates to my mind that the rent to which the section refers is something which arises on the occasion of a demise and is the subject of a reservation out of the subject of a demise. A sum payable to a landlord by a tenant by virtue of a collateral agreement containing no demise cannot, I think, properly be referred to as a rent reserved.

It is true that that case dealt with the words of a section of a different Act of Parliament, but, none the less, it appears to me that that judgment is applicable to the facts of the present case. In fact, I think that the present case is a stronger one from the point of view of the taxpayers than that before BENNETT, J. It is argued by the Crown on the authority of that case and the decisions cited in it that, if the word "rent" in this proviso is to be given a strict technical meaning, none the less, on the true interpretation of this agreement of June 4, 1940, there has been a surrender of the old leases and a fresh demise. I find it impossible to accept that argument. The whole tenour of the agreement negatives it. There are repeated references to the underleases subsisting, and the whole agreement contemplates by its very terms that the underleases, so far from being surrendered, shall continue. Furthermore, I come back to my original difficulty. If the old underleases were surrendered, what was the rent payable for any one of these premises under the fresh demise? It seems to me impossible to ascertain it.

The second argument for the Crown is that the word "rent" in this proviso should not be given a strict and technical meaning, but that it should be given the meaning which would be attributed to it by an ordinary business man or the man in the street. I cannot accept that contention either. I think that in a taxing enactment such as s. 17 of the Act of 1938 the intention is to give the word a technical meaning. The foundation for this assumption is to be found in No. I of sched. A where the word "rent" is used as meaning "rack-rent." That, in itself, is a technical term. If it were intended by the legislature that the word "rent" should mean any benefit which the landlord shall obtain as a result of the erection of an air-raid shelter it would have been perfectly easy to say so, but the legislature chose to use the word "rent," and I think it must be given a technical meaning. As I understood the learned SOLICITOR-GENERAL, he submitted that a sufficient definition for his purpose could be obtained if we applied to the present case the language used by EVERSHED, L.J., in his judgment in *Property Holding Co., Ltd.* v. *Clark* (3). That case dealt with the Rent Restrictions Act, and the judgment is to be read in the light of that fact. What the court was considering was the meaning of the words in s. 12 (1) (*a*) of the Rent Restrictions Act, 1920 : " let as a separate dwelling where either the annual amount of the standard rent or rateable value does not exceed " so much, and the proviso to that section which says : " this Act shall not, save as otherwise expressly provided, apply to a dwelling-house *bona fide* let at a rent which includes payment in respect of board, attendance or use of furniture." Evershed, L.J., used this language ([1948] 1 All E.R. 173) :

> In my judgment, the question in each case is to determine what in substance is the subject-matter of the tenancy granted to the tenant by the contract. *Prima facie* the rent is the monetary compensation payable by the tenant in consideration for the grant, however it be described or allocated. Alternatively, it may be described (as Scott, L.J., has described it) as the contractual monetary obligation, the payment of which is the condition of the right to enjoy the property granted.

Applying that alternative definition, it seems to me impossible in the present case to say that these annual payments under the agreement of June 4, 1940, were a monetary obligation the payment of which was the condition of the right to enjoy the property granted. In my opinion, they were nothing of the kind. The enjoyment of the property granted was derived from the seven underleases, and the failure to pay this additional sum, as I have already indicated, would in no way affect the right to continue to enjoy the demised premises under the underleases. So, even if the word " rent " is to be given the same meaning as in the Rent Restrictions Acts, I do not think that will avail the Crown in the present appeal. For these reasons, I think that this appeal succeeds and that the figure of assessment should be reduced to the figure of £37,186.

There is one other matter to which it is necessary to refer. The learned Solicitor-General has invited us, if we are against him, to consider whether we ought not to send the case back to the commissioners for the ascertainment of further facts. He says that, under the proviso, if it is made to appear that any part of the building is let and the rent or any other consideration for the lease is greater than it would have been, the proviso comes into play and affects the whole building, and that it appears that the Commissioners of Works were only tenants of a certain portion of this building and it may be that some other part of the building is let and the rent or other consideration for the lease is greater than it would have been, and that, if that is the case, the whole building would be caught by the proviso. That matter could have been determined by calling evidence before the commissioners if the point had ever been raised. It is true it was for the taxpayers to make out their case for the reduction of their assessment, but, having regard to the way in which the case proceeded before the commissioners and the points that were taken, I think it is clear that both sides were content to deal with the matter on the basis that it fell to be decided in the light of this agreement and the underleases. I do not think it would be right for us to send this case back to the commissioners to hear further evidence.

SOMERVELL, L.J.: I agree that this appeal should succeed, for the reasons given by Tucker, L.J. As we are differing from the learned judge I will add a few observations of my own.

I understand that the cases with regard to the meaning of " rent," under common law or in a statute, unless there is some definition or some special wording in the statute which gives it a different meaning, were not cited to the General Commissioners or to Macnaghten, J. If they had been, I feel that there are certain observations in the latter's judgment which he probably would not have made. Accepting the law as laid down in *Donellan* v. *Read* (2), the Solicitor-General submitted, first, that we should imply from the agreement that there was a surrender of the old underleases and a new grant for an increased rent. It seems sufficient to say that that is contrary to the manner in which the parties arranged the subject-matter between themselves in the agreement. The basis of the agreement, is seems to me, is that the existing sub-leases are to subsist and that the tenants under those sub-leases agree to pay certain annual sums to the landlords for the consideration set out in that agreement. I can see no reason why one should not take the opening lines of cl. 3 as accurately setting out the legal position, and that says that the sums which are in question here, which it has been contended were rent for various premises demised, are paid in consideration of the undertakings given in cls. 1 and 2. Broadly speaking, the landlords in cls. 1 and 2 undertake to build the shelter in premises separate from the demised premises and to allow the sub-tenants to use it. I cannot see how it can be contended that a sum paid for that consideration is either rent or consideration for all or any of the underleases. If one reads on, the point is emphasised that this sum was not contracted to be paid either as rent or as consideration for the leases, though I agree that, even if it had been contracted to be paid as rent as in *Duke of Westminster* v. *Store Properties Ltd.* (1), it would not follow that it was rent in law or within the statute. The payments are to go on for the twelve years even though the underleases or one of them may have come to an end. It is, therefore, independent of the grants conferred by the underleases. The only references to "rent" are these. The agreement says that "such sums" (indicating that they are not rent) "shall be deemed to be in addition to the aggregate rent reserved by the said respective underleases and be recoverable as rent payable thereunder." It is clear to my mind that those words cannot make the sums in question rent either in themselves, or, particularly, having regard to the other provisions of the agreement to which I have referred. The utmost that they could accomplish is to afford the landlord a contractual right, if they were not paid, to exercise the remedies which a landlord can exercise at law in respect of non-payment of rent. Obviously, a provision of that kind, even if it is effectively contained in these words, would not affect the matters which we have to consider. Therefore, it is plain, on the face of this document, that these sums are not rent, nor are they considerations for the underleases or any of them in the ordinary meaning of those words.

The learned SOLICITOR-GENERAL submitted that we ought to give to the words "other consideration for the lease" what he described as a very broad meaning. In my view, he cannot succeed on this part of his submission unless the words can be read as meaning "any consideration moving from a tenant to a landlord in respect of the provision of an air-raid shelter." It is quite impossible to give them a meaning as wide as that. They plainly mean something different. Then the SOLICITOR-GENERAL urged that there would be anomalies on the construction which I accept as between landlord and landlord. One landlord builds an air-raid shelter and gets a collateral payment for it. He is unaffected by any increase in his sched. A assessment. Another landlord builds an air-raid shelter and he gets money, not as a collateral payment, but by way of rent under a lease granted after the shelter has been made. It may be that that is an anomaly, but anomalies do arise under legislation. Sometimes they occur because the legislature would get into intolerable complexity if it sought to avoid every anomaly that might arise. It may be, as I suggested in the course of the argument, that the proviso is there because, once consideration for the provision of an air-raid shelter had become rent in the technical sense, a somewhat complicated code of provisions would have been necessary to adjust the sched. A assessment if this element in the rent had to be quantified and excluded. Whether that is so or whether anomalies are produced which were not contemplated by the legislature, the words, in my opinion, plainly do not cover the sums which are in question in this appeal.

VAISEY, J.: It is unnecessary for me to add anything to the judgments which have just been delivered, with which I am in full agreement. For the reasons already given by TUCKER, L.J. and by SOMERVELL, L.J., I think that this appeal succeeds.

Appeal allowed with costs in the Court of Appeal and below. Application that the case should be remitted to the commissioners for ascertainment of further facts refused.

Solicitors: *Clifford-Turner & Co.* (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

BRADDOCK AND OTHERS *v.* BEVINS AND OTHERS.

[Court of Appeal (Lord Greene, M.R., Asquith and Evershed, L.JJ.), January 16, 19, 20, 21, 26, 27, February 27, 1948.]

Libel—Privilege—Qualified privilege—Election—Statement by candidate in election address.

A was the Labour candidate for election to a city council in the Abercromby ward of the E. parliamentary division of the city of L., and B, C and D, A who were all members of the Labour Party, were prominent supporters of A and appeared with him at his meetings. B, once a member of the Communist Party, was member of Parliament for the E. division and a member of the city council, of which C and D were also members. A, B, C and D claimed damages for an alleged libel contained in an election address published by the first defendant, X, the Conservative candidate, B and printed by Y, the second defendant. The statements which the plaintiffs alleged to be defamatory were :—(1) "Communism. I am profoundly disturbed by the aims of the Soviet government. I am convinced that our civilisation is gravely threatened by the fanatical desire of the Russian communists to shackle their barbaric will on mankind. I am horrified that the Socialist M.P. for this division [B] and her friends in Abercromby should persistently take sides with the Soviet government C and the British Communist Party." (2) "Communist candidates are fighting Socialists in many part of Liverpool—but not in Exchange. That is because they have a tacit understanding with B. and her friends not to oppose near-communists." The distribution of the address was limited to electors on the roll. At the trial, the judge ruled on the evidence that the word "friends" in the alleged libels could not refer to A, C or D and he withdrew from the jury the case relating to them. As regards B., D the judge ruled that the defence of qualified privilege applied, and the jury returned a general verdict in favour of the defendants. On appeal :—

Held : (i) the words "her friends" were mere generalisation and could not be taken to refer to A, C and D as identifiable individuals, and their case was rightly withdrawn from the jury.

(ii) statements contained in the election address of a candidate at an E election concerning the opposing candidate are entitled to the protection of qualified privilege if they are made without malice and are relevant to the matters which the electors will have to consider in deciding which way they will cast their votes, and

(iii) B. having identified herself prominently with the policy of the candidate and lent him her public support, the privilege extended to cover statements in the address regarding her, but F

(iv) there had been such a misdirection by the judge of the jury at the trial as to lead to the conclusion that a "substantial wrong or miscarriage had been thereby occasioned" within R.S.C., Ord. 39, r. 6, and, therefore, a new trial would be granted.

Observations on the importance of a judge keeping the various issues in a case separate in his summing-up to the jury and of defining with clearness for the guidance of the jury the various matters to which, on the G several issues, their minds should be directed ; and on the desirability of leaving specific questions to the jury when a number of issues is involved and not taking a general verdict.

[As to Qualified Privilege, see HALSBURY, Hailsham Edn., Vol. 20, pp. 468-486, paras. 569-592 ; and for Cases, see DIGEST, Vol. 32, pp. 112-115, 130, 131, Nos. *1437-1474, 1609-1618.*] H

Cases referred to :

(1) *Knupffer* v. *London Express Newspaper, Ltd.*, [1944] 1 All E.R. 495 ; [1944] A.C. 116 ; 113 L.J.K.B. 251 ; 170 L.T. 362 ; 2nd Digest Supp.

(2) *Watt* v. *Longsdon*, [1930] 1 K.B. 130 ; 98 L.J.K.B. 711 ; 142 L.T. 4 ; Digest Supp.

(3) *Harwood* v. *Astley*, (1804), 1 Bos. & P.N.R. 47 ; Digest Supp.

(4) *Pankhurst* v. *Hamilton*, (1887), 3 T.L.R. 500 ; 32 Digest 165, *2011.*

(5) *Adam* v. *Ward*, [1917] A.C. 309 ; 86 L.J.K.B. 849 ; 117 L.T. 34 ; 32 Digest 129, *1608.*

(6) *Duncombe* v. *Daniell*, (1837), 8 C. & P. 222; 32 Digest 130, *1609*.
(7) *Anderson* v. *Hunter*, (1891), 18 S.C. 467.
(8) *Bruce* v. *Leisk*, (1892), 29 Sc. L.R. 412.
(9) *Bray* v. *Ford*, [1896] A.C. 44; 65 L.J.Q.B. 213; 73 L.T. 609; 32 Digest 164, *1988*.

APPEAL by plaintiffs from STABLE, J.

The plaintiffs were Mrs. Braddock, M.P., Mr. Francis Lavery, Mr. Harry Livermore, and Mr. Richard Clitherow. In November, 1946, Mr. Clitherow was the Labour candidate at a municipal election in the Abercromby ward of the Exchange division of the city of Liverpool, the first three plaintiffs being his supporters and speakers on his behalf. The defendants were Mr. Bevins, the Conservative candidate, and T. W. Gornall & Co., the printers of his election address which contained the alleged libels. The defendants denied that the words complained of were defamatory without the innuendos placed on them by the plaintiffs and that they were published maliciously, and they pleaded justification, privilege and fair comment. At the trial a verdict for the defendants was returned. The Court of Appeal now ordered a new trial of the action so far as Mrs. Braddock was concerned on the ground that at the trial the judge had misdirected the jury.

Rose Heilbron for the plaintiffs.
Gerrard, K.C., and *Baucher* for the defendants.

Cur. adv. vult.

Feb. 27. **LORD GREENE, M.R.**, read the following judgment of the court. By their statement of claim the plaintiffs alleged against the defendants the publication of defamatory statements against the plaintiffs. These statements were contained in an election address sent to the municipal electors of Abercromby (one of three wards in the Exchange parliamentary division of Liverpool) on the occasion of an election of a councillor. The defendant, Bevins, was the Conservative candidate in that election. The second defendants were the printers of the election address in question. After the evidence was closed, STABLE, J., ruled that the words complained of could not refer to any one of the last three plaintiffs, and he, accordingly, withdrew the case so far as it related to them from the jury. These plaintiffs complain of this ruling as being incorrect, and they contend that their case ought to have been left to the jury. As regards the first plaintiff, Mrs. Braddock, the jury returned a general verdict in favour of the defendants. She complains of misdirection on a number of points and of error of law in the judge's ruling that the occasion was one to which the defence of qualified privilege applied. Throughout the case the alleged libel has been treated as falling into two parts, referred to as the first and second libel respectively. The statement of claim contains allegations of a separate innuendo for each of the two libels.

It will be convenient to discuss, first of all, the two rulings of STABLE, J., on matters of law, his withdrawal from the jury of the case of the last three plaintiffs, and his ruling that the occasion was one of qualified privilege. Before doing this, we must give a few short particulars concerning the plaintiffs. The plaintiff, Mr. Clitherow, was the Labour candidate for the Abercromby ward at the election. He was defeated by the defendant, Mr. Bevins. During the election campaign the first three plaintiffs, Mrs. Braddock, Mr. Lavery and Mr. Livermore, who are all members of the Labour Party and are well known as such in Liverpool, were prominent among the supporters of Mr. Clitherow and were advertised to appear on the platform at his meetings. Mr. Lavery and Mr. Livermore were Labour members of the Liverpool City Council for the Abercromby ward. Mr. Livermore was chairman of the Exchange Divisional Labour Party. The first plaintiff, Mrs. Braddock, is an even more prominent figure on the Labour side in political life, both national and municipal. She was once a member of the Communist Party, but she left it many years ago. She has been a member of the Labour Party for more than 20 years and in July, 1945, she was elected as a Labour member of Parliament for the Exchange division of Liverpool. She has been a Labour member of the City Council since 1930, where she represents St. Anne's Ward. In considering the matters relevant to this appeal, and, in particular, the question of privilege, it is important to bear in mind the political affiliations of the several plaintiffs and their political interests and activities in relation to the election.

We will deal, first, with the ruling under which the case of the last three plaintiffs was withdrawn from the jury. No one of these is named in the alleged libels and before any one of them can succeed he must shew that the alleged libels or one of them was published of himself. In establishing this there are two stages. First, he must satisfy the judge as a matter of law that the words are capable of referring to himself as a particular identifiable individual—in this all three failed at the trial—and, secondly, if he succeeds in this, he must satisfy the jury that the words do so refer to himself. The word relied on for these purposes is the word "friends." This word appears once in each libel. In the first libel is the assertion that the Socialist M.P. for the Exchange division "and her friends in Abercromby" persistently take sides with the Soviet government and the British Communist Party. In the second libel is the statement that Communist candidates were not fighting socialists in the Exchange division because they had a tacit understanding with Mrs. Braddock "and her friends" not to oppose near-Communists. There was no evidence that the word "friends" of Mrs. Braddock had some secondary meaning or that these three plaintiffs or any of them were or was usually or at all described by such a generic or class name in the Exchange division or in Abercromby ward or elsewhere. The word must, accordingly, be construed in the ordinary sense which it would naturally bear in the context in which it was used. This context cannot, in our view, permit of any other interpretation save that of political friends (or, in the first of the two references, political friends in the Abercromby ward), and this, again, does not, we think, import any particular degree of political friendship or limit the generality of the word to any particular degree of political association. The word in its context appears to us to mean no more than the word "comrades" would have meant in the mouth of a member of the Labour Party, and we can find no limit to the significance of the word save that of the whole circle of Mrs. Braddock's political supporters generally or in the Abercromby ward. No doubt, the three concerned were prominent among those supporters, but this circumstance, in our opinion, is insufficient to enable it to be said that the words are capable of referring to any one of them as an identifiable individual. The case is, perhaps, somewhat near the border line, but we have come to the conclusion that there is nothing in the words themselves or in the context or in the circumstances in which the words were used to make them capable of such a reference. The words appear to us to be a mere generalisation, and, on applying the principles laid down by the House of Lords in *Knupffer* v. *London Express Newspaper, Ltd.* (1), the appeal of these three plaintiffs fails. We see no warrant for thinking that the plaintiff, Mr. Clitherow, is in any better position in these respects than the other two. There is nothing in the circumstances of his candidature or otherwise that gives him a special qualification for the appellation "friend" of Mrs. Braddock or one of her "friends in Abercromby." We are, accordingly, of opinion that STABLE, J., was right in deciding this question as he did.

We now turn to the question of privilege. We need not examine in any detail the requirements necessary to confer qualified privilege. They are elaborately explained in the judgment of SCRUTTON, L.J., in *Watt* v. *Longsdon* (2). The LORD JUSTICE says ([1930] 1 K.B. 147):

> . . . except in the case of communications based on common interest, the principle is that either there must be interest in the recipient and a duty to communicate in the speaker, or an interest to be protected in the speaker and a duty to protect it in the recipient. Except in the case of common interest justifying intercommunication, the correspondence must be between duty and interest. There may, in the common interest cases, be also a common or reciprocal duty. It is not every interest which will create a duty in a stranger or volunteer.

The duty may be legal, moral or social (*ibid.*, 144). Here we are concerned with a situation which may be broken up into its elements as follows :—(i) the words complained of are contained in an election address lawfully issued by a candidate in a municipal election in the Abercromby ward ; (ii) the distribution of the election address was limited to electors on the roll—this was admitted ; (iii) as the other three plaintiffs are not concerned, the words complained of do not refer to any one of them, and, in particular, they do not refer to the opposing candidate, Mr. Clitherow ; (iv) the words refer and can only refer to Mrs. Braddock ; (v) Mrs. Braddock was a prominent figure in local Labour politics and political activities in Liverpool, and, in particular, in the Exchange parliamentary division of which she is the sitting Labour member and in which Abercromby ward is situate; (vi) the opposing candidate, Mr. Clitherow, was standing as the Labour candidate and was publicly supported by Mrs. Braddock who was advertised in his election address, no doubt with her consent, as a special speaker at what was described in his election address as his "great eve of poll rally"; (vii) the defendant, Mr. Bevins, was not himself an elector in the Abercromby ward. In principle, and quite apart from such assistance as can be derived from authority, we should have thought it scarcely open to doubt that statements contained in the election address of one candidate concerning the opposing candidate, provided they are relevant to the matters which the electors will have to consider in deciding which way they will cast their votes, are entitled to the protection of qualified privilege. The electors clearly have an interest in receiving a communication of that kind. Indeed, the task of the electors under democratic institutions could not be satisfactorily performed if such a source of relevant information *bona fide* given were to be cut off by the fear of an action for libel. As will be seen, there is a good deal of authority for the view that qualified privilege extends to communications by one elector to another in relation to a candidate at an impending election. It would be curious if the interest and duty subsisting between one elector and another were to be rated higher in this respect than the interest and duty subsisting between an elector and a candidate, and we are unable to see any ground for such a distinction. A candidate cannot in this connection be regarded as a meddler, or, to use the words of SCRUTTON, L.J. (*ibid.*, 147), a mere "stranger or volunteer." Even if it be thought that he has no common interest with the electors to have what is honestly believed to be the truth communicated—and in a democratic country to deny the existence of such a common interest may to some appear illogical—we make bold to assert that he has a duty towards the electors to inform them honestly and without malice of any matters which may properly affect their choice in using their suffrages.

There remains the point that the complainant here is not the rival candidate. She is a person who was a supporter and an active supporter of one candidate, she was a prominent local political leader of the party which that candidate claimed to represent in the election and a person whose support was advertised as a ground for voting for him in the election. Does the qualified privilege extend to cover communications in an election address of matters regarding such a person provided they are relevant to the questions which the electors are to consider? It appears to us to be impossible to draw a distinction between such a person and the candidate himself. Those who identify themselves with the policy of the candidate, who lend him their public support, who choose to stand forth as local leaders of the party which he claims to represent, cannot, as it seems to us, demand to be exempt from the risks to which the existence of qualified privilege exposes them. There is an old saying that: "Those who play at bowls must expect rubbers." The risk is one which is inherent in the game of politics.

In *Astley* v. *Harwood* (3) a case decided in the Exchequer Chamber in 1804, the plaintiff, Sir Jacob Astley, while a candidate at a Parliamentary election, had been accused by the defendant of (among other things) having murdered his own father. This accusation was made in the presence of electors and others. SIR JAMES MANSFIELD, C.J., said that the verdict of the jury must mean that they believed the defendant's intention to have been to impute the actual crime of murder, a finding which involved that the words complained of were actionable *per se*, but the CHIEF JUSTICE said that the fact that the plaintiff was a candidate did not mean that any person might "accuse him of any imaginable crime with impunity." This case has no real bearing on the present question, since it does not appear that the defendant was himself an elector or had any claim to protection by qualified privilege, and, moreover, the communication was not confined to electors but extended also to persons who could have had no interest in receiving it. *Pankhurst* v. *Hamilton* (4) was relied on by counsel for the plaintiffs as supporting her submission that there was no qualified privilege in the present case. The plaintiff had been the Liberal candidate and the defendant the Conservative candidate at an election. The defendant at a meeting had charged the plaintiff with being an atheist. The

Solicitor-General, for the defendant, relied on privilege, and, in the course of his address, GROVE, J., observed (3 T.L.R. 502) that :

> . . . the question of privilege was of great importance—whether an elector or a candidate was entitled to charge another candidate with any immorality or crime during an election, or say anything he liked of him.

GROVE, J. (*ibid.*, 505) rejected the proposition that a man could say " anything he pleased of another simply because it was during an election contest." He then explained to the jury the nature of malice as defeating privilege and put this question to them : " Did they consider the defendant had gone beyond the privilege, and had published the libels with express malice actuated by some improper motive ? " This appears to us to recognise the principle that within proper limits defamatory words spoken by one candidate of another are entitled to the protection of qualified privilege. When we say " proper limits " we mean, of course, that the matter communicated must be germane to the questions which the electors may properly and reasonably take into consideration in deciding how to cast their votes. This is merely an application of the ordinary principle, stated by LORD FINLAY, L.C., in *Adam* v. *Ward* (5), that " the privilege extends only to a communication upon the subject with respect to which privilege exists." In the present case there can be no doubt that the matters mentioned in the alleged libels were matters which the electors in Abercromby ward as such electors had an interest in hearing. In *Duncombe* v. *Daniell* (6) a voter published in a newspaper defamatory matter concerning a candidate at a Parliamentary election. LORD DENMAN, C.J., said (8 C. & P. 229) :

> However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate.

This clearly recognises the existence of privilege in the case of a communication by an elector, but denies its existence where the communication is made " to all the world " as distinct from a communication confined to other electors.

We were also referred to two Scottish cases. In *Anderson* v. *Hunter* (7) the pursuer had been a candidate at a municipal election for one of the two divisions of the parish of Barvas. The defender was a ratepayer in the parish of Barvas, but he was not an elector in the division for which the pursuer was a candidate. The court held that there was no case of privilege, " the defender not being a voter in the election with reference to which he is said to have made the statements complained of." In *Bruce* v. *Leisk* (8) privilege was held to exist where the communication was by one elector to another.

It appears to us that, so far as communications by one elector to another are concerned, the law of England must, on principle, be the same as that in Scotland, and the English authorities cited support that view. As we have already said, we can see no ground for denying in the case of a rival candidate the existence of a duty to communicate relevant matters to the electors, nor can we see any ground for suggesting that the electors have not as much an interest in receiving such a communication from a candidate as they have in receiving it from a fellow elector. It was suggested that the fact that the candidate has an interest in procuring his own election in some way negatives the existence of privilege or that the desire to defeat his opponent amounts by itself to evidence of malice. These views appear to us to be untenable. In the result, we consider that the ruling of STABLE, J., on the question of privilege was correct in law. It covers the case of Mrs. Braddock, and the same principles would, in our judgment, have applied to the case of the other three plaintiffs had they not dropped out of the case. Of course, if we are wrong in our view that the words complained of are not as a matter of law capable of referring to them as individuals, there would remain in their case the question whether there was any evidence of express malice proper to be left to the jury. This question does not, however, in the circumstances call for consideration.

We now turn to that branch of the case which is concerned with misdirection. STABLE, J., having withdrawn from the jury the cases of the last three plaintiffs and having ruled that the communication was the subject of qualified privilege, there were three questions for the jury on which direction was required. These questions were : (1) Were the words complained of defamatory of Mrs. Braddock ? (2) Were they fair comment on a matter of public interest ? (3) Was there express malice so as to destroy the defence of qualified privilege? STABLE, J., did not ask the jury to give separate answers to these questions. Had he done so, the decision of this appeal might well have presented fewer difficulties than, in fact, it has done. The case, indeed, is a good illustration of the disadvantage of inviting the jury simply to find a verdict for the plaintiff or for the defendant when a number of issues is involved. When this course is taken and there are, as here, several alternative grounds on which a verdict for the defendant can be based, it is, in general, impossible to do more than speculate as to the particular ground or grounds on which the verdict was based. The result may be unfortunate since misdirection on one of the grounds will, in general (subject to R.S.C., Ord. 39, r. 6, to which we will refer later) be sufficient ground for ordering a new trial. The reason for this is that where it is impossible for the Court of Appeal to say that the jury did not base its verdict on the ground as to which there has been misdirection, it cannot be said that the misdirection was not responsible for the verdict. It may well be, as counsel for the defendants argued, that, having regard to the defence of qualified privilege, a misdirection (if such there was) on the question of fair comment could not have affected the issue of the case. Even so, however, we are quite unable to ascertain whether the jury considered (*a*) that the words were not defamatory of Mrs. Braddock (in which case malice would have been irrelevant) or (*b*) that, although defamatory, they were published without express malice. Either finding would have resulted in the verdict which the jury, in fact, gave. These considerations demonstrate the importance in such a case as the present of keeping the various issues separate in the summing-up and of defining with clearness for the guidance of the jury the various matters to which, on the several issues, their minds should be directed. This is all the more important when separate questions are not put to the jury. To be asked merely to find for the plaintiff or the defendant after a direction in which the various matters relevant to the alternative grounds are to any serious extent intermingled instead of being explained separately may well be calculated to confuse the mind of the jury. Indeed, it seems to us that such an intermingling might in some cases be of itself sufficient to constitute a misdirection even if the trained mind of a lawyer might be able to pick out and re-arrange under their appropriate headings the particular observations which relate to the several matters requiring consideration by the jury. There are more examples than one of this intermingling in the present summing-up. Thus, in the middle of the summing-up on the issue of defamation or no defamation are to be found references to two matters which properly belong to the defence of fair comment. One of these, at any rate, namely, the distinction drawn between fact and opinion, was admittedly a misdirection if understood (as the jury must have understood it) as referring to defamation. The other, namely, the use of the word "many," in the passage in the second libel "Communist candidates are fighting Socialists in many parts of Liverpool—but not in Exchange" is said by counsel for the plaintiffs to be an untrue statement of fact sufficient to invalidate the defence of fair comment. The truth or untruth of this word "many," no doubt, has relevance to the question of defamation, but the substantial point relates to the defence of fair comment, yet the judge only refers to the use of the word "many" in his summing-up on defamation and makes no reference to it, as he should have done, when he is dealing with fair comment. We do not propose, for reasons already indicated, to deal at length with the question of fair comment, but we may here say this. Counsel for the plaintiffs argued that on the facts the use of the word "many" was necessarily untrue and that the judge ought, therefore, to have ruled that the defence of fair comment failed. We cannot agree with this. STABLE, J., evidently thought that it was capable of conveying an untrue meaning as a statement of fact and with this we agree, but on that footing it ought to have been referred to in that part of the summing-up which related to the defence of fair comment. As it was, the jury could not, when considering that defence, give to the word "many" the necessary attention without lifting, so to speak, the judge's remarks with regard to it out of that part of the summing-up which related and was expressed to relate to defamation only.

We have anxiously considered whether the summing-up as a whole ought not, for reasons of this character, to be regarded as having been so confusing to the jury as to amount to a misdirection. With some doubt we have come to the conclusion that we ought not to go as far as this. We prefer to base our opinion on what are asserted to be matters of positive misdirection. As we have pointed out, the jury may have based their verdict either on the view that the words were not defamatory or on the view that express malice was not proved to their satisfaction. If there was a misdirection on either of these topics the verdict cannot stand, for it is impossible to discover which of the two grounds formed the basis of the verdict. Misdirection is alleged with regard to both these questions and we will deal with them separately.

On the subject of defamation the main criticisms directed against the summing-up were three in number. It was said that the innuendos pleaded were not properly put to the jury, indeed, that they were not even referred to. It was said, secondly, that the judge directed the jury that the words complained of did not involve any attack on the political sincerity or political integrity of Mrs. Braddock, and, thirdly, that the direction would have been understood by the jury as meaning that words could not be found by them to be defamatory if the jury considered them to be expressions of opinion and not statements of fact. In the circumstances of the present case we do not attach much weight to the first ground of objection. No doubt, in normal cases where a judge is leaving to the jury the question whether the words complained of, in fact, bore the meaning ascribed to them in the innuendo, it is convenient and proper for him to remind the jury of the specific terms of the latter, and cases are imaginable in which his omission of all reference to an innuendo might amount to misdirection. We are satisfied, however, that in the present case the terms of the innuendo in respect of both libels were so repeatedly impressed on the minds of the jury, both in the cross-examination of Mrs. Braddock and in the concluding speeches of counsel, that the effect of the judge's omission (which in any case relates to the first libel only) was inconsiderable. In the case of the second libel he appears to have put to the jury the innuendo which was argued. The other two matters of complaint are, in our view, much more serious. The first occurs, it is true, in a passage beginning with the words "Just one word about the damages." Not only was it, in our view, a misdirection on damages, but it would inevitably have been regarded by the jury as a direction on liability, a direction to exclude from their minds any possible meaning of the words as importing an attack on the political sincerity or the political integrity of Mrs. Braddock, *i.e.*, as a ruling by the judge that the words were in law incapable of such a meaning. That the words are capable of such a meaning is, in our view, clear. The actual reference is to be found in the following passage in the summing up:

> If that question [*i.e.*, the question of damages] should ever arise in this case, you will, I think, bear in mind that in this alleged offence no sort of attack is made on the character of Mrs. Braddock as an individual, as a woman. No attack is made on her sincerity, her political sincerity or on her political integrity, nothing personally vindictive or abusive.

If this was not to be understood by the jury as a ruling that the words were incapable of bearing a meaning which involved an attack on the political sincerity or integrity of Mrs. Braddock, we are at a loss to know how they would have understood it. It was, in our opinion, a serious misdirection. The jury cannot have regarded it as anything but a general direction on the subject of defamation, and if, as counsel for the defendants argued, it was intended by the judge to relate, not to the question of defamation, but only to the question of damages, it would not have made sense. If the words complained of were to be regarded as incapable of bearing the alleged meaning in relation to damages, it is obvious that they must have been incapable of bearing the alleged meaning at all. It is true that later on in the summing-up there occurs this passage: "You have to consider whether, fairly read, it imputes any misconduct, political or otherwise, to Mrs. Braddock," but we do not regard this as undoing the harm that we think must have been done by the earlier direction, even if the jury understood an allegation of political misconduct as meaning the same thing as an attack on political sincerity or political integrity. We need not explain why we consider that the words complained of are capable of being interpreted as an attack on the political sincerity or the political integrity of Mrs. Braddock. It is sufficient to say that the question whether they, in fact, bore such a meaning ought to have been left to the jury.

Indeed, counsel, if we understood him rightly, did not contest the view that this passage in the summing-up must be regarded as a misdirection if it is to be read as referring to the substantial matter of defamation or no defamation as well as to damages. His only attempt to explain it away was by suggesting that it must be read as referring to damages only and not as excluding the matters referred to from the consideration of the jury on the question of defamation or no defamation. We have dealt with that point.

In dealing with the remaining matter in relation to defamation, the learned judge starts by saying: "The first thing you have to decide is whether this paragraph in this election address, fairly read, contains anything defamatory of Mrs. Braddock." Of this and the remainder of the paragraph no complaint can be made. The summing-up then goes on to elaborate this thesis and tells the jury what they are to remember "in approaching that problem." He quotes the two opening sentences of the first alleged libel and rightly says that they are not a libel on Mrs. Braddock or on anybody else. He then quotes the next following paragraph beginning with the words "I am horrified" down to the words "British Communist Party." Complaint was made of this separation of the first libel into two parts, and it was said that it ought to have been treated as a whole. We do not regard this as a serious complaint, nor do we think that the jury would have been misled. What does appear to us to be serious is what follows. It will be remembered that the judge is directing the jury on the subject of defamation, but immediately and without any warning he interposes a considerable quantity of matter which, as it appears to us, can only have been regarded by the jury as relating to the question of defamation but which admittedly amounted to a serious misdirection so far as that question was concerned. For it amounts to saying, and must have led the jury to suppose, that a statement of opinion, as distinct from a statement of fact, could not be defamatory. It was only after a critical examination by counsel and the court that the conclusion was reached (and admitted by counsel for the defendants to be correct) that at this point the judge must have diverged into the matter of fair comment without any sort of warning that he was doing so. It is, of course, inaccurate to say that an expression of opinion cannot be defamatory and the jury not being able to re-arrange the judge's observations so as to group them under the heads to which in law they were relevant, were not, in our opinion, given the opportunity fairly to consider the question of defamation. The direction here must, we think, have been all the more misleading since after these references to fact and opinion the judge emphasises the fact that he has been discussing defamation and defamation alone by adding:

> There, members of the jury, is the whole thing. If you come to the conclusion that that is really not a defamatory statement at all, as I say, that is an end of the whole matter. Its publication does not reflect upon Mrs. Braddock.

Complaint is also made as to the summing-up on "express malice." The definition of "express malice" is not criticised, but it is said that the jury were not properly instructed as to the evidence which they had to consider on the subject. The mere fact that the judge did not refer to all the matters which could be regarded as evidence of malice—and there were, no doubt, several of such matters in addition to those to which he specifically referred—would not, we think, by itself give rise to a misdirection. The judge is not bound to refer to the whole of the evidence, particularly when, as, no doubt, was the case here, it had been exhaustively placed before the jury by counsel. It is said, however, that the judge, by referring in the terms he did to one only—and that not, perhaps, the most attractive—of the points made by counsel, must have conveyed to the jury the impression that this was the only matter which they had to consider on the subject. The one point to which the judge did refer was the argument that the mere mention of Mrs. Braddock's name, she not being herself the candidate, was evidence of malice. That reference was in the following language:

> Now what is the evidence here that Mr. Bevins was actuated by spite . . . ? Miss Heilbron says, "Well, the mere fact he mentioned her name in the election address is evidence of malice."

Then the judge discusses that point alone and indicates (we do not say wrongly) his own view that that mention of Mrs. Braddock's name was not itself sufficient to justify a finding of malice. We think that this criticism of the summing-up is right in that the way in which the judge referred to this one point and the emphasis which he placed on it cannot have helped conveying to the jury the idea that it was the only evidence of malice which they need consider.

We need not examine the other criticisms of the summing-up suggested by counsel for the plaintiffs. What we have said is, in our view, sufficient to show that there was substantial misdirection which, apart from the possible effect of R.S.C., Ord. 39, r. 6, already referred to, would entitle the appellant, Mrs. Braddock, to an order for a new trial. That rule provides :

> A new trial shall not be granted on the ground of misdirection . . . unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned . . .

In the present case we are of opinion, not only that a miscarriage has taken place, but that it is a substantial miscarriage. Looking only at the misdirections which we have described on the matters of defamation or no defamation and of malice, we find, first, that what was an important matter in Mrs. Braddock's case, *viz.*, the alleged attack on her political sincerity or her political integrity was, in effect, withdrawn from the jury, and, second, that her case on malice was not properly put. It is not for this court to speculate on the verdict which the jury might have returned if the case of Mrs. Braddock on those topics had been properly put before them. Whatever the precise meaning of the rule may be—and its application must be considered in relation to each individual case—it cannot, in our opinion, be interpreted as an invitation to the Court of Appeal in such circumstances as these to treat itself as being in the position of the jury. The rule was considered by the House of Lords in *Bray* v. *Ford* (9). Special emphasis was, no doubt, there laid on the fact that in that case the principal matter of complaint related to damages, a matter on which the jury in a libel case has such wide limits within which it can express its decision that a court cannot well say that the amount awarded would probably have been the same even if the misdirection had not taken place. The opinions expressed appear to us to go beyond the mere question of damages. Thus, Lord Halsbury, L.C., says ([1896] A.C. 48) :

> What influence such a wrong might have had upon the *verdict or* upon the amount of damages I am not disposed to consider . . . I absolutely decline to speculate what might have been the result if the judge had rightly directed the jury. It is enough for me that an important and serious topic has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant.

Lord Watson says (*ibid.*, 49) :

> Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal.

Here, an important part of Mrs. Braddock's case was, as we have maintained, not so submitted. Lord Herschell does, perhaps, go the farthest in emphasising the special importance of the fact that the most important matter was that of damages, but when he says (*ibid.*, 53) :

> The jury have returned their verdict on what they were erroneously led to think was the case, and not on the real case which the defendant was entitled to have submitted to them . . .

he is, we think, intending to express a view not confined to the question of damages. Lord Shand said (*ibid.*, 55) :

> The misdirection was therefore on a matter clearly material to the issue, which . . . *might possibly have even affected the question whether the plaintiff was entitled to a verdict*, and which in any view might seriously affect the question of damages.

We are, accordingly, of opinion that Mrs. Braddock is entitled to a new trial.

Order accordingly. Defendants to recover the costs of the trial and of the appeal so far as they relate to the plaintiffs other than Mrs. Braddock. Defendants to pay Mrs. Braddock's costs of the appeal. Other costs to abide the result of the new trial.

Solicitors : *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the plaintiffs) ; *Hands & Sons*, agents for *Edwin Berry & Co.*, Liverpool (for the defendants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

[1948] 2 All E.R. 123.

FEARN *v.* FEARN.

[COURT OF APPEAL (Tucker, Bucknill and Cohen, L.JJ.), February 9, 10, 26, 1948.]

Divorce—Condonation—Proof required—Reinstatement of wife—Prejudice of wife by husband's conduct—Formal words of forgiveness.

In June, 1944, while serving with the army in Italy, the husband received a letter from the wife informing him that she was expecting a child by another man. He replied that he had forgiven her and would always love her, and during the following three months he wrote a number of letters to her to the same effect. The child was born on Aug. 12, 1944. The wife had received a pre-natal allowance and was receiving the other army allowances for herself and the child to the knowledge and with the consent of the husband. In September, 1944, the husband received certain information and, in consequence, his attitude changed and, on Sept. 22, he wrote to his wife informing her that he intended to divorce her. He then took the necessary steps to have the wife's and child's allowances stopped :—

HELD : mere words of forgiveness, even though formal, could not be accepted as proof of condonation unless (*a*) there was conduct showing reinstatement by the husband of the wife, or (*b*) the wife had been prejudiced by the conduct of the husband after the hearing of her adultery. Since the husband had at no time renounced the wife, there had been no reinstatement of her ; there was no evidence that she had been prejudiced in any way ; and, therefore, there was no sufficient proof of condonation.

Keats v. *Keats and Montezuma* (1859) (1 Sw. & Tr. 334 ; 32 L.T.O.S. 321) and *Crocker* v. *Crocker* ([1921] P. 25 ; 124 L.T. 493), *applied.*

[AS TO CONDONATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679-682, paras. 1004-1009 ; and FOR CASES, see DIGEST, Vol. 27, pp. 336-341, Nos. *3161-3213.*]

Cases referred to :

(1) *Keats* v. *Keats and Montezuma*, (1859), 1 Sw. & Tr. 334 ; 28 L.J.P. & M. 57 ; 32 L.T.O.S. 321 ; 27 Digest 336, *3166.*

(2) *Crocker* v. *Crocker*, [1921] P. 25 ; 90 L.J.P. 136 ; 124 L.T. 493 ; 27 Digest 338, *3178.*

(3) *Rose* v. *Rose*, (1883), 8 P.D. 98 ; 52 L.J.P. 25 ; 48 L.T. 378 ; 27 Digest 362, *3470.*

(4) *Cramp* v. *Cramp and Freeman*, [1920] P. 158 ; 89 L.J.P. 119 ; 123 L.T. 141 ; 27 Digest 338, *3179.*

APPEAL by the husband from a judgment of His Honour JUDGE WILLES, K.C., sitting as a commissioner of assize, dated May 29, 1947, dismissing the husband's petition for divorce on the ground of the wife's adultery. The adultery was proved, but the commissioner refused to grant relief on the ground that the adultery had been condoned. The husband's appeal was now allowed and a decree *nisi* pronounced. The facts appear in the judgment of BUCKNILL, L.J.

Vaughan, K.C., and *Hyamson* for the husband.
Raeburn, K.C., *R. W. Vick* and *Alfred Stone* for the wife.

Cur. adv. vult.

Feb. 26. The following judgments were read.

BUCKNILL, L.J. : This is an appeal from the judgment of His Honour JUDGE WILLES, sitting as commissioner of assize, dismissing a petition by the husband, Leslie Fearn (suing as a poor person) for a decree of dissolution of his marriage to Maisie Irene Fearn on the ground of her adultery. The adultery was proved, but the commissioner dismissed the petition on the ground that the husband had condoned the adultery.

The facts are not in dispute. The parties were married in November, 1940. The husband at the time of the marriage was in the army. Their matrimonial home was at 20, Ashby Street, Derby, a house which the husband rented and where he spent his leaves with his wife. In August, 1941, the husband was ordered abroad and did not return to this country until September, 1945. Husband and wife corresponded with each other, but on or about June 14, 1944, the husband, who was then serving in Italy, received a very unwelcome letter from his wife. Unfortunately all the relevant letters from the wife to the husband were lost in action and one can only ascertain their contents from his recollection and from his answers to them. In this letter the wife said she had made a terrible mistake and did not know what to say about it, that she had been with a man, and was expecting a baby. She said she had been friends with the man for some time, but did not mention his name, that she had been at a party and had two or three drinks, and hence the trouble. In reply, the husband wrote to the wife on June 14, saying that he would always love her, and he continued :

> I think the world of you and always will. Now, I don't know how things stand with you, you say you were going with the fellow for quite a while, if you think anything of him I won't stand in your way, the army will get me a divorce. The letter you sent me pointed that way to me.

The letter ended : " Your ever loving husband for as long as you wish." On June 20 the husband, in reply to another letter from the wife, dated June 12, again wrote to her, saying :

> Well, I have forgiven you, darling . . . Well, I love you, and I hope you love me just as much. This has got to be lived down and it can be. That relys (*sic.*) on you.

A number of letters were written in a similar strain by the husband to the wife. In one he said :

> I love you and I was glad to know you still love me. Stick to that promise you've made me. Be good and don't go out with girl friends, it will help me a lot liking kiddies as I do and as far as anybody else is concerned, it will be my own and I'll treat it as such.

On Aug. 20 the husband received a letter from his mother saying that his wife had had a baby girl, and he wrote to his wife, saying : " I'm really glad of that, that's just what I was hoping for." On Aug. 22 the husband sent a present of some lace, and ended up :

> . . . give Julie [the baby] a big kiss for me. Take care of yourself. I love you. Your ever loving husband always for ever.

In a later letter he wrote :

> Darling, you say I'll never have cause to doubt you again. I want us to be happy, and we can be, you and I, because its in us both and if you stick to that we will be.

On Sept. 2 he wrote again and in the letter said :

> By the way did you get that insurance business fixed up. I hope so . . . Anyway my sweet it won't be long before I'm seeing you now. That'll be the day. I must close now darling, take care of yourself and baby too.

Meanwhile, before the birth of the baby, the wife had obtained a pre-natal allowance, a fact, apparently, of which the husband knew, and she continued to draw her separation allowance. In September the husband had been getting letters hostile to the wife from his family. Thus, in a letter to his wife he writes :

> The family seem to be kicking, you seem to have got in bad books, as long as your not in bad books with me, don't worry.

In a later letter he wrote to the wife saying :

> I love you. Now what's this talk about *if* I come back to you, there's no *if* about it. Arnold seems to be set on getting me a divorce. I think he'll find I've something to say about that. They seem to think I've got a bad girl. Well, I don't, and its up to you to prove them wrong. In the meantime have nothing to do with them. I'll write to Mother and have a stop put to it—I'm glad you still love me, darling, it would have broken my heart if you had not. You'll never know how upset I was thinking of that because I made sure you'd think a lot of the fellow.

About Sept. 22, the husband's attitude towards his wife changed in consequence of letters from his mother and some strangers. The change is shown in the following letter from him to his wife :

> Darling, I've received three letter cards from you the last one Sept. 12. Now I've had some letters from Mother and Flo telling me you've been going about with fellows for I don't know how long and they expected to happen what did happen, but this is the worst. I've also had three letters from three people I've never heard of telling me how you've been carrying on. Now as you know I was going to overlook the family, but I can't these. It seems you've more to tell me or should have told than you have. I don't know the people myself and their advice is for me to get a divorce. Now all these people can't be running you down just because they don't like you. They must know something you haven't told me. Now this has got me down for people I don't know to write me like they have. I took your word that it was just a mistake,

> and that it was a fellow you just got to know but it seems you weren't telling me the truth. This has made me unhappy because I think a lot about you, you must know that, but I'm afraid it leaves me with one view that is to get a divorce. I guess this is going to be a shock to you after me saying I'll come back to you which I fully intended doing, but I believe there was more to tell me than you did. Up to this I believe I'd more faith in you than anything in this world, even after what happened, but its gone in three letters which I could not put to one side and say its not true. I wanted to be the last person to hurt you, you've been hurt enough and I guess I'm as upset writing it as you will be reading it. I wish you'd have told me what you should. Love, Les.

The wife's answer to the husband was that he could go ahead and get a divorce and from that time onwards the correspondence between them ceased. The husband took the necessary steps to have the wife's and child's allowances stopped, and he saw his commanding officer and obtained a poor person's certificate for a divorce petition on June 18, 1946.

In cross-examination the husband admitted that until he got these last letters he was perfectly content to go back to his wife, having freely forgiven her. The mother of the husband was called and, after proving the birth of the baby, said:

> There was one man she [the wife] carried on months and months with. I should think that that was the father of the child.

She added that she wrote to her son telling him the right thing was to get a divorce and let the man keep the child. The wife also was called as a witness. She alleged that she met a man about August, 1943, took too much to drink and committed adultery with him. She received the pre-natal allowance in July, 1944, and the child was born on Aug. 12, 1944. Her own allowance continued until October, 1945, and the allowance for the child till April, 1945. She was asked this question:

> *Q.*—And this other man, when you received your husband's forgiveness what did you do about it? *A.*—I was sure my husband would forgive me. He had already gone.

The wife declined to tell the court the name of the man with whom she had committed adultery.

The commissioner, after stating that the mere expression of forgiveness does not constitute condonation in law, even when the forgiveness is in writing and is sent and accepted by the wife, came to the conclusion that the husband restored the wife to her former position because he also saw his commanding officer and other persons interested in his welfare, told them he had forgiven his wife, and received and acted on advice to make the pre-natal allowance to his wife and to provide for the child as his own child. I do not find in the transcript any evidence by the husband that he acted in this way. He merely took no steps to stop his wife's separation or pre-natal allowance or the allowance for the baby until about a month after the birth.

In my opinion, the question whether the conduct of the husband in this case amounts to condonation is difficult to answer. The leading case of *Keats* v. *Keats and Montezuma* (1) is based on facts wholly different from the facts in this case, but, as LORD STERNDALE, M.R., said ([1921] P. 34) in *Crocker* v. *Crocker* (2), the principle there stated was quite general in its terms—"was not in any way dependent upon the actual facts of the particular case." LORD STERNDALE, M.R., also said (*ibid.*, 33, 34): "That case [*Keats* v. *Keats* (1)] is not binding upon us; but it is 60 years old and has constantly been acted upon in this court." In *Keats*' case (1) the Judge Ordinary (SIR CRESSWELL CRESSWELL), when addressing the jury on the meaning of condonation, said (1 Sw. & Tr. 346):

> I have not been able to find in the reports of cases decided in the Ecclesiastical Courts, any precise definition of what was meant in those courts by the word "condonation"; but looking to the circumstances under which former judges have held condonation to have been established, I have come to the conclusion that condonation means a "blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed." This is the best definition that I can give you of the term of condonation.

In *Keats*' case (1) the issues were directed to be tried before the Judge Ordinary and a special jury, but the question whether there should be a decree came before the full court, composed of LORD CHELMSFORD, L.C., WIGHTMAN, J., and CRESSWELL, J.O., and the rule *nisi* was granted. On an application to the court for a new trial, LORD CHELMSFORD, L.C., in his judgment, said (1 Sw. & Tr.

353, 354) that the court was called on to decide whether the Judge Ordinary's definition of condonation was correct, and whether it was to be adopted as the principle on which all similar cases were to be decided for the future. LORD CHELMSFORD, L.C., said (*ibid.*, 354, 355):

> . . . the second part of the proposition . . . explains as well as restricts the first part. It must be such a blotting out of the offence as restores the wife to her former position. This is contended to be incorrect, because it excludes a condonation by words only; for it is said there are two sorts of condonation, one express or by words only; A the other implied, as by taking back a delinquent wife and cohabiting with her. On the other hand, the distinction in the law of condonation is denied, and it is asserted that no condonation by words only, however strong, will be sufficient, unless they are followed by sexual intercourse.

LORD CHELMSFORD'S conclusion on that assertion was as follows (*ibid.*, 356, 357):

> The acts which prove forgiveness may be so strong and unequivocal, as by taking B home an offending wife and cohabiting with her, that they may conclusively establish condonation. But words, however strong, can at the highest only be regarded as imperfect forgiveness, and, unless followed up by a something which amounts to a reconciliation and of a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete. It has been argued that nothing less than renewed sexual intercourse will be sufficient to establish condonation. It is obvious, without adducing instances to illustrate my meaning, that that in some cases C may be a test wholly inapplicable. But I am willing to adopt an expression which was happily used by WIGHTMAN, J., in the course of the argument, and to say that in my judgment there can be no condonation which is not followed by "conjugal cohabitation" . . . To say that condonation requires conjugal cohabitation or connubial intercourse, leaves the nature of the cohabitation or intercourse to be adapted to the varying condition and circumstances of different parties. This will also justify the language of the . . . Judge Ordinary, that the forgiveness must be shown by a restoration of the wife to her former position . . . I see no reason at all to differ with D the Judge Ordinary in the way in which he has stated the law of condonation to the jury; but with him I think that the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation, and that this must be shown by the reinstatement of the wife in her former position, which renders proof of conjugal cohabitation, or the restitution of conjugal rights, necessary.

The crucial question, therefore, in the present case is this. Did the conduct of the husband after hearing of the wife's adultery amount to a reinstatement E of the wife in her former position. Did it amount to conjugal cohabitation or the restitution of conjugal rights, so far as it was possible for a husband who is fighting in Italy to be in a state of conjugal cohabitation with his wife in England?

The decision in *Keats* v. *Keats* (1) was approved and followed by the Court of Appeal in *Crocker* v. *Crocker* (2). The material facts in that case were that the husband was a soldier on active service. While he was away his wife committed adultery, with the result that she had a child of which he was not the F father. The husband, on first hearing of the wife's adultery, took the children of the marriage away from her and stopped her allowance. He then wrote a letter to his wife in which he said that he was willing not only to forgive her and to take her back again, but even to take charge of her illegitimate child. He then received certain letters from his relations, and he wrote another letter to her in which he refused to have anything more to do with her. On these G facts LORD STERNDALE, M.R., said ([1921] P. 36, 37):

> It is said that upon those letters there is condonation; but in my opinion they do not constitute condonation at all. The husband is there expressing his willingness to take his wife back . . . but the children were never brought back to her; the allowance and the allotment of payment were never restored to her; and she certainly was not, and could not by those letters alone be restored to her former position. I do not think it is necessary for me, any more than the Judge Ordinary in *Keats* v. *Keats* (1) G thought it was necessary for him, to say whether the mind of man could possibly devise a form of reconciliation in words which would restore a guilty spouse to his or her former position; it is difficult to imagine, but it is quite enough to say that, in my opinion, these letters do nothing of the kind. The wife was not in any way restored to her position . . .

The facts in that case, therefore, differed vitally from the facts in the present case, in that, in the present case, the husband took no steps to renounce his wife by stopping her marriage allowance. There was in the present case no loss of position as a wife to which she could be reinstated, for nothing had been taken away from her by her husband which he could restore for the purpose of reinstating her as his wife.

The case appears to me to raise two questions. The first question seems to be partly one of fact and is whether the conduct of the husband amounted to a restoration of the wife to her former position as a wife, whether there was a resumption or continuance of "conjugal cohabitation." In my view, the husband did nothing which amounted to a restoration of the wife to her former A position and there was no conjugal cohabitation at the time. At the highest the husband merely allowed the wife to remain in the position in which she had been before her confession and took no steps to depose her from that position. The second point is a question of law and one which was not decided in *Keats*' case (1) or in *Crocker's* case (2). It is whether formal words of forgiveness can by themselves constitute condonation. LORD STERNDALE, M.R., glanced at the point, B in the passage which I have quoted from his judgment in *Crocker's* case (2), with a somewhat doubtful eye. A husband can make a valid agreement with his wife not to take divorce proceedings in respect of her confessed adultery. Thus, in *Rose* v. *Rose* (3), a husband and wife entered into a deed of separation by which it was agreed that every offence, if any, committed by either party against the other should be considered as condoned. It was held by the Court of Appeal, affirming the decision of SIR JAMES HANNEN, P., that adultery by C the husband subsequent to the deed did not revive acts of cruelty committed by him before the deed. SIR GEORGE JESSEL, M.R., in the course of his judgment, said (8 P.D. 99):

> It appears to me to be perfectly consistent with public policy to hold that there may be what, for want of a better term, I will call final condonation. In the old Ecclesiastical Courts condonation was never final, but I do not see that public policy is against final condonation, indeed I think that it is in favour of allowing it. That D bygones should be bygones is as advantageous between husband and wife as between any other parties.

There is, however, no such agreement in the present case. There are merely the plain words of complete forgiveness.

The importance of reinstatement and the comparative irrelevance of forgiveness as an essential feature of condonation is illustrated by *Cramp* v. *Cramp* E *and Freeman* (4). In that case the facts were similar to those in *Crocker* v. *Crocker* (2), except that the husband never forgave the wife and the wife admitted that she never thought her husband had forgiven her and never asked to be forgiven. On the other hand, the husband had intercourse with his wife on several occasions after knowledge that she had committed adultery. The husband subsequently petitioned for a decree on the ground of his wife's adultery, but McCARDIE, J., held that his right was barred by his condonation F of the offence. In the course of his judgment, McCARDIE, J., said ([1920] P. 161):

> No matrimonial offence is erased by condonation. It is obscured, but not obliterated. It may be revived after many years.

From this feature of legal condonation he drew the inference (*ibid.*, 163, 169, 171) that:

> G . . . the truer definition of condonation is that it is a conditional waiver of the right of the injured spouse to take matrimonial proceedings, and it is not forgiveness at all in the ordinary sense . . . [it] is not conditional forgiveness, but a conditional reinstatement of the offending spouse . . . A man cannot at the same moment exercise the rights of a husband and disclaim the continuance of the marriage bond . . . a husband, who has sexual relations with his wife after knowledge of her adultery, must be conclusively presumed to have condoned her offence.

H In the absence of any clear authority, one may speculate as to the principle underlying the doctrine of condonation to see whether that throws any light on what the law should be on the point whether mere words of forgiveness, verbal or written, can ever constitute legal condonation. In this connection it is important to note the great weight which the legislature attaches to the principle of condonation. It is an absolute bar to a decree of divorce; it is not a discretionary bar, such as is the cruelty or the adultery of the petitioner or unreasonable delay in presenting the petition. Being, therefore, an absolute bar, I think it is reasonable to assume that the law requires a high degree of

proof that an innocent husband has not only intended to waive the offence, but has manifested that intention by restoring the guilty wife to her former position. I think it is a corollary to that requirement that in a case like the present one the wife should have been removed from her position as a wife before she can be restored to it. The other principle which, I think, may be considered when deciding whether mere words can ever constitute condonation is that the innocent husband after knowledge of the adultery must not behave in such a way as seriously to prejudice the guilty wife. Sexual intercourse A
is an extreme illustration of such prejudice. Such behaviour by an innocent spouse may be regarded as condonation of the offence. One finds a similar principle in certain statutory limitations placed on the right of a petitioner to avoid his marriage under the Matrimonial Causes Act, 1937, s. 7. In the present case I cannot see any evidence that the wife has been prejudiced by the conduct of the husband after hearing of her adultery. If one considers what is in the interest of the community as to the kind of proof required to B
establish condonation, it seems to me on the whole that, while it is in the interest of the community that matrimonial bygones should be bygones, it would create great difficulties and injustice if mere words of forgiveness were to be accepted as proof of condonation. For instance, in the present case the husband wrote the letters of forgiveness to his wife at a time when he had only her statements before him as to the details of her misconduct and was C
himself living under conditions of danger on active service which made it difficult for him to come to a rational and considered decision as to what he should do. To hold that his letters to her thereby debarred him from exercising his right to a decree on the ground of the adultery of the wife seems to me harsh and unreasonable.

These reasons lead me to the conclusion that the law insists, and rightly insists, on conduct showing reinstatement by the husband of the wife as proof D
of condonation. In the particular circumstances of this case there has been, in my view, no reinstatement of the wife because the husband did not at any time renounce her, and there was no broken "conjugal cohabitation" which was restored. I think, therefore, that in this case there was no sufficient proof of condonation and that the husband is entitled as of right to a decree on the ground of his wife's adultery.

TUCKER, L.J.: In arriving at his decision that the husband had E
condoned his wife's adultery, the commissioner was mistaken as to the effect of some of the evidence. In his judgment he said:

> He went and saw his commanding officer and other persons interested in the welfare and troubles of our service men, and as a result of the perfectly proper and sound advice that he got in face of his own attitude to the girl he loved which is clearly shown in the letters that he wrote—in face of that attitude he was perfectly properly advised F
> to make the allowance to the wife which the girl needed as an expectant mother and treat her as the mother of a lawful child, to get her the pre-natal allowance and after the birth of the child to provide for the child as his own child and the girl as still his wife.

Later, he speaks of the husband as having "secured for her" these allowances. This was not in accordance with the evidence. No evidence was given as to the steps which have to be taken before a pre-natal allowance is granted, *e.g.*, whether any application or authorisation on the part of the husband is G
required. The dates would make it appear probable that the pre-natal allowance was obtained on the application of the wife alone. Furthermore, the husband did not seek to obtain the advice of his commanding officer or anyone else until September, 1944, when, as a result of the advice obtained, he stopped the allowances. It does, however, appear from the evidence, although the matter was not very fully explored, that the husband was aware that his wife was receiving these allowances and took no step to stop them H
until September, 1944. The question for decision is, accordingly, whether the husband's letters of forgiveness, coupled with his failure from June to September to stop the allowances, amounts to condonation. I think the authorities referred to by BUCKNILL, L.J., establish that words of forgiveness cannot of themselves amount to condonation. In the present case there is nothing beyond words of forgiveness, unless the mere failure to stop the allowances for a period of four months during which the husband was engaged on active service overseas can be regarded as an unequivocal act of recognition

amounting notionally to conjugal cohabitation. I do not think it can be so regarded. It may be asked what more could the husband have done to reinstate his wife in the position from which she had deposed herself? The answer may be that the circumstances of the husband's absence on active service rendered it impracticable for him completely to condone his wife's adultery until he had returned to this country and was in a position to take stock of the situation before taking an irrevocable step. I do not suggest that circum-
A stances may not exist in which a petitioner absent overseas may take some irrevocable step which will convert his words of forgiveness into condonation. It is sufficient to say that I can find no evidence of such a step having been taken in the present case in the four months during which the husband was engaged in actual front line active service and had had only his wife's version of her conduct. To hold that in such circumstances the husband had condoned his wife's adultery would, in my view, be equivalent to deciding that mere
B words of forgiveness, given perhaps hastily and without full knowledge of the facts, are sufficient to constitute condonation. For these reasons I agree that this appeals succeeds.

COHEN, L.J.: I have had the opportunity of reading the judgments which have been delivered by my learned Brethren, and I do not desire to add any reasons of my own for agreeing that this appeal should be allowed.

C *Appeal allowed and a decree nisi pronounced. No order as to costs.*

Solicitors: *N. Ashton Hill*, Services Divorce Dept., Law Society (for the husband); *Boxall & Boxall*, agents for *J. Robert Pinder & Son*, Derby (for the wife).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

D

NAAMLOOZE VENNOOTSCHAP BELEGGINGS COMPAGNIE "URANUS" v. BANK OF ENGLAND AND OTHERS.

E [COURT OF APPEAL (Lord Greene, M.R., and Evershed, L.J.), March 3, 1948.]

Practice—Costs—Security for costs—Order against defendant—Plaintiff and defendant out of jurisdiction—Plaintiff ordered to give security.

In an action to decide the ownership of certain bearer bonds, it was discovered by the plaintiff, a Dutch company incorporated out of the jurisdiction, that one of the defendants was in effect agent for a Dutchman
F and a Dutch charity, both resident out of the jurisdiction, and on the plaintiff's volition these parties were joined as defendants. The two new defendants applied for security for costs, which was ordered by the master, and thereupon the plaintiffs asked that the new defendants should also give security as being persons out of the jurisdiction. This the master also ordered. On appeal:—

HELD: the defendants were exercising their right to defend themselves
G against attack and their right to obtain security for costs from foreign plaintiffs, and they ought not to be prevented from doing so, or hampered, by being themselves ordered to give security for costs.

Observations of STIRLING, J., in *Re Compagnie Generale d'Eaux Minerales et de Bains de Mer*, ([1891] 3 Ch. 451, 458), and *Maatschappij Voor Fondsenbezit and anr.* v. *Shell Transport and Trading Co. and ors.*, ([1923] 2 K.B. 166; 129 L.T. 257), *considered.*

H *Decision of* WYNN-PARRY, J. (*ante* p. 304), *affirmed.*

[AS TO SECURITY FOR COSTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 64-68, para. 108; and FOR CASES, see DIGEST, Practice, pp. 903-915, Nos. *4428-4583.*]

Cases referred to:

(1) *Re Compagnie Generale d'Eaux Minerales et de Bains de Mer*, [1891] 3 Ch. 451; 60 L.J.Ch. 728; 40 W.R. 89; 43 Digest 196, *437.*

(2) *Maatschappij Voor Fondsenbezit and anr.* v. *Shell Transport and Trading Co. and ors.*, [1923] 2 K.B. 166; 92 L.J.K.B. 685; 129 L.T. 257; 67 Sol. Jo. 617; Digest, Practice, 904, *4451.*

Appeal from a decision of Wynn-Parry, J., made on Feb. 3, 1948 (reported *ante* p. 304), dismissing an application by the plaintiffs, who were a company incorporated in Holland, that the defendants, who resided in Holland, should give security for costs. The Court of Appeal dismissed the appeal. The facts appear in the judgment of Lord Greene, M.R.

C. A. Settle for the plaintiffs.
J. H. A. Sparrow for the defendants.

A

LORD GREENE, M.R.: This appeal raises a curious and novel point. In the action in which the application now under review was made, the plaintiffs, a Dutch company resident in Holland, are seeking to establish their title to certain bearer bonds issued by the British government, being bonds of the British Funding Loan, 1960/1990. These bonds, according to the statement of claim, were physically situated in Holland at the time of the German occupation. They were taken under compulsion by the German authorities. Apparently, B they came on to the market and were acquired ultimately, through how many hands we do not at present know, by a Dutch gentleman, Mr. Sauveplanne, who is one of the defendants, and by a Dutch charitable institution, which stands next after the name of Mr. Sauveplanne in the list of the defendants. The remainder came to the hands of the third foreign defendant, who is a Dutch woman. The claimants seek to establish their title to those bonds C notwithstanding the fact that they were dealt with during the war in the manner that I have mentioned.

The Governor and Company of the Bank of England, who are charged with the service of the bonds, Messrs. Baring Brothers & Co., Ltd., and the Swiss Bank Corporation, who, as agents for the other defendants or for some of them, had attempted to collect the proceeds of certain coupons, are made defendants. All three are in a sense nominal defendants, although an injunction D is asked for, but for the purposes of this appeal we can neglect those of the defendants who are banks. The first two Dutch defendants, Mr. Sauveplanne and the charity, applied for security for costs against the plaintiffs. The plaintiffs then asked for security for costs against those defendants. Mrs. Dekker-Molenaar, the last defendant, was no party to the application against the plaintiffs, and, accordingly, the plaintiffs have not retaliated by asking for security against her. The matter which comes up for our decision is the E order for which the plaintiffs applied by way of retaliation against the first two Dutch defendants. That application was for an order that those defendants should give security for costs as a condition of their being allowed to defend the action. Wynn-Parry, J., refused to make such an order against those defendants. The matter, therefore, stands in this position. An order against the plaintiffs for security has been made at the instance of those defendants, F but no corresponding order had been made against those defendants. The plaintiffs now appeal.

The idea that a foreign defendant properly joined in an action in these courts is to be impeded in defending himself by being forbidden to do so unless he gives security for costs is one which, at first sight, is not an attractive one. On the other hand, the idea that a foreign plaintiff who chooses to remain resident abroad and who, nevertheless, brings an action in this country should be required G to give security as a condition of his being allowed to continue with his action is not quite so repellent. Indeed, it is one of the commonest grounds for the exercise of the jurisdiction of the courts to order security. It is said that where there is a foreign plaintiff and a foreign defendant and the foreign defendant exercises what is *prima facie* his right to require security from the foreign plaintiff, the court ought to make it a condition of granting such an order that the defendant himself should give security. I do not find that at all an attractive pro- H position. Nevertheless, if there were authority to justify any such extreme view we should, of course, have to pay due respect to it, but it is, I think, worth noticing that all the ingenuity and industry of counsel has succeeded in discovering only one case in which there is a shadow of a suggestion that such an order is a proper one to make. The case, *Re La Compagnie Generale d'Eaux Minerales et de Bains de Mer* (1), is stated in the Annual Practice as laying down the proposition for which the present plaintiffs contend, but when it is examined it cannot, in my opinion, be construed in that way. What happened in that case was that a Hungarian woman living in Hungary issued an originating notice of motion under the Patents, Designs and Trade Marks Act, 1883, asking for rectification of the register by removing a trade mark therefrom which was registered in the name of the company whose name appears in the title to the action. That company carried on business in Paris and had no place of business in this country. The Comptroller-General was, of course, a respondent to the originating notice of motion which was served on the French A company. The French company thereupon applied by motion to STIRLING, J., to have the service of the originating motion set aside. An order to that effect was made, but STIRLING, J., said that he would fix a day for hearing the motion as against the Comptroller who was the other respondent to the motion and directed that the plaintiff should send a copy of the originating notice of motion to the foreign company with an intimation that it was sent to inform them that proceedings were pending in the court which might affect their interests. B This was done, and on a later date the matter came once more before STIRLING, J., and counsel for the French company appeared. Obviously in an action of that character it was most desirable from the plaintiff's point of view that the French company should be before the court and be bound by any order that was made. It was also most desirable from the French company's point of view that it should have a chance of coming before the court and not find that something had been done on the motion against the Comptroller which affected its C rights to maintain the registration of its trade mark. The position, therefore, gave opportunities for very nice and skilful manoeuvring by both parties. The plaintiff wanted to get the French company there, but naturally would not want to appear to be too anxious. The French company wanted to be there, but again naturally would not want to appear to be too anxious. Eventually what happened was that counsel for the French company, who had not yet D appeared and who, therefore, were not parties at all, said ([1891] 3 Ch. 458) : "Before appearing we shall require security for costs," and STIRLING, J., said : "You are also out of the jurisdiction. Should it not be mutual ?" The report goes on :

> After some further discussion the matter was ordered to stand over until the second motion day in Michaelmas sittings, the company submitting to the jurisdiction, and security for costs (the amount to be settled in chambers) to be given by both sides.

E

That was a very reasonable deal from the point of view of both sides, and it was obviously nothing more nor less than a compromise. The order, which was clearly a compromise order, can be no authority for the proposition that counsel for the plaintiffs has put forward—that when a foreign defendant applies for security for costs against a foreign plaintiff it ought to be made a condition that the foreign defendant himself should give security.

F When the argument is reduced to its fundamental point, it is seen to be based on five words spoken by STIRLING, J., without argument, in an action where the parties were obviously manoeuvring, the words being: "Should it not be mutual ?" I do not know whether STIRLING, J., was thinking that, if it came to making an order in such a case, the order ought to be one for mutuality, or whether he was thinking that, having regard to the situation of the two contending G parties, the fair thing to do would be that they should agree to a mutual order, but what I certainly cannot extract from the case is any authority for the proposition that there is some rule or some principle or some ground of equity and justice why a defendant in the position of these defendants should be forbidden the right to defend himself in these courts and to obtain security for costs from a foreign plaintiff unless he in turn brings money into court by way of security for costs. If that were the law and I could be satisfied about it by H reference to some authority, I should follow it, but the case referred to appears to me not to come within a hundred miles of establishing any such broad proposition. It is a proposition which, to my mind, runs counter to the whole of one's ideas of the difference in the positions of plaintiff and defendant. I should be sorry to think that the time should ever come when a defendant should be deprived of the right to defend himself in the courts merely because he has done what every defendant, English or foreign, is *prima facie* entitled to do, namely, to apply against a foreign plaintiff for security for costs. It seems to me that, if such a principle as that for which counsel for the plaintiffs has argued were to be admitted, it ought to be applied in every case where security can be ordered and the circumstances are comparable. There are many cases in which, according to the ordinary practice, the court will order security against a plaintiff who is resident in this country. Supposing that such a plaintiff sues a defendant who happens to be impecunious so that the plaintiff, if successful, will not recover a pennyworth of costs, is it to be said that such a defendant is to be deprived of his right to get security from such a plaintiff unless he submits to an order to do something which *ex hypothesi* A would be impossible because he is impecunious ? I cannot see any justification for a principle that might lead to such a result. The position of a plaintiff and the position of a defendant are quite different in these respects, and, after all, the foreign plaintiff who chooses to sue here knows quite well before he issues his writ that he is going to be made subject to the ordinary practice of the court if an application is made to provide security. He can avoid that by coming to this country and becoming resident here. If he chooses not to do so, B he knows perfectly well the risk he runs. The matter is in his own hands. It does not seem to me to be right that a defendant should be disentitled to take advantage of that situation unless he in his turn submits to an order to provide security for costs.

I should end by mentioning one further case, which was also that of a Dutch company. *Maatschappij Voor Fondsenbezit and anr.* v. *Shell Transport and Trading Company and ors.* (2), was a very complicated matter in which a Dutch C company were intervening to get made defendants in an action in which they were obviously going to assert a claim to the proceeds of certain royalties which was said to be superior to and to take precedence over a claim which another Dutch company was bringing. The case was obviously one where, when the application to be added as defendants first came before the court, it was not possible for the court to be certain what the ultimate position of the intervening company D would be. It looked as if, although in form they were defendants, they would, in effect, be in the position of claimants, because they were claiming priority under a judgment which they had obtained. The plaintiffs in the action applied that they should be ordered to give security for costs. No such order was made, and it was pointed out by Younger, L.J., that, at any rate at that stage, it would be impossible to order security because it had not yet appeared whether or not those defendants were ultimately going to be in the position of claimants, E in which case, of course, the situation would be quite different. It is obvious that, in his view, if their position was going to be that of real defendants in substance, no order for security by them should be made. In the headnote Scrutton, L.J., is quoted as having said that security ought to be refused against them on the ground that the added defendants were really defending themselves against attack, and, therefore, ought not to be required to give security. That seems to me to be the simple principle, that a defendant who F is exercising the right of any defendant to defend himself against attack ought to be allowed to do so and not prevented or hampered by being ordered to give security. In my opinion, Wynn-Parry, J., was right, and the appeal must be dismissed.

EVERSHED, L.J. : For the reasons given by my Lord and by Wynn-Parry, J., I agree that this appeal fails. I will add only that I think that G I do no injustice to counsel and his advisers if I say that he and they may have been encouraged to make the application by the terms of a note in the Annual Practice to Ord. 65, r. 6. That note appears between two other notes headed respectively : "Counterclaiming defendant" and "Quasi-plaintiff," and is in these terms (Annual Practice 1946-47, p. 1510) :

> Both parties out of jurisdiction—On an application for rectification of the register H of trade marks, both parties being resident out of the jurisdiction, security was ordered to be given by both.

Reference is then made to the *Compagnie Generale* case (1). The note we are told is of respectful antiquity, but, in my judgment, it is misleading, for it might suggest that where two parties, a plaintiff and a defendant who is not a counterclaiming defendant, were out of the jurisdiction, some principle of mutuality supervened to vary the ordinary principles applicable to security for costs to which the Master of the Rolls has referred. I am satisfied that there is no such principle, and I am equally satisfied that the consent order made in the *Compagnie Generale* case (1) is no authority for the suggestion that there is such a principle. I, therefore, think that the note in the ANNUAL PRACTICE is misleading and venture to express the hope that in further editions it may be either expunged or suitably modified.

Appeal dismissed with costs.

Solicitors: *H. Davis & Co.* (for the plaintiffs); *Slaughter & May* (for the Dutch defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

ALTERSKYE *v.* SCOTT.

[CHANCERY DIVISION (Jenkins, J.), February 11, 17, 24, 1948.]

Discovery—Production of documents—Improper use of documents in the action alleged—Implied obligation to make no improper use of disclosed documents—Further undertaking unnecessary, except in special cases.

In an action for rescission of a contract the plaintiff applied for a further and better affidavit of documents. The defendant admitted that the affidavit of documents already filed was inadequate, but he alleged that the plaintiff had made an improper use of documents in the action and contended that he should not be required to make a further and better affidavit except on an undertaking by the plaintiff not to use any of the documents in the action or any of the documents disclosed in the further affidavit for any ulterior or collateral purpose:—

HELD: a general undertaking of the kind required by the defendant would not be ordered, because the implied obligation, under which each party was, to make no improper use of disclosed documents, was a sufficient protection, but it was open to the defendant to say in the affidavit, with regard to particular documents or a particular class of documents, that, for a stated reason, they were especially confidential and that he objected to producing them except on an undertaking by the plaintiff. If the parties could not agree on the terms of the undertaking, the matter could come before the court.

Williams v. *Prince of Wales Life, etc., Co.*, (1857) (23 Beav. 338) and *Hopkinson* v. *Burghley (Lord)*, (1867) (2 Ch. App. 447), *distinguished.*

[AS TO PRODUCTION OF DOCUMENTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 374-378, paras. 454-457; and FOR CASES, see DIGEST, Vol. 18, pp. 95-97, Nos. *469-483.*]

Cases referred to:

(1) *Bowden* v. *Russell*, (1877), 46 L.J.Ch. 414; 36 L.T. 177; 16 Digest 29, *271.*
(2) *Kitcat* v. *Sharp*, (1882), 52 L.J.Ch. 134; 48 L.T. 64; 16 Digest 29, *274.*
(3) *Williams* v. *Prince of Wales Life, etc. Co.*, (1857), 23 Beav. 338; 18 Digest 95, *474.*
(4) *Hopkinson* v. *Burghley (Lord)*, (1867), 2 Ch. App. 447; 36 L.J.Ch. 504; 18 Digest 161, *1130.*

PROCEDURE SUMMONS.

The plaintiff in an action applied for a further and better affidavit of documents. The defendant contended that he should not be required to file a further affidavit except on an undertaking by the plaintiff not to use the documents for any collateral or ulterior purpose, because, the defendant alleged, the plaintiff appeared to have made an improper use of documents already disclosed in the action. JENKINS, J., held that the implied obligation, which each party was under, to make no improper use of disclosed documents was a sufficient protection, and he refused to order the undertaking asked for. The facts appear in the judgment.

C. A. Settle for the plaintiff.
Lindner for the defendant.

JENKINS, J.: The plaintiff in this action for rescission of a contract for the purchase of a hotel and hotel business and for damages for alleged misrepresentations applies for a further and better affidavit of documents. It is alleged in the statement of claim that the defendant represented (i) that the profits of the business of the hotel for the four-weeks period ending Apr. 20, 1946, were as set out in the trading profit and loss account which was supplied, (ii) that business for the period from the week ended Apr. 20, 1946, to the week ended Aug. 24, 1946, were as set out in the written analysis handed by the defendant to the plaintiff, and (iii)—and this is, I think, the important matter—that the business of the hotel had at all times been properly conducted in the ordinary course of business for and on behalf of the defendant. The plaintiff alleges that he was induced to enter into the agreement by and on the faith of the said representations. He then alleges that the representations were untrue and A sets out a number of particulars as to the untruth of the representations. For the present purpose I can take those particulars in general as being to the effect that during the period in question the defendant had committed various breaches of the food regulations, had bought goods at prices above the permitted prices, had exceeded the permitted prices when he sold a meal, and had obtained more fuel than he was entitled to. It is obvious that these allegations trench on grounds which are likely to be of considerable interest to the B Ministry of Food and the police, and it seems that, after the original affidavit of documents had been filed, the defendant had visits and inquiries from representatives of the Ministry of Food and the police. It is admitted that the affidavit of documents as so far filed is not adequate, and the defendant does not dispute his liability to file a further and better affidavit, but he alleges, and it is put on oath by his solicitor, that one of the representatives of the Ministry of Food who made the inquiries to which I have referred was in possession of a C copy of the defendant's affidavit of documents as originally filed. The defendant says that that suggests an improper use by the plaintiff of documents in the action, and that, therefore, he ought not to be required to make a further and better affidavit of documents except on an undertaking by the plaintiff that he will not use any of the documents in the action or any documents disclosed under the further affidavit of documents for, in effect, any ulterior or D collateral purpose. The discussion before me makes it clear that there is room for considerable argument what a collateral or ulterior purpose is. Counsel for the plaintiff does not dispute that his client obtained discovery on an implied undertaking—and this, of course, applies to both sides—that the documents disclosed would not be used for any collateral or ulterior purpose, but he points out the difficulty of deciding whether or not any given use of a particular document might be said to be ulterior or collateral in its purpose or other E than reasonably necessary for the conduct of the action. That might be a matter of opinion.

Counsel for the defendant referred me to *Bowden* v. *Russell* (1) and *Kitcat* v. *Sharp* (2), in which the improper use of documents in an action—*i.e.*, where one of the parties circulated the pleadings with rude remarks about the other party—was held to amount to contempt of court. No undertaking can in any case be necessary that neither party will commit conduct of that nature. If he does so, he F is guilty of contempt of court. The argument to-day included references to certain authorities in SETON'S JUDGMENTS AND ORDERS, 7th ed. Vol. I, p. 76, which support the proposition, which is not disputed, in regard to the implied undertaking, under which a party obtaining discovery is, not to use documents for any collateral or ulterior purpose. In one or two of the cases an undertaking was required to be given to the court by a person seeking production before production was ordered against the person from whom it was sought : see *Williams* G v. *Prince of Wales Life, etc., Co.* (3), and *Hopkinson* v. *Burghley* (4), where certain letters marked "private and confidential" were only ordered to be produced on an undertaking of the character which I have mentioned.

The matter standing thus on the authorities, what is the proper way of disposing of the present application ? It is to be observed that it is by no means usual to find in an order for discovery an undertaking of this character. H It has never been the practice to include a general undertaking of this kind by either party, so far as I know, in the common form order. Therefore, it seems to me that in general the practice is to regard as a sufficient protection the implied obligation to make no improper use of disclosed documents under which each party is. Secondly, it is to be observed that the cases in which undertakings have been exacted with respect to particular documents did not concern applications for further and better affidavits of documents, but concerned the production of particular documents. Therefore, it does not seem to me that I ought to include in the order for a further and better affidavit of documents any stipulation in regard to an undertaking by the plaintiff as to the use to which the documents will be put. It seems to me that an undertaking of that sort, unless it is directed to certain specific ends or concerns a particular document and is framed to do what is necessary to protect the person producing those documents from their being improperly used, is very difficult to formulate without embarrassing the party from whom it is required, affecting the proper A conduct of the proceedings, and opening the door to endless wrangles whether it has been broken or not. Therefore, I do not propose to include any such undertaking in the order for a further and better affidavit of documents. The defendant must rely on the implied obligation not to make an improper use of the documents. If he can substantiate improper use in any particular case, he has his remedy. He can bring that instance of alleged improper use before the court either on proceedings for contempt, if he considers that it amounts B to contempt of court, or on proceedings to restrain the conduct complained of. It seems to me, however, that in the further and better affidavit of documents which I now propose to order it will be open to the defendant, if so advised, to say, with respect to particular documents or a particular class of documents, that those documents are, for this or that reason, especially confidential and that he objects to producing them except on an undertaking by the plaintiff in whatever form the defendant conceives would be adequate for his protection. C If, on that, the parties cannot agree as to the form of the undertaking, then the matter can come before the court as a question concerning the terms, if any, which ought to be imposed on the plaintiff as a condition of having production of those particular documents. It seems to me that to require in general terms any undertaking of the sort asked for by the defendant at the present stage would be premature and would be likely to give rise to difficulty. For these D reasons, I propose to order that the defendant Louis Scott do, within 7 days, make and file a further and better affidavit of documents fully and sufficiently stating what documents are or have at any time been in his possession or power relating to the matters in question in this action.

Order accordingly. Costs of the application to be the plaintiff's in any event.

Solicitors: *Bell & Ackroyd* (for the plaintiff); *Tobin & Co.* (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

E

JENKINS *v.* REID.

[CHANCERY DIVISION (Romer, J.), February 24, 25, 1948.]

Trade—Restraint of trade—Medical practice—Scope—Limits of time and space—Covenant not to practise " as physician surgeon or apothecary at any time within 5 miles or professionally visit or consult with patients of practice." F

The plaintiff, a qualified woman doctor, was married to a doctor, who for some years had practised as a general practitioner in the neighbourhood of Almondsbury and Olveston in Gloucestershire. On Aug. 3, 1939, the husband and the defendant entered into a deed of partnership, to which the plaintiff was a party, but not as a partner. The deed, as part of the G consideration for the defendant's entering into it, contained a clause which provided that, "during the continuance of the partnership or in the event of the death withdrawal or expulsion from the partnership" of the husband, the plaintiff would not "at any time thereafter practise as a physician surgeon or apothecary within the radius of five miles of Almondsbury or Olveston post offices" or "professionally visit or consult with any of the patients of the practice." The prohibited area comprised, *inter alia*, certain H built-up and other areas in and on the outskirts of Bristol which were not covered by the partnership practice. Both at the beginning of the partnership and during its continuance the practice was an ordinary country general medical practice and neither partner did specialist or consultant work. The husband died in September, 1946. On a summons under R.S.C., Ord. 54A, r. 1, to determine the validity of the restrictive covenant entered into by the plaintiff:—

HELD: on a true construction of the covenant, the relationship between the parties created by the deed should be treated as analogous to that of employer and employee, having regard to the wide scope of the covenant, which extended to prohibit the plaintiff from acting as a consultant or a specialist, the first part of the covenant was not reasonably necessary for the protection of the practice; and, even if the second part could be severed, in view of the absence of any limit of time or the area covered and the prohibition against the plaintiff acting as a consultant, it was too extensive in scope and uncertain in its language to be valid; and, therefore, the covenant was void and unenforceable as being in unreasonable restraint A of trade and so contrary to public policy.

Routh v. *Jones* ([1947] 1 All E.R. 758), *followed.*

[AS TO VALIDITY OF RESTRAINT OF TRADE BY AGREEMENT, see HALSBURY, Hailsham Edn., Vol. 32, pp. 403-421, paras. 674-704; and FOR CASES, see DIGEST, Vol: 43, pp. 21-39 Nos. *135-385.*]

Cases referred to: B

(1) *Herbert Morris, Ltd.* v. *Saxelby,* [1916] A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; *affg.,* [1915] 2 Ch. 57; 43 Digest 24, *154.*

(2) *Leather Cloth Co.* v. *Lorsont,* (1869), L.R. 9 Eq. 345; 39 L.J.Ch. 86; 21 L.T. 661; 34 J.P. 328; 43 Digest 23, *147.*

(3) *Routh* v. *Jones,* [1947] 1 All E.R. 758.

(4) *Fitch* v. *Dewes,* [1921] 2 A.C. 158; 90 L.J.Ch. 436; 125 L.T. 744; *affg. S.C. sub nom. Dewes* v. *Fitch,* [1920] 2 Ch. 159; 43 Digest 34, *276.*

(5) *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.,* [1894] A.C. 535; C 63 L.J.Ch. 908; 71 L.T. 489; *affg. S. C. sub nom. Maxim Nordenfelt Guns & Ammunition Co.* v. *Nordenfelt,* [1893] 1 Ch. 630; 43 Digest 22, *139.*

(6) *Attwood* v. *Lamont,* [1920] 3 K.B. 571; 90 L.J.K.B. 121; 124 L.T. 108; 43 Digest 20, *131.*

(7) *Gravely* v. *Barnard,* (1874), L.R. 18 Eq. 518; 43 L.J.Ch. 659; 30 L.T. 863; 39 J.P. 20; 43 Digest 29, *226.*

(8) *Davis* v. *Mason,* (1793), 5 Term Rep. 118; 43 Digest 64, *661.* D

(9) *Palmer* v. *Mallet,* (1887), 36 Ch.D. 411; 57 L.J.Ch. 226; 58 L.T. 64; 43 Digest 52, *542.*

ORIGINATING SUMMONS under R.S.C., Ord. 54A, r. 1, to determine whether, on the true construction of a partnership deed, and having regard to the relevant surrounding circumstances and in the events that had happened, a clause in the deed restraining the plaintiff from practising at any time as a physician, E surgeon or apothecary within a radius of five miles of Almondsbury or Olveston (Gloucestershire) post offices or from professionally visiting or consulting with any of the patients of the practice referred to in the deed—*viz.*, an ordinary country general medical practice—was wholly or partly void and unenforceable as being contrary to public policy, too vague and in unreasonable restraint of trade. A declaration was made that the covenant was wholly void and unenforceable for those reasons. The facts appear in the judgment. F

L. H. Collins for the plaintiff.

Lindner for the defendant.

ROMER, J.: This is an originating summons under R.S.C., Ord. 54A, r. 1, to determine the validity or otherwise of a restrictive covenant into which the plaintiff, Mrs. Rosalind Jenkins, entered in a deed, dated Aug. 3, 1939, made between G three parties—Dr. Jenkins, of the first part, the defendant, Dr. Alexander Reid, of the second part, and the plaintiff, who was the wife of Dr. Jenkins, of the third part. The deed, which was a deed of partnership, recited that Dr. Jenkins had for some years past carried on the profession of a general medical practitioner at Almondsbury, Olveston, Patchway, Thornbury, and neighbourhood, in the county of Gloucester, and that he had agreed to admit Dr. Reid into partnership in consideration of a sum therein mentioned and to assign to Dr. Reid one-third of H the practice. By the operative part of the deed, Dr. Jenkins assigned to Dr. Reid one equal one-third part of the practice, and he and Dr. Reid agreed to become and be partners in the profession of physicians and surgeons on and subject to the terms, conditions and stipulations expressed in the following articles. The partnership was to be for a term of five years commencing July 1, 1939, and subject as thereinafter mentioned was to continue after the expiration of such five years from year to year until it was determined by notice. Clause 3 provided:

> The business of the said partnership shall be carried on at the surgeries at Almondsbury, Olveston and Patchway aforesaid or at such other surgery or surgeries as shall from time to time be agreed upon by the said partners.

Clause 10 provided :

> Dr. Reid shall have the option to purchase a further one-sixth share in the capital and profits of the partnership (so making his total share therein up to one half thereof) at any time on his marriage or after the expiration of the first two years of the partnership.

In point of fact, on the outbreak of war the operation of that clause was expedited and Dr. Reid acquired a one-half share in the partnership instead of a one-third share. Clause 16 provided for what was to happen on the retirement or death of the two doctors, and cl. 19 was a restriction imposed in the following terms :

> In the case of a partner withdrawing or being expelled from the partnership as aforesaid the said withdrawing or expelled partner (as the case may be) shall not at any time thereafter practise as a physician or surgeon or apothecary within a radius of ten miles of Almondsbury or Olveston post offices and this provision shall be enforceable not only at the instance of the remaining partner but also his personal representatives or successors in the practice.

Clause 21 is the clause with the validity of which I am concerned in this case :

> During the continuance of the partnership or in the event of the death withdrawal or expulsion from the partnership of Dr. Jenkins then Mrs. Jenkins shall not at any time thereafter practise as a physician or surgeon or apothecary within the radius of five miles of Almondsbury or Olveston post offices or professionally visit or consult with any of the patients of the practice save as hereafter provided. Nothing, however, in these presents contained is to be construed as preventing Mrs. Jenkins continuing the work on which she is at present engaged, *videlicet* :—(*a*) lecturing and examining Red Cross workers ; (*b*) exercising the appointments which she now holds in Bristol and district and (*c*) attending ante-natal cases which may be sent to her by a district nurse. During the continuance of the partnership Mrs. Jenkins may with the consent of either of the partners see any of the patients of the practice and shall account to the partnership for any fees arising therefrom.

At the time of the deed Mrs. Jenkins was herself a doctor and her medical qualifications are expressed by the appropriate letters after her name in the deed. She qualified in 1935, shortly before her marriage. In her affidavit in support Mrs. Jenkins says that she holds the medical qualifications stated in the deed of partnership and has passed the preliminary examination for the Fellowship of the Royal College of Surgeons. Then she says that her husband, Dr. Jenkins, died on Sept. 25, 1946. Her affidavit continues :

> At the beginning of the said partnership the practice was an ordinary country general medical practice such as is to be found in all country districts in England. Surgeries were maintained at Almondsbury, Thornbury, Olveston and Patchway and Dr. Jenkins or the defendant attended at such surgeries at regular fixed hours in order to advise and treat patients who should attend the surgeries between those hours. When not attending the surgeries the partners would visit patients in their own homes or if an accident had occurred at the place of the accident or the place of the patient's work. Patients were treated for all common ailments or injuries. No specialist work was done by the partners and when specialist treatment was required or when unusual complications occurred in the course of the disease or injury patients would be advised to consult, and recommended to consult, some particular specialist or to visit or to be admitted to some particular hospital. Neither of the partners was or professed to be a specialist in any branch of medicine or surgery. On or about Aug. 26, 1939, Dr. Jenkins, who was then in the Royal Navy Volunteer Reserve, was called up for service in the Royal Navy. He served with the Royal Navy until October, 1945, when he returned and resumed his work with the partnership. When my husband was called up, by arrangement with the partners I began to work for the partnership and saw and treated patients both at the surgeries and at their own homes or other places. The partners had endeavoured in vain to obtain an assistant and it was with reluctance that I agreed to give up my appointments in Bristol and work for the partnership. I continued to work for the partnership all through the war and even after Dr. Jenkins' return in October, 1945, I helped with the patients to a considerable extent. My services as assistant were not formally terminated until May 31, 1947, on which date there expired the notice contained in the letter dated Apr. 30, 1947 [containing a notice from the defendant terminating her services]. I regard myself as having been employed by the partnership under the powers contained in the last sentence of cl. 21 of the partnership. I have not myself received any remuneration for my services as assistant, but the defendant

> allows me to draw out of the partnership profit the sum of £75 a year received for my services from 1942 to 1945 as air raid precautions doctor to the Bristol Aeroplane Company, but during his lifetime and notwithstanding his absence on service Dr. Jenkins continued to be credited with his share of the profits of the partnership. The whole of Dr. Jenkins' basic pay in the Navy was credited to the partnership. I have accounted or am willing to account for all partnership fees received by me.

A Then she exhibits a one-inch ordnance map of the country north of Bristol on which she has drawn two circles each with a radius of five miles and centred respectively at Almondsbury and Olveston post offices. She calls attention to certain built-up areas lying to the north-west and north-east of Bristol, in particular the district of Filton, which are within the five miles radius which forms the prohibited area. This area also comprises a considerable portion of the districts of Winterbourne, Hambrook, Frampton Cottrell and Mangotsfield which are on the outskirts of Bristol. B She says that none of the districts which she has mentioned was covered by the partnership practice, though she was not prepared to say that the partners never visited patients in those areas or that patients from those areas never attended the partnership surgeries. After pointing out that cl. 21 of the deed is unrestricted in point of time she says:

> At the date of the deed I was 29 years of age. I cannot conceive how any protection against the special knowledge acquired by a former assistant to the practice can be required after a lapse of, say, ten years at the most. C After the lapse of that time any special knowledge of the practice or of its patients would have faded from my memory and I could offer no more competition than any other practitioner coming to the district. Moreover in ten years the patients comprising the practice would largely have changed. Those old patients of the partnership whom I formerly treated would, if still in the district, have acquired in the course of ten years the habit of attending the old surgeries or being treated by the continuing partner or partners and would not after this lapse of time, if they recalled me at all, have any inclination to return D to me for treatment merely because I might have treated them ten or more years previously . . . The scope of the restriction in cl. 21 is so wide that it prevents me from practising as a physician or surgeon and not merely as a general medical practitioner or apothecary. The use of the expression "physician or surgeon" would prevent me setting up in practice as a specialist in any branch of medicine or surgery and either as a specialist who only sees cases when referred to him by a general practitioner or as a specialist (such as an opthalmic surgeon) who is generally consulted by patients visiting him direct. E The following specialised occupations would appear to be denied to me:—Orthopaedic surgeon, ear nose and throat specialist, a skin specialist, a gynaecologist, a children's specialist, an opthalmic surgeon, obstetrician, or mental specialist. The clause would also appear to prevent me from taking up an appointment as a works doctor at any factory within the area covered by the covenant. I cannot imagine how any special or peculiar knowledge of the partnership or of the patients acquired by me when working for the partnership could be unfairly or improperly used by me to the prejudice of the partnership practice if I exercised any F of the specialist occupations mentioned above.

That affidavit was answered by one of Dr. Reid in which he agrees that the partnership practice was an ordinary country general medical practice, and says that that was true of it both at the beginning of the partnership and during its continuance. He goes on:

> G Prior to entering into partnership with Dr. Jenkins I was an assistant at Bristol to a Dr. Fineley. In March, 1939, I agreed with Dr. Jenkins to join him as an assistant for a period of six months, and, if everything was satisfactory, thereafter to join him in partnership. By June, 1939, it was apparent to both of us that we were well suited to each other and Dr. Jenkins invited me to join him in partnership then and not wait the expiration of the six months. I agreed to do so. At that time the plaintiff herein was assisting in the conduct of an ante-natal clinic at Bristol as part-time employment by the Bristol Corporation. She took no regular active part in the H practice of her husband though she occasionally helped in giving anaesthetics, seeing patients, and doing minor surgical work when occasion arose. She was, however, hopeful that an ante-natal clinic would be started at Almondsbury and that she would be appointed to look after it. The idea of cl. 21 was that, in the event of the death or retirement of Dr. Jenkins, the defendant, who was to purchase his share in such events, would be ensured the goodwill of the practice. The clause was most carefully discussed between the plaintiff, Dr. Jenkins and the defendant, and was drafted so as not to restrict the plaintiff in any activities in which she was engaged at the date of the deed or which she then contemplated. At that time she was not interested in general medical practice and had no intention of engaging in it . . .

By para. 6 he says this:

> During the first few months of her employment in the practice the plaintiff continued her ante-natal clinic in Bristol and only worked part-time in the practice. Thereafter when a full-time doctor had been appointed for this work in Bristol the plaintiff devoted her whole time to the practice.

Dr. Reid also exhibits a map of the same area as that shown on the map exhibited by the plaintiff, and he has drawn on it a line which roughly represents the area of the practice in 1939, which, I gather, has not substantially altered much since that time. The line drawn on that map shows that Filton and these other built-up areas near Bristol lie outside the area. Then he says:

> Being a country practice the scope of the practice extends for a much greater distance on the country or Gloucester side of the centre points than it does on the town or Bristol side. The plaintiff entirely omits to mention [certain place names] some of which places are actually outside the area of the circles on her map, but in which many of the best patients of the practice reside. The number of patients of the practice is approximately 3,500 and consists of approximately 1,500 panel patients and 2,000 private patients. The nature of the practice is of a family character and general in scope. It consists of midwifery cases which comprise approximately one per cent. of the work. General treatment of common ailments comprises 98 per cent. of the work. Minor surgical operations comprise one per cent. of the work . . . Previously to my entering into partnership with Dr. Jenkins on the terms of the said deed the plaintiff, who was and is a duly qualified medical practitioner and resided with her husband, Dr. Jenkins, at one of the surgeries of the then practice of Dr. Jenkins, was accustomed, as above-mentioned, to assist Dr. Jenkins when necessary, in the said practice and was well known to the patients thereof, not only as the wife of Dr. Jenkins, but as a doctor on her own account. Consequently, it was reasonably to be expected that patients of the practice might, after the death or retirement of Dr. Jenkins, or in case the plaintiff should set up in practice on her own in the same district, consult the plaintiff who was in a specially favourable position to acquire a knowledge of the patients of the practice. To the knowledge of the plaintiff I would never have entered into partnership with Dr. Jenkins had such a clause not been included in our articles of partnership. I am now desirous of taking a colleague into partnership and if the plaintiff is free to practice without restraint this will be very difficult.

By para. 13:

> I am advised that it may be of assistance to the court to explain the work of a "consultant," "specialist," "physician," "surgeon," "apothecary" and a "general medical practitioner." "Consultant" is a person who advises patients referred to him by other practitioners and does not treat patients direct. Such a person might be a consultant in surgery or medicine and usually is connected in an honorary capacity with a hospital or infirmary. Such a person would not have a medical or surgical practice in the commonly accepted meaning of these expressions. "Specialist" is a person who advises and attends patients referred to him by general or other practitioners. He is in a similar position to a consultant, but usually confines his activities to one particular branch of medicine or surgery, *e.g.*, ear nose and throat, chest, heart, etc. A surgeon would never describe himself as "Doctor," but as "Mister," occasionally adding his qualifications. Neither a "consultant" nor a "specialist" would ever describe himself as a "physician and surgeon." This is the description by which general medical practitioners are commonly called. "Apothecary" is an antiquated way of describing a "doctor" and a dispenser of medicine. "General medical practitioner" is a practising doctor who, as a rule, has no specialist qualifications and gives no specialist treatment.

On that matter further information is given by Dr. Stevenson, who is one of the assistant secretaries of the British Medical Association, and he gives the following definitions:

> "Consultant": A consultant is a registered medical practitioner who has acquired special knowledge and experience in a particular branch of his profession. In the strictest sense of the term a consultant is one who sees patients referred to him by a colleague, normally a general medical practitioner. It is usual for a consultant to hold a higher qualification in the branch of his profession in which he has acquired special knowledge. "Specialist": A specialist is a registered medical practitioner who has acquired special knowledge and experience in a particular branch of his profession. It is usual for a specialist to hold a higher qualification in the branch of his profession in which he has acquired special knowledge and experience. "Physician": The term "physician" may have two meanings, namely, a registered practitioner who is specialising in medicine or a practitioner who is undertaking general practitioner work. It is unusual for a general practitioner, however, to

> designate himself solely as physician. " Surgeon " : The term " surgeon " may have two meanings, namely, a practitioner who is specialising in surgery or a practitioner who is undertaking general practitioner work. It is, however, unusual for a general practitioner to designate himself solely as surgeon. " Physician and surgeon " : Many general practitioners describe themselves as physicians and surgeons, but it is unusual for a general practitioner to use one of the terms alone. The term physician and surgeon is commonly used to denote a general medical practitioner. " Apothecary " : An apothecary, according to Chambers' Dictionary, is one who prepares and sells drugs for medicinal purposes. The term has long since been substituted by " druggist." In many clauses in partnership agreements, however, the term apothecary is used to cover a medical practitioner holding the licence of the Society of Apothecaries. Although registered medical practitioners do not style themselves now as apothecaries there can be little doubt that it is the latter interpretation of the word which is referred to in partnership agreements. It could hardly be held to deny the contracting party from setting up in the locality as a chemist. " General medical practitioner " : A general medical practitioner is one qualified in law to practice medicine, surgery and midwifery and is available for advice to any person who cares to consult him, whatever his accident or injury or whatever his disease. It would be for the general practitioner to decide whether the condition on which he is consulted is one which would normally fall within the skill and competence of a general practitioner or one which required consultation with a consultant or specialist. The above expressions are commonly accepted in the medical profession as bearing the above meanings. No consultant or specialist would be likely to describe himself as a " physician and surgeon." He might describe himself as a " physician " or a " surgeon," but I know of no case where any specialist or consultant describes himself as a " physician and surgeon."

Finally, there is a short affidavit in reply of the plaintiff to which she says, dealing with the events of last year :

> I put up a plate on June 7, 1947, merely stating my name and qualifications. No particulars of surgery hours were given. Pending the decision of the court I desired to keep my name before the public since news was spreading that I was no longer practising and had abandoned all intention of practising. I wished to reserve the position and have been at pains to attend to or treat only patients who have particularly asked for me personally or who are personal friends of mine and thus avoid interfering with the defendant's practice.

Further she says, referring to the defendant's affidavit :

> I agree that at the end of 1945 there were about 1,500 panel patients, but in 1945, at any rate, I am confident that there were not as many as 2,000 private patients. There were about 770 private patients and 500 club and parish patients . . . I am quite satisfied that at least 85 per cent. of all the patients lived in the area enclosed by lines drawn from Olveston in the north-east to Patchway in the south-east, from Patchway to Over in the south-west, from Over to Olveston Common in the north-west, and from Olveston Common back to Olveston.

Finally she says :

> I admit that before the date of the partnership deed I assisted Dr. Jenkins when necessary, and, therefore, became known to some of the patients, not as a doctor on my own account, but as a person able to help Dr. Jenkins when required, but, as mentioned in the defendant's affidavit, I took no regular active part in Dr. Jenkins' practice. With regard to para. 13 of the defendant's affidavit, both a consultant and a specialist as there defined would describe himself as a physician or as a surgeon, using whichever term was appropriate. A consultant as so defined does not usually buy or sell his practice and for that reason might not describe himself as " having " a " medical or surgical practice," but, insofar as it is for me to say so, a consultant, as so defined, would certainly be practising as a physician or as a surgeon as the case might be.

Both the plaintiff and the defendant were cross-examined. The defendant said that he has now built another surgery near to his surgery at Almondsbury which he is using by permission of the plaintiff, and that he intends to take in another partner. With regard to the profits, he said he imagines the gross profits of the practice are substantially the same now as they were in 1945, and that the number of patients now is practically the same as during the war, both panel and private. He said that there has been no substantial diminution in the number of patients seen by him, but that the plaintiff has been seeing some of the best patients of the practice. With regard to the nature of the practice, he said that the practice is that of a country medical practitioner. He said there are very few patients from the Bristol area and there are one or two patients from

Filton, Mangotsfield, and so on, and he agreed that those places, which are described as built-up areas on the north side of Bristol, have some tens of thousands of inhabitants. The plaintiff was cross-examined and she agreed that she knew the defendant would not have entered into the partnership unless she had entered into the covenant, and it was discussed between herself, her husband and Dr. Reid, and she said the reason was that she held a special position in the locality and had a job of her own. She had been a doctor in the locality before she married, and then she went into the question what patients she had been seeing and the ones she wants to see, and she confined those to certain people who asked for her and also to some of her friends.

That is the position so far as the facts go, and what I have to decide is whether or not this covenant ought to be enforced against the plaintiff. It is a rather curious position. The plaintiff, although a party to the deed, was not entering into it as a partner, nor was she selling anything. She was giving up certain rights which she would otherwise have been entitled to exercise, those rights being qualified in a particular and specified way, but it is not a question of that plaintiff selling a practice or part of a practice and entering into a covenant as a vendor, nor, strictly, of course, is the deed a document, so far as she was concerned, which brought about the relation of master and servant, because there was no agreement by her to serve in any capacity nor any agreement by Dr. Reid or Dr. Jenkins to give her employment. It is, however, plain that it was contemplated, as, indeed, happened, that she would give assistance occasionally, as and when required, as she had done previously, and that is expressly provided for at the end of cl. 21 in these words: " During the continuance of the partnership Mrs. Jenkins may with the consent of either of the partners see any of the patients of the practice and shall account to the partnership for any fees arising therefrom." I mention these aspects of the matter because they are relevant owing to the fact that consideration is applied to these covenants in restraint of trade, as they are called, according to whether the covenantor is a vendor or an employee. I am invited to say by counsel for the defendant that, although it is not strictly a vendor and purchaser case, it is analogous to it in that the plaintiff, although not selling anything, was the wife of somebody who was selling something, *viz.*, an interest in his practice, and was gaining a benefit from it and she had entered into this covenant because, had she not done so, Dr. Reid would not have been prepared to enter into the partnership. On the other hand, it has been said by counsel for the plaintiff, that the case is more analogous to that of master and servant and the rigid treatment which is meted out by the court in cases such as those should be meted out in this case, especially having regard to the fact that the plaintiff was not going to get any personal benefit under this document.

In my opinion, the kind of considerations that apply in vendor and purchaser cases ought not to apply here, especially when one bears in mind the considerations which do apply in vendor and purchaser cases as stated by LORD ATKINSON in *Herbert Morris, Ltd.* v. *Saxelby* (1) ([1916] 1 A.C. 701). LORD ATKINSON first refers to the following passage from the judgment of JAMES, V.-C., in *Leather Cloth Co.* v. *Lorsont* (2) (1869) (L.R. 9 Eq. 353):

> Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and, therefore, enables him to enter into any stipulation however restrictive it is, provided that restriction in the judgment of the court is not unreasonable, having regard to the subject-matter of the contract.

LORD ATKINSON then continues:

> These considerations in themselves differentiate, in my opinion, the case of the sale of goodwill from the case of master and servant or employer and employee. The vendor in the former case would in the absence of some restrictive covenant be entitled to set up in the same line of business as he sold in competition with the purchaser, though he could not solicit his own old customers. The possibility of such

competition would necessarily depreciate the value of the goodwill. The covenant excluding it necessarily enhances that value, and presumably the price demanded and paid, and, therefore, all those restrictions on trading are permissible which are necessary at once to secure that the vendor shall get the highest price for what he has to sell and that the purchaser shall get all he has paid for. Restrictions on freedom of trading are in both classes of case imposed, no doubt, with the common object of protecting property. But the resemblance between them, I think, ends there.

Those considerations have no application to the position of the plaintiff in the present case at the time she entered into this deed, under which she got no personal benefit either by way of employment or by way of money, and I am disposed to apply approximately the same considerations as are applied in the master and servant cases, which are made sufficiently clear in *Routh* v. *Jones* (3) ([1947] 1 A.E.R., 758), the headnote of which reads as follows :

> The plaintiffs, who were general medical practitioners in partnership in Okehampton, engaged the defendant as their medical assistant, the agreement providing : " The assistant agrees . . . that he will not during this contract of service save in the employ of the principals nor within the space of 5 years thereafter practise or cause or assist any other person to practise in any department of medicine surgery or midwifery nor accept nor fill any professional appointment whether whole time or otherwise whether paid by fees salary or otherwise or whether honorary within a radius of 10 miles from 11, East Street, Okehampton . . ." :—HELD : the covenant was invalid as being in restraint of trade because (i) the restriction that the defendant was not to " practise . . . in any department of medicine surgery or midwifery " was wider than was justified for the protection of the plaintiffs' business because it covered, *inter alia*, practice as a consultant which could not reasonably be considered likely to cause detriment to the plaintiffs' practice. (ii) the stipulation against accepting " any professional appointment " was also wider than was justified for the protection of the plaintiffs' practice, since it would cover such an appointment as medical officer of health which could not affect the plaintiffs. (iii) all restraints on trade, if there is nothing more, are contrary to public policy, and, therefore, void, unless there are special circumstances to justify them, and the onus of proving such special circumstances must rest on the party alleging them.

LORD GREENE, M.R., after setting out the facts, said this (*ibid.*, 760) :

> The employment was terminated and after an interval the defendant who, according to his evidence, had not been able to set himself up in practice elsewhere or obtain a position as an assistant, decided to set up in practice in Okehampton as a general medical practitioner. He informed the plaintiffs that it was his intention so to do. It is curious that the one thing against which the plaintiffs were, undoubtedly, entitled to protect themselves by a properly framed covenant is the one thing which the defendant was proposing to do . . . I turn to the principal point in the case—whether either or both of the branches of the covenant are bad as going beyond what is reasonably necessary for the protection of that goodwill—it is sometimes referred to as " goodwill " as a useful word to use, though, perhaps, not always quite accurately—which the plaintiffs were entitled to protect by a properly framed covenant. It is not disputed that the type of professional activity in which they were engaged was one of those in which the association in that activity of an assistant gives him the opportunity of obtaining a knowledge of the patients and so forth which, if used by him thereafter, would detrimentally affect the plaintiffs, and it is not suggested that they were not entitled to protect themselves against it.

LORD GREENE, M.R., then refers to *Fitch* v. *Dewes* (4) and says that LORD BIRKENHEAD in that case uses the phrase " intimacies and knowledge." LORD GREENE, M.R., then proceeds (*ibid.*, 761) :

> The knowledge is not, in my opinion, the professional skill that he has acquired, nor, in my opinion, does it cover his reputation as a skilful professional man. The knowledge there referred to is the knowledge of the clients of the practice, their peculiarities, and so forth. It may well be that one cannot effectively give adequate protection in a case of that kind without at the same time giving the employer the benefit of a measure of protection against competition. Protection against competition as such is the one thing which an employer is not entitled to stipulate for, but the fact that a legitimate covenant may also operate to prevent competition does not mean that the covenant is a bad one. The essential thing against which protection can be claimed is what I have mentioned. The first step is to ascertain what is the particular business or professional activity which the convenantee is carrying on at the time of the covenant. That does not mean what particular things he has done, but what is the general scope of his business, even although at the moment the covenant was entered into he has not embarked on some of the ordinary branches of it. Here the plaintiffs' activity was that of general medical practitioners.

> There is no evidence of what that phrase comprises. The definition which counsel for the plaintiffs asks us to accept he formulated in this way: A general medical practitioner is one who holds himself out as prepared to treat any patient for any disease, ailment or injury normally to be met with in the country where he practises. I cannot accept that in the absence of evidence, and counsel invited us to apply our own personal knowledge of what a general medical practitioner is normally thought to be. I think it very inconvenient that the court, on a question of that kind, should have to fall back on some knowledge which may not necessarily be the same for each member of the court, but I should have thought it is notorious that the phrase "general medical practitioner" by itself excludes a consultant. It may also exclude a specialist in some particular treatment, but is not a consultant in that he accepts patients who come to him direct, whereas a consultant, in the strict sense of the term, only accepts a patient who is brought to him for consultation with the patient's own medical attendant. The covenant here is not confined to prohibition against general medical practice. A covenant confined to that would, I think, unquestionably be good. Counsel for the plaintiffs argued with great force that the covenant would not enable the plaintiffs to protect their general medical practice if it was in terms so limited. The language of the covenant is wide enough to shut out the defendant from any practice of any branch of the medical art. He could not use his medical knowledge in any way whatsoever. The plaintiffs maintained that anything short of that could not effectively protect the goodwill, or the *quasi* goodwill, of their general medical practice.

Then the learned MASTER OF THE ROLLS dealt with certain further matters and came to the conclusion (*ibid.*, 762):

> It seems to me that such a prohibition [as that imposed upon the defendant in that case] is not reasonably necessary to protect their general medical practice. If a patient were brought to the defendant while he was practising as such a consultant, *ex hypothesi* he would be brought by another doctor. If he were brought by the plaintiffs, no harm would be suffered by them. If he were brought by another doctor whose patient he was, how could that affect the general medical practice of the plaintiffs? It was suggested that, if the defendant was not practising as a consultant there, the plaintiffs might be called in by another doctor as consultants with him. That seems to me to be a far-fetched idea, and I cannot myself see on the evidence, at any rate, as it stands, and it would require very strong evidence to displace the view I have formed, how practice as a consultant could injure the general medical practice of the plaintiffs. In my view, a restriction which extends to a consultant's practice is one which is not reasonably necessary for the protection of the plaintiffs' practice. If that be right, it is sufficient to vitiate the whole of the relevant part of the first branch of the covenant.

Later in his judgment (*ibid.*, 763) LORD GREENE, M.R., refers to a passage in the speech of LORD PARKER OF WADDINGTON in *Herbert Morris, Ltd.* v. *Saxelby* (1) ([1916] 1 A.C. 706) referring to LORD MACNAGHTEN's judgment in the *Nordenfelt* case (5) and continues:

> It is clearly being said there that, if the covenantee alleges that a covenant in restraint of trade is good owing to special circumstances, he must prove the special circumstances on which he relies.

LORD GREENE, M.R., then refers to *Attwood* v. *Lamont* (6), which was a case before the Court of Appeal.

Counsel for the defendant accepted that the onus was on him to satisfy the court that these restrictions were reasonably necessary for the protection of the goodwill of the partnership practice, and he urged that the covenant was reasonable in the light of the circumstances in which it was entered into and having regard to the relationship of the parties. Alternatively, he said that the covenant is severable, and, if the first part is bad, the second part is good. The circumstances which he said were relevant for a consideration of this matter were, first, that the plaintiff was the wife of a partner and was herself a doctor and had got indirect benefit under the deed; secondly, that she had assisted her husband in the practice and had special knowledge of it and it was contemplated that she would continue to render assistance; and, thirdly, that her covenant was a part of the consideration for the defendant entering into the deed. Counsel then drew my attention to certain authorities which are rather old authorities on this matter and, having regard to the more recent decisions, are not, I think, a safe foundation for arguments on this branch of the law because the approach of the courts to covenants of this nature has gradually changed and is now materially different in many respects from what it was when those cases were decided. I do not propose to refer to them other than by name, *Gravely* v.

Barnard (7), *Davies* v. *Mason* (8), and *Palmer* v. *Mallet* (9). I would add that the question whether the restrictions in those cases were or were not reasonable or unreasonable by reason of no limit as to time or having regard to the area laid down was not argued or decided. Counsel for the defendant also said, with regard to the first part of the covenant, that it is not an unreasonable covenant in that it did not preclude the plaintiff from carrying on her practice if she practised in certain rather limited spheres, *e.g.*, as a consultant or a specialist, but only prevented her from doing what it was contemplated the partnership A should do when the deed was entered into, and there was no harm in preventing her from doing that even although no limit of time be imposed by the covenant.

Counsel for the plaintiff attacked the validity of this covenant in no mean terms. He said that the fair way to approach the matter is on a master and servant basis. The plaintiff had assisted her husband and had, therefore, acquired knowledge of the patients, not because she was a doctor herself or because she was the wife of Dr. Jenkins, but because she had assisted her husband. B He admitted that there was consideration, because, as the defendant said, he would probably not have entered into the deed but for the covenant into which the plaintiff entered.

As I have already said, I cannot treat this as an ordinary case of master and servant. On the other hand, it plainly is not a vendor and purchaser case, and I think it right to treat the matter in the way in which the courts have been C accustomed to treat cases of master and servant—not the less so because the partnership was under no obligation to do anything for the plaintiff throughout its term or thereafter by way of giving her employment or making any payment to her. Counsel for the plaintiff said the first part of the covenant is bad for three reasons. First, he said, it is bad on the ground that the distance is wider than is requisite for the protection of the goodwill of the practice. He said that it was, undoubtedly, a country practice, and that, if the five miles radius D had brought in rural territory which was outside the boundaries of the actual practice, it may well be that that, although, perhaps, not strictly necessary, it would have been innocuous, but that, in fact, there was brought into the prohibited territory an area of a totally different character, *i.e.*, a built-up area, and that makes all the difference. He pointed out in connection with this aspect of the case that if the plaintiff set up in practice outside the five mile limit she would break the covenant if she visited patients—one patient or more—who lived E within the area, and he says there is insufficient evidence to provide material on which the court could come to a conclusion of law whether the covenant is good in that the exclusion of the built-up area was necessary for the defendant's protection inasmuch as the partnership had practically no patients in places like Filton. I feel the force of what is said on that point and I think it is a matter which deserves to be borne in mind in considering the problem as a whole, F but it is not, in my view, a decisive factor. Secondly, he said that there is no limitation of time. The plaintiff was 29 when she entered into this covenant and the effect of this covenant was to subject her to this restriction for as long as she lived. Counsel points out that the defendant has made no attempt to prove the necessity for a lifelong restriction for the preservation of the goodwill of the partnership. He also pointed out that there was a large number of patients whom after a few years, the plaintiff would forget, and that they were G a fluctuating class, some of whom might die and some marry. Counsel submitted it was out of all reason to subject the plaintiff to a lifelong restriction of that sort. I am certainly very much impressed by the fact that the restriction is to go on for as long as the plaintiff lives. One would expect that, if it was necessary to have such a restriction, there would have been evidence to explain why it was necessary, but there is no such evidence before me and I certainly do not infer that such a long restriction was in the least necessary for the preservation of the H goodwill of the practice. I certainly bear that point in mind in considering the matter as a whole. Thirdly, it is said that the covenant is bad because the scope is far too wide and would prevent the plaintiff from doing things which could not in any sense be regarded as trespassing on the preserves of the partnership. It is with special reference to that part of the evidence which deals with the meaning of these terms, " physician " and " surgeon," that this argument is addressed, and it is clear from the evidence that if the plaintiff set up in practice as a consultant or a specialist she would be doing work which is not done by "physicians and surgeons," and at the date of the partnership deed no consultant work was being done, at all events by the partnership, nor was it ever done throughout the existence of the partnership. On this point, therefore, it seems to me the case is precisely on all fours with *Routh* v. *Jones* (3), in which the MASTER OF THE ROLLS, dealing with the same type of practice, *viz.*, a general medical practice, said ([1947] 1 All E.R. 762):

> . . . a restriction which extends to a consultant's practice is one which is not reasonably necessary for the protection of the plaintiffs' practice. If that be right, it is sufficient to vitiate the whole of the relevant part of the first branch of the covenant.

I have, therefore, come to the conclusion, taking the language of this deed in its ordinary sense, that the plaintiff would be committing a breach of the covenant by acting as a consultant or a specialist in medicine or surgery, and, in my view, the covenant is bad unless, as counsel for the defendant invites me to do, it is confined so as to conform to what he said was the intention of the parties, *viz.*, to make the restriction more or less co-existent with the nature of the practice which is being carried on. I am quite unable to adopt that view of the matter. There is no ambiguity in this language. There are plain alternatives, and I see no reason why any of the three forms of activity which are precisely defined should bear an abnormal or an unnatural meaning. It is said that nothing different was meant from general practice because that was all they had in mind. I am unable to accept the view that the parties divided general medical practice into these three divisions and named them one by one rather than set them up under the general heading of "general medical practice." I think these words have to be taken as they are found, and, in my judgment, the first part of the covenant is bad. Then it is said that, even if the first part is bad, it can be severed from the second part, which is good. I have grave doubts whether this is a proper case for severing, having regard to the views on the subject which have been expressed by high authority, especially that of YOUNGER, L.J., in *Attwood* v. *Lamont* (6). However, it is not necessary for me to decide definitely whether the second part can be severed from the first, because I am quite satisfied that, even if it were severed, it is just as bad and just as invalid as the first. If it were severed it would read in this way: "During the continuance of the partnership or in the event of the death withdrawal or expulsion from the partnership of Dr. Jenkins then Mrs. Jenkins shall not at any time thereafter professionally visit or consult with any of the patients of the practice." The first thing that strikes one is that there again she is precluded from doing something which was remote or foreign to the nature of the general medical practice carried on by the partners, *viz.*, to "consult with," which, as I take it, would include acting as a consultant, but, apart from that, it seems to me that the whole thing is so hopelessly vague that it would be almost impossible for the plaintiff or anybody else to know whether or not she was breaking her covenant, and for this reason. I think "patients of the practice" there means patients at any time, *i.e.*, persons who may at any time during the plaintiff's lifetime after the termination of the partnership be treated as patients of the practice. Counsel for the defendant says that that is not too vague because nobody should be regarded properly as being a patient unless he was a regular patient, but, even so, I do not know how the plaintiff would know whether such and such a person was or was not a patient of the partnership. Supposing that somebody came under her professionally and she enquired whether that person was or had been a patient of Dr. Reid and the person said: "Oh well, two or three years ago I had influenza and Dr. Reid attended me, but I have not seen him since," would he be a patient, and should he be treated as a patient, of the practice? For that person substitute one in the same circumstances who five years ago was a patient. Can the plaintiff safely advise or treat that person? Then there is no limitation as to area. If the plaintiff set up in practice in London and somebody came from the prohibited area on a visit, it is clear that the plaintiff would be guilty of a breach of this agreement if she treated such a person for any form of illness in London. I do not really know what was intended by this restriction and I do not feel inclined to guess at some narrow meaning which would save it from defeat, especially having regard to the fact that these covenants are construed *contra preferentes*. My conclusion, accordingly, is that the second part of the covenant is bad, both because it is too extensive in its scope and because of the uncertainty in which the language is couched. The whole of the restrictions imposed by cl. 21 of this deed are invalid and unenforceable as against the plaintiff, and I will so declare. The declaration is "that the said cl. 21 is void and unenforceable as being contrary to public policy, too vague, and in unreasonable restraint of trade, and is not binding on the plaintiff."

Declaration accordingly with costs to the plaintiff.

Solicitors: *Peacock & Goddard,* agents for *Cartwright, Taylor & Corpe,* Bristol (for the plaintiff); *Reed & Reed,* agents for *Bayliss, Rowe & Co.,* Bristol (for the defendant). A

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* ROWNTREE & CO. LTD.

[COURT OF APPEAL (Tucker, Somervell and Cohen, L.JJ.), March 1, 2, 1948.] B

Revenue—Excess profits tax—Capital—Computation—"Borrowed money"—Proceeds of discounting bills—Finance (No. 2) Act, 1939 (c. 109), *sched. VII, pt. II,* para. 2 (1).

By s. 14 (2) of the Finance (No. 2) Act, 1939 (for the purpose of excess profits duty): "The average amount of the capital employed in a trade or business in the standard period or any chargeable accounting period shall be computed in accordance with pt. II of sched. VII" of the Act. C By para. 2 (1) of sched. VII, pt. II: "Any borrowed money . . . shall be deducted . . ."

In pursuance of arrangements covering a period of years a company raised money for the purposes of its business by drawing sight bills, payable at four and six months, on an acceptance house, who accepted the bills in consideration of a commission paid to them by the company, and then, as agents for the company, discounted them on the market and remitted the proceeds to D the company. Under the arrangement the company was bound to put the acceptance house in funds shortly before the maturity dates of the respective bills. Money was raised in this way during the company's standard period. The Special Commissioners were of the opinion that the words "borrowed money" in para. 2 (1) should not be given a strained meaning and that in ordinary commercial usage the relationship between E the company, the acceptance house, and the holders of the bills was not that of borrower and lender nor were the transactions ones of loan. They, therefore, held the money so raised was not "borrowed money" within the meaning of para. 2 (1):—

HELD: the words "borrowed money" in para. 2 (1) in law required the relationship of a borrower and a lender, a relationship which did not exist in this case, but, even if the words were to be given some wider interpreta- F tion, the finding of the commissioners that in ordinary commercial usage the relationship between the parties was not that of borrower and lender ought not to be disturbed.

Dicta of LORDS FINLAY, ATKINSON and SUMNER in *Inland Revenue Comrs.* v. *Port of London Authority* ([1923] A.C. 514, 518, 520; 129 L.T. 374, 375, 376), *applied.*

Decision of MACNAGHTEN, J. ([1947] 2 All E.R. 473), *reversed.* G

[FOR THE FINANCE (NO. 2) ACT, 1939, S. 14 (2), SCHED. VII, PT. II, PARA. 2 (1), see HALSBURY'S STATUTES, Vol. 32, pp. 1198, 1222.]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *Port of London Authority,* [1923] A.C. 507; 92 L.J.K.B. 655; 129 L.T. 365.

(2) *Carstairs* v. *Bates,* (1812), 3 Camp. 301; 3 Digest 257, *768.* H

APPEAL from an order of MACNAGHTEN, J., dated July 25, 1947, and reported [1947] 2 All E.R. 473, allowing an appeal by the Crown from a decision of the Special Commissioners of Income Tax that the proceeds of the discounting of a company's bills accepted by an acceptance house and paid to the company were not "borrowed money" within para. 2 (1) of pt. II of sched. VII of the Finance (No. 2) Act, 1939, for the purpose of computation of capital for assessment to excess profits tax. The Court of Appeal now reversed the decision of MACNAGHTEN, J., and restored that of the commissioners.

Cyril King, K.C., and *J. H. Bowe* for the company.

The Solicitor-General (*Sir Frank Soskice, K.C.*) and *R. P. Hills* for the Crown.

TUCKER, L.J. : This is an appeal from a decision of MACNAGHTEN, J., in a revenue case in which he allowed the Crown's appeal from the decision of the Special Commissioners. The facts are conveniently set out in the judgment of MACNAGHTEN, J., which I quote. He said ([1947] 2 All E.R. 473) :

> The excess profits tax was imposed by the Finance (No. 2) Act, 1939, and it is provided by s. 13 (3) of that Act that, if the average amount of the capital employed in a trade or business in any chargeable accounting period is greater or less than the average amount employed therein in the standard period, the standard profits for a full year shall, in relation to that chargeable accounting period, be increased or decreased, as the case may be, by the statutory percentage of such increase or decrease of capital. By s. 14 (2) it is provided that the average amount of capital employed in a trade or business is to be computed in accordance with pt. II of sched. VII to the Act, and sched. VII, pt. II, para. 2 (1) provides that, in making such a computation "borrowed money" should be deducted. The company selected 1936 as its standard period. During that year they obtained large sums of "short" money by discounting bills of exchange, the average amount so obtained being £268,232. In 1933 the company was in need of money for the general purposes of its business, and decided to obtain what are called "acceptance credit facilities" from Erlangers, Ltd., an acceptance house of high repute in the city of London. Erlangers, Ltd., agreed to accept bills drawn by the company up to £100,000 for a commission at the rate of 1 per cent. per annum. By the end of 1936 the credit limit of £100,000 had been raised to £400,000. The bills drawn by the company on Erlangers, Ltd., were usually sight bills for £5,000, payable at six months, and it was arranged that Erlangers, Ltd., having accepted a bill, should forthwith, as agents and on behalf of the company, discount it on the market with one or other of the companies and firms who carry on the business of bill discounters in the city. It was further agreed that Erlangers, Ltd., having discounted the bills as agents and on behalf of the company, should remit the proceeds to the company. During 1936 the rate of discount on the London Money Market for fine bills—and a bill accepted by Erlangers, Ltd., was, of course, a fine bill—was either 9/16ths or 19/32nds of 1 per cent. per annum. Thus, the company during the currency of the bill had the use of the money so remitted to it by the discount house through Erlangers, Ltd., as the company's agents. When the bill fell due and Erlangers, Ltd., became bound to pay the bill, the company had, of course, to provide Erlangers, Ltd., with the money due thereon, but, by making use of the "acceptance credit facilities" offered by Erlangers, Ltd., the company was able to obtain the use of money for the period of the bills at a rate of less than 1¾ per cent. per annum. The question is : Was that money of which the company had the use "borrowed money" within the meaning of the provisions relating to excess profits tax ?

I ought, I think, to refer to the precise words in the schedule to the Act of 1939 with which we are dealing. They are to be found in pt. II of sched. VII to the Finance (No. 2) Act, 1939, in paras. 2 and 3. Paragraph 2 (so far as material) reads :

> (1) Any borrowed money and debts shall be deducted, and in particular any debt for income tax computed by reference to the standard rate or for the national defence contribution or excess profits tax in respect of the trade or business shall be deducted . . .

Paragraph 3 provides :

> Any investments the income from which is by virtue of the provisions of pt. I of this schedule not to be taken into account in computing the profits of the trade or business, and any moneys not required for the purposes of the trade or business, shall be left out of account, but where any investments in the beneficial ownership of the person carrying on the trade or business are so left out of account, the sum (if any) to be deducted under the last preceding paragraph in respect of borrowed money shall be computed as if the principal of the borrowed money were reduced by the value of those investments . . .

The sole question we have to consider is whether this sum of £268,232 was "borrowed money" within the meaning of para. 2. The precise arrangement under which these financial facilities were accorded to the company are to be found in two letters set out in the Case Stated and I will read the material parts of those letters. The first is a letter from Erlangers to the company dated Jan. 12, 1933, and is as follows (so far as material) :

> . . . we now have much pleasure in hereby placing at your disposal acceptance credit facilities for an amount of :—£100,000 0*s.* 0*d.* (one hundred thousand pounds)

> to expire not later than May 31, 1933, for the purpose of financing your purchases of raw material. The credit is available once only in your drafts on us at 4 months' sight, to be drawn in broken amounts of not exceeding, say, £5,000 each, and to bear a brief reference to the merchandise financed, as well as to our credit no. 11622. Acceptance commission on drafts accepted by us under this credit is payable to us at the time of acceptance at the rate of 1 per cent. per annum. Cash cover for our acceptances will be provided by you so as to be in our hands not later than one clear working day before maturity thereof. We have duly noted from Mr. Morrell's letter that the proceeds of the drafts to be drawn on us by you under this credit will be utilised by you for the purposes of paying off bills for a like amount which you have to meet towards the end of the present month . . . We should be obliged if you would confirm to us that you are in accord with the contents of this letter, and if you would at the same time let us have list, together with specimens (in triplicate), of the signatures binding on your company, as well as a copy of your memorandum and articles of association.

The agreement set out in this letter was subsequently approved by a minute of the board, and by letter of Jan. 25 Erlangers acknowledged receipt of a letter of Jan. 24 in which the company had indicated that they had drawn 21 bills, totalling £100,000, on the acceptance house. The letter of Jan. 25, 1933, reads :

> We are in receipt of your letter of the 24th instant, enclosing your twenty-one drafts, drawn upon us under the above-mentioned credit, for a total of :—£100,000 0*s*. 0*d*. at 4 m/s. which we have accepted to mature on May 25/28, 1933 (May 28, 1933, being a Sunday), to the debit of a drafts account which we have been pleased to open in your name in our books, value May 26 next. For our acceptance commission thereon, at the rate of 1 per cent per annum, *viz.* :—£333 6*s*. 8*d*. we have debited an ordinary account which we have likewise opened in your name in our books. In accordance with your request, we have had pleasure in arranging on your behalf for the discounting of our above-mentioned acceptances, the rate being 7/8 per cent. per annum, and have placed the proceeds thereof, *viz.* :—£99,705 2*s*. 8*d*. as per statement herewith, to the credit of your ordinary account, value today. As further requested by you, we have today paid to the Midland Bank, Ltd., Head Office, Poultry, E.C.2, for the credit of your account with them, the sum of :—£99,371 16*s*. 0*d*. being net proceeds of our above-mentioned acceptances, after deduction of discount charges and acceptance commission, for which amount we debit your ordinary account, value today, of which please take note.

Those letters show what the agreement between the parties was and how it was carried out with regard to the first batch of bills. As indicated in the passage to which I have referred in the judgment of MACNAGHTEN, J., that agreement was subsequently extended in time and in amount, but in substance the question for decision arises on the proper construction to be put on the business relationship which resulted from those two letters. The Special Commissioners stated their conclusion in the following words :

> We . . . were of opinion that the sum in issue amounting to £268,232 as aforesaid was not borrowed money within the meaning of paras. 2 (1) and 3 of pt. II, sched. VII, Finance (No. 2) Act, 1939. We took the view that we ought not to give to the words " borrowed money " in the sections above referred to a strained meaning which, in our view, they did not bear. We did not consider that in ordinary commercial usage the relationship between the company, the acceptance house and the holders of the bills of exchange was that of borrower and lender or that the transaction was one of loan. We were fortified in our opinion by a consideration of *Port of London Authority* v. *Inland Revenue Comrs.* (1) in which the court had to interpret for purposes of excess profits duty a provision, similar in its language and purport to the provisions of the excess profits tax Acts, wherein it was decided by the House of Lords that, to bring the provision as to borrowed money into operation, there must be a real loan and a real borrowing. While, therefore, we recognised that the relations between the company and the acceptance house were attended with incidents in some respects similar to those which would have ensued if there had been a borrowing, we held that the sum in issue amounting to £268,232 was not borrowed money. We, therefore, allowed the company's appeal.

It is to be observed from that finding that the Special Commissioners were not deciding in favour of the company on the ground of some narrow legal meaning to be given to the words "borrowed money," but that they were deciding, with their experience of these matters, that in ordinary commercial usage the transaction was not one of loan, and they considered themselves to have been fortified in that view by the case to which they referred. MACNAGHTEN, J., came to the contrary view and he dealt with the argument which had been advanced before him in these words ([1947] 2 All E.R. 474) :

> It is said on behalf of the company that, for there to be a borrowing of money, there must be a lender as well as a borrower, and that nobody lent any money to the company. For the Crown it is said that the money of which the company had the use for the period of the bills was lent either by the discount house or by Erlangers, Ltd. I am unable to see how it can be said that the acceptance house lent any money. It is the function of an "acceptance house" to lend its name as acceptor, but it does not lend any money to anybody. The acceptance house need not have any money at all, if the person for whom the acceptance house accepts the bill fulfils his obligation A of provding cash to meet the bill when it falls due. It was the discount house which provided the money of which the company had the use for the period of the bill and no longer.

Earlier in his judgment he had said: "That it was borrowed money in the ordinary acceptation of the word there can be no doubt." As I read the judgment of the learned judge, he is stating that, in his view, from a business point of view and in the ordinary acceptation of the words, this was borrowed money, B the borrowers being the company and the lenders the discount houses. I do not read his judgment as finding that from a strictly legal point of view the discount houses were lending money to the company for which they could have sued as money lent. That would have been an impossible finding as a matter of law. I read his judgment as approaching this question from the point of view of what he calls the ordinary acceptation of the words "borrowed money" C rather than from that of the strictly legal meaning of those words, and he seems to have arrived at a different conclusion from the Special Commissioners as to what is the true meaning in a commercial sense to be attributed to these words "borrowed money" in the statute.

Reliance was placed by counsel for the company, and also by the Special Commissioners, on *Inland Revenue Comrs.* v. *Port of London Authority* (1), a case which requires careful consideration. The headnote states ([1923] A.C. 507):

> D By the Port of London Act, 1908, the Port of London Authority acquired the property of the three leading dock companies of London. The consideration for the transfer was the issuing by the Authority to the companies or their nominees of some £22,000,000 of Port stock, A stock carrying interest at 3 per cent., B stock carrying interest at 4 per cent.

The question, so far as is relevant to the present case, was whether the issue of that stock came within the provisions of para. 2 of pt. III of sched. IV to E the Finance (No. 2) Act, 1915, which dealt with excess profits duty, as it was then called. The language of that paragraph was as follows:

> Any capital the income on which is not taken into account for the purposes of pt. I of this schedule, and any borrowed money or debts, shall be deducted in computing the amount of capital for the purposes of pt. III of this Act.

—language which, for all practical purposes, is identical with that which we F have to consider. In dealing with the argument that the "unpaid purchase money" was borrowed money, LORD FINLAY said (*ibid.*, 514):

> The second ground urged by the appellants was that the amount of the stock must be taken to have been money borrowed by the Port Authority from the holders of the stock in respect of which they paid interest. When in the second paragraph of pt. III of sched. IV "borrowed money" is spoken of, what is referred to is a real borrowing and a real lending. Here there was nothing of the kind. All that can be G said is that the issue of the stock as the consideration for the purchase was attended with incidents in some respects similar to those which would have ensued if there had been a borrowing. It is impossible to construe in this way any Act of Parliament, and more particularly a taxing Act. To bring the provision as to borrowed money into operation there must be a real loan and a real borrowing. The suggested construction would involve putting upon a taxing Act a strained meaning which its words do not bear.

H LORD ATKINSON said (*ibid.*, 518):

> I also concur with the Court of Appeal in the opinion that the transaction was not one carried out to any extent by borrowed money. The old dock companies, the absorbed companies, transferred their respective undertakings in consideration of Port stock issued to them by the respondents, and those companies distributed this stock amongst their own stockholders according to certain authorised scales. This stock was taken in substitution for the stock they formerly held, on the certificates for the latter being cancelled. No money passed directly or indirectly between the parties to the transaction; neither did any party borrow money or lend it.

Lord Sumner said (*ibid.*, 520):

> My Lords, the only point is whether the liability of the Port of London Authority on its " Port Stock " is a " debt " within sched. IV, pt. III, para. 2, of 5 & 6 Geo. 5, c. 89. It is not unpaid purchase money, for there was no purchase money. It is not borrowed money, for there was no borrowing by the Port of London Authority and if, by an unlicensed stretch of the imagination, a purchase on credit is a purchase, in which the buyer pays to the seller cash on delivery, which he has borrowed from the seller himself for that purpose, the holders of the Port stock, at any rate, sold nothing and therefore did not even fictionally lend anything. A

It is argued for the Crown here that there was, in fact, a borrowing and a lending, and the Solicitor-General put in the forefront of his argument the contention that the company were the borrowers and that Erlangers were the lenders. As to that, I find myself in complete agreement with the judgment of Macnaghten, J., in which he said, " I am unable to see how it could be said that the acceptance house lent any money." I think they clearly did not, B and that the fact that the letters passing between the parties contemplated a number of transactions of the kind set out therein made the position no different from what it would have been if there had been one isolated transaction by way of the acceptance of a bill and the discounting of it and handing over of the proceeds. There was merely an arrangement to carry out a transaction of that kind in a large number of cases over a considerable period of time, and it seems C to me that, whether one looks at it from a narrow legal point of view or from a broad commercial point of view, there was no lending by Erlangers to the company.

Then it was said by the Solicitor-General that, if that contention was not acceptable to the court, he would rely on Macnaghten, J.'s finding that the discount houses were the lenders. As to that, if the word " lender " is to be given its strict legal meaning, I am unable to see how the discount houses lent D any money to anybody. They did not. They purchased these bills, and I think it is a fallacy to regard a transaction of this kind as one of borrower and lender. " But," said the Solicitor-General, " even if Erlangers are not strictly lenders in law, none the less, if you look at this transaction as a whole, if you regard it as a tripartite arrangement, its object was to raise money in the money market, the money was in fact raised, it was made available for the use of the company by the discount house, and, therefore, the discount house E is to be regarded as the lender in a commercial sense, and for the purposes of this taxing Act there is a borrowing of money wherever A makes available for B money for B's use on the terms that B will pay an equivalent sum to A at some future date." I think the speeches in the *Port of London* case (1) in the House of Lords indicate that the proper approach to this case is to construe these words " borrowed money " as words which require the existence of a borrower and lender, and that there must be a real borrowing in the legal sense F of the word. I find it difficult, if not impossible, to appreciate how there can be borrowed money unless the legal relationship of lender and borrower exists between A and B. After all, the words " borrow " and " lend " are not words of narrow legal meaning. They represent a transaction well known to business people which has taken its place in the law as a result of commercial transactions among the merchants of this country, and when the law, under the Bills of G Exchange Act or elsewhere, has to deal with matters of this kind, it is dealing with commercial transactions. As Somervell, L.J., put it during the argument, whether the words are to be looked at from the point of view of Bullen and Leake or whether they are to be looked at from the point of view of a commercial transaction in the city of London, one arrives at the same result, that for there to be borrowed money there must be the legal relationship of lender and borrower, and I find it impossible to discover that there was such a H relationship existing either between the company and Erlangers or between the company and the discount houses. However that may be, if the words are to be given some wider interpretation than that, I am content to rest on the decision of the Special Commissioners, with their experience in dealing with matters of this kind, and I should be prepared to accept their finding that in ordinary commercial usage the relationships between the company, the acceptance house and the holders of the bills of exchange were not those of borrower and lender. For these reasons, I think this appeal succeeds.

SOMERVELL, L.J.: I agree, and I have very little that I wish to say, but, as we are differing from the learned judge, I will add a few observations. The Solicitor-General put his argument, first, on the basis that either the acceptance house, Erlangers, or the discount house, could be described as the lender, and he put in the forefront of his argument the submission that Erlangers lent the money to the company. He sought to support that by a definition of lending, and he said that there is a lending whenever a person makes or undertakes to make available for another person money which that other person subsequently has to pay back to someone. The answer I would give to that is that, in my view, that is not an accurate definition of lending. I think that the Solicitor-General's argument rather proceeded on the basis that any "raising" of money must be regarded as a "borrowing" of money. There I think it fails, and I agree with the learned judge, for the reasons which he gives, that Erlangers cannot be regarded as lenders. Nor do I think (and here I disagree with the learned judge) that the discount house can be regarded as lenders. It seems to me that this case brings out very well that there are two ways at least (there may be more) of raising money. One is by borrowing it and the other is by discounting a bill of exchange. They are both quite well known methods. One is borrowing and the other is discounting a bill. The fact that in many cases they produce the same result of providing financial resources for carrying on a business does not mean that words which are apt to describe one must be construed as covering the other. The way of putting the case, which, in the course of the argument, attracted me at one time, was that, in the strict construction of the words in their context, this money might be said to be money borrowed from the money market though not borrowed from the accepting house or from the houses which discounted the bill, but, on consideration, I think that that approach lands one back in exactly the same difficulty as I felt during the earlier part of the argument. "Borrowing," as Tucker, L.J., said, is a familiar word. "Borrowed money" is a familiar phrase. It is possible that in certain contexts it might have a rather wider meaning than it would have, say, in the strict context of a legal pleading, but, looking at the transaction as a whole, I have come to the conclusion that these sums were not borrowed money in any ordinary meaning which can be given to that expression. I am reinforced in that view by the finding of the commissioners, and I hope it is in accordance with what was laid down by Lord Finlay in the case which has been referred to, the material passage of which has been read. For those reasons I think the appeal must be allowed.

COHEN, L.J.: I agree that the appeal should be allowed, and will state my reasons shortly. The Solicitor-General said, in the main part of his argument, that the contract was to be found in the letters of Jan. 12 and 13, 1933, that that contract was a contract for a loan by Erlangers to the company, and that the drawing, acceptance and discount of the bills were mere machinery for giving effect to the contract of loan. If his premise were right, the Crown would plainly be entitled to succeed, because the money obtained by the contract would clearly be borrowed money, giving to those words the effect which in strict law they would bear, but I am unable so to construe the contract. The Solicitor-General admitted that, if there were a single transaction of discounting an accommodation bill, the proceeds could not properly be described as borrowed money. I then put to him the case of a single transaction, but with a special provision that cash cover was to be provided for the acceptance a clear working day before the maturity of the bill in order to bring the transaction more in accordance with that recorded in the letter of Jan. 12, 1933, and he said he was not prepared to answer it without more information as to the nature of the contract. I could give him no more information, because I was deliberately putting the contract in that form without any other provision, and I venture to think there can be no doubt that the money obtained by the transaction I have indicated would not be borrowed money in the legal or commercial sense of the word. The contract in question in this case, to my mind, is not a contract of loan, but merely a contract or a series of bill transactions, and it does not in essence differ in legal effect from a contract limited to a single transaction. If this be the case, agreeing as I do with my Brothers that we have to look at the matter from the legal point of view and give to the expression "borrowed money" the sense which in law it would naturally bear, this is enough to dispose of the matter, but, assuming that the Solicitor-General was right when he said that we must construe the expression "borrowed money" in relation to its context and the subject-matter with which the legislature was dealing, and that, approaching the matter from this angle, we must construe it in accordance with commercial usage, even so, I think the Crown would fail. The commissioners took the view that, although the transaction had some of the incidents of borrowing money, the money obtained from it was not, commercially speaking, borrowed money. There appears to have been no evidence led as to commercial practice in this matter, but in the absence of such evidence I think the court ought not to differ from the Special Commissioners on a matter which seems to me to be essentially within their purview. For these reasons I think that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *John D. Watson*, York (for the company); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

RUSSELL *v.* NORFOLK (DUKE) AND OTHERS.

[King's Bench Division (Lord Goddard, C.J.), February 23, 24, 25, 26, 1948.]

Contract—Implied term—Racehorse trainer—Licence to train—Condition—Discretion of Jockey Club to withdraw licence—Need to hold inquiry before withdrawal—Conduct of inquiry according to rules of natural justice—Libel—Privilege—Qualified privilege—Racehorse trainer "warned off"—Publication in "Racing Calendar."

Under the Rules of Racing of the Jockey Club: "(i) Every trainer of a horse running under these rules must obtain an annual licence from the stewards of the Jockey Club and pay a yearly subscription of one sovereign to the Bentinck Benevolent Fund. (ii) A person whose licence to train has been withdrawn on the ground of misconduct is a disqualified person." The rules also, by r. 17, empowered the stewards *inter alia* to grant and withdraw licences at their discretion, to inquire into and deal with any matter relating to racing, to warn off Newmarket Heath, and to authorise publication of their decision in the Racing Calendar. A trainer paid £1 and was granted a licence to act as a trainer during 1947. A condition of the licence was: "A trainer's licence may be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, and such withdrawal or suspension may be published in the Racing Calendar, for any reason which may seem proper to them, and they shall not be bound to state their reasons." Following an inquiry into the circumstances in which one of the horses trained by him won a race, the stewards of the Jockey Club withdrew his licence and published the fact of the withdrawal in the Racing Calendar. In an action for a declaration that the trainer's name was wrongfully placed on the list of disqualified trainers, for an order to delete it, and for a declaration that the decision to withdraw the licence was void as contrary to natural justice, and also for damages for breach of contract and for libel:

Held: (i) assuming that the application for a licence and the licence itself together constituted a contract to permit the trainer to act as such, it could not be implied as a condition of that contract that the stewards would hold an inquiry before exercising their discretion to withdraw a licence, and, therefore, no condition could be implied that such an inquiry, if held, should be conducted in accordance with the principles of natural justice, and there was no evidence of breach of contract to go to the jury.

(ii) the stewards and the trainer having a common interest in the matter, and the trainer having agreed that the stewards' decision should be published in the Racing Calendar, publication therein was privileged, and, the absence of malice being admitted, there was no case in libel to go to the jury.

Chapman v. *Ellesmere* (*Lord*), ([1932] 2 K.B. 431; 146 L.T. 538), *followed.*

[AS TO IMPLIED TERMS OF A CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 322-3, para. 451; and FOR CASES, see DIGEST, Vol. 12, pp. 607-616, Nos. *5028-5090.*

AS TO QUALIFIED PRIVILEGE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 480-486, paras. 579-592; and FOR CASES, see DIGEST, Vol. 32, pp. 112-116, Nos. *1437-1478.*]

Cases referred to:

A (1) *Re Nott & Cardiff Corporation*, [1918] 2 K.B. 146; 118 L.T. 487; 82 J.P. 181; 16 L.G.R. 253, C.A.; *on appeal sub nom. Brodie* v. *Cardiff Corporation*, [1919] A.C. 337 H.L.; 12 Digest 612, *5053.*

(2) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24, C.A.; 12 Digest 610, *5042.*

(3) *MacLean* v. *Workers' Union*, [1929] 1 Ch. 602; 43 Digest 101, *1046.*

(4) *Chapman* v. *Ellesmere (Lord)*, [1932] 2 K.B. 431; 101 L.J.K.B. 376; 146 L.T. 538; 76 Sol. Jo. 248, C.A.; Digest Supp.

B (5) *Toogood* v. *Spyring*, (1834), 1 Cr. M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 149 E.R. 1044; 32 Digest 117, *1489.*

(6) *Cookson* v. *Harewood*, [1932] 2 K.B. 478, n.; 101 L.J.K.B. 394, n.; 146 L.T. 550, n., C.A.; Digest Supp.

(7) *Wright* v. *Woodgate*, (1835), 2 Cr. M. & R. 573; 1 Gale 329; Tyr. & Gr. 12; 150 E.R. 244; 32 Digest 132, *1635.*

(8) *Adam* v. *Ward*, [1917] A.C. 309; 86 L.J.K.B. 849; 117 L.T. 34; 32 Digest 129, *1608.*

C ACTION tried by LORD GODDARD, C.J., with a special jury.

On Mar. 6, 1947, the Jockey Club granted the plaintiff a licence to act as a racehorse trainer for one year. The possession of such a licence was necessary for any person training for meetings to which Jockey Club rules applied, which comprised practically all the meetings held. Following a race at the Lincoln Spring D Meeting in 1947, the winning horse, trained by the plaintiff, was examined on behalf of the Jockey Club. Subsequently, an inquiry was held by the stewards of the Jockey Club which the plaintiff attended, and the stewards withdrew the licence and published the fact of the withdrawal in the RACING CALENDAR. The plaintiff brought an action against the stewards (sued on their own behalf and on behalf of all other members of the Jockey Club) and Messrs. Weatherby and Sons (as secretaries of the club and printers and publishers of the RACING E CALENDAR) claiming a declaration that his name had been wrongfully placed on the defendants' list of disqualified trainers (as being "warned off Newmarket Heath"), an order that his name should be deleted from the list, and a further declaration that the licence had never been lawfully withdrawn and that the defendants' decision to withdraw it was void as contrary to natural justice. He also claimed damages for breach of contract and for libel. LORD GODDARD, C.J., ruled that the occasion of the publication of the statement in the RACING CALEN- F DAR was privileged and in the admitted absence of malice there was no case in libel to go to the jury. On the rest of the case he left to the jury only the question whether the inquiry held by the stewards was fair. The jury disagreed. HIS LORDSHIP then held that there was no case in contract to go to the jury and gave judgment for the defendants. The facts appear in the judgment.

Roberts, K.C., G. Howard and *Dennis Lloyd* for the plaintiff.

G *Sir Valentine Holmes, K.C.*, and *Elwes* for the defendants.

LORD GODDARD, C.J. At the close of the plaintiff's case counsel for the defendants submitted that there was no case to go to the jury. Having heard his submission and counsel for the plaintiff in reply, I asked counsel for the defendants whether he elected to call evidence, and, as he did, I heard his evidence and also agreed to leave to the jury the question which counsel for the plaintiff desired H to be left to the jury, which was whether or not the inquiry before the stewards of the Jockey Club was fairly held, but I refused to leave to the jury, for reasons which will appear hereafter, any question on the issue of libel. I left the question that I was asked to leave to the jury in the hope that their finding would, at any rate, prevent a new trial if the Court of Appeal should take a different view from that which I am about to express, and hold that that question was material. The jury, unfortunately, were unable to agree, and, therefore, that question remains unanswered, but, in my opinion, the submission of counsel for the defendants is right and there was no case to go to the jury at all.

The plaintiff complains that the defendants wrongfully withdrew his licence as a trainer, whereby he became a disqualified person under the Rules of Racing, and also that they libelled him by publishing this fact in the RACING CALENDAR. The relief claimed in the action is as follows :

> (1) A declaration that his name has been wrongfully placed on the list of disqualified trainers [warned off Newmarket Heath]. (ii) An order that the defendants do delete the plaintiff's name from the list of persons so disqualified as aforesaid. (iii) A further declaration that the licence of Mar. 6, 1947, was never lawfully withdrawn by the defendants, but that their decision to do so was void as contrary to natural justice. (iv) Damages for breach of contract. (v) Damages for libel. A

It is essential to see what are the causes of action alleged. First, it is said that there is a breach of contract, and, therefore, before considering whether there is evidence of a breach, it is necessary to see, what evidence there is of a contract. The contract, if any, is contained in two documents, namely, an application for a licence to train and the licence itself, but before reading the documents I will refer to r. 102 of the Rules of Racing, which says : B

> (i) Every trainer of a horse running under these rules must obtain an annual licence from the stewards of the Jockey Club, and pay a yearly subscription of one sovereign to the Bentinck Benevolent Fund. (ii) A person whose licence to train has been withdrawn on the ground of misconduct is a disqualified person.

Pursuant to that rule the plaintiff applied for a licence, and paid his £1, and a licence was granted to him to train during the year 1947. Counsel for the defendants contends, in the first place, that there is no contract at all, and that the payment of the £1 was no more than a condition of the licence. Counsel for the plaintiff, invited by me to formulate the contract that he alleges, did so in these terms : " In consideration of the payment of £1 the stewards agree to permit the plaintiff to act as a trainer for one year under the Rules of Racing and in accordance with the conditions of the licence." I do not stay to consider whether the £1 was, in fact, a consideration, but I will assume that it was, and on that assumption it seems to me that the contract so formulated by counsel for the plaintiff is, at any rate, the only contract which can be spelt out of the documents. When one considers the conditions, I find that condition (3) of the licence provides as follows : C D

> A trainer's licence may be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, and such withdrawal or suspension may be published in the RACING CALENDAR, for any reason which may seem proper to them, and they shall not be bound to state their reasons. E

The contract, therefore, is to permit the plaintiff to act as a trainer for the year 1947 under the Rules of Racing, subject to the right of the stewards to withdraw or suspend his licence in their absolute discretion. Under r. 17 of the Rules of Racing the stewards are given exactly the same power, except that in the rules the word " absolute " is not used, but it is simply " at their discretion." In the statement of claim it is sought to imply a further condition as part of the contract. It is alleged that it was an implied condition of the contract between the parties and a duty owing to the plaintiff by the first three defendants as stewards of the Jockey Club that they should not on the grounds of misconduct purport to disqualify the plaintiff as a trainer during the period covered by the licence or warn him off Newmarket Heath on such grounds unless they had first fairly investigated and adjudicated on any complaint made against the plaintiff on that behalf, and/or that, if they conducted an investigation or made an adjudication, such investigation and adjudication as they might conduct should be in accordance with principles of natural justice. F G

I can see no possible ground on which any such term can be implied. If I were to imply such a term, it seems to me that I should be implying one which was in conflict with the express term, which is that the licence can be suspended or withdrawn in the absolute discretion of the stewards. The principles on which a court can imply a condition in a contract are well known, and I only propose to read one passage from the judgment of PICKFORD, L.J., in *Re Nott and Cardiff Corporation* (1). His Lordship there refers to the well-known judgment of LORD ESHER in *Hamlyn* v. *Wood* (2), and says ([1918] 2 K.B. 168) : H

> It seems to me that this doctrine of implied term must be confined to cases where the contract is silent on a term which is necessary in order to carry it out and therefore must have been intended by the parties, and that it cannot be extended to introduce

a term which may make that carrying out more convenient and might have been included if the parties had thought about it.

It seems to me that in this case it would be impossible to say that the parties must have intended the term which is alleged here, because that would prevent the stewards from exercising the absolute discretion which the express term in the licence gives to them.

It is said that this term must be implied also because of r. 17, which deals with the powers of the stewards and is of a very comprehensive character. It starts by giving them power to grant and withdraw licences in their discretion, to deal with agents and the registration of companies and associations employed in the business of racing, and to fix dates of meetings and to order abandonment, and then there is given a power to make inquiry into and deal with any matter relating to racing, to warn off Newmarket Heath, and to authorise publication in the CALENDAR of their decision. Neither under this rule nor under the conditions are the stewards required to hold an inquiry before exercising any of their powers. A power to withdraw a licence at the absolute discretion of the stewards and a power to withdraw it only after and as a result of an inquiry, which would be something in the nature of passing a sentence after a hearing, are two very different things. I cannot imply a condition merely because it would be a reasonable condition. If a condition can be implied, no doubt it must be one which is reasonable, but that does not mean that because a court considers that a condition would in certain circumstances be reasonable, it can imply it. In saying this I am expressing no opinion, of course, whether it would be a reasonable condition or not. The stewards can grant licences on what terms they like. If a person does not like the terms, he need not accept them, and in that case he will not get a licence. That he would not, therefore, be able to follow the occupation of a trainer is beside the point. It would be futile to set up as a trainer without a licence, but that is because, with the exception of a few meetings known as "flapping meetings," the proprietors of racecourses hold their meetings under Jockey Club rules and so will not accept horses for their meetings trained by an unlicensed trainer.

I can find no contract here under which the stewards were under any duty to the plaintiff to hold an inquiry. It is said that they did hold an inquiry, and, therefore, that they must hold it honestly, fairly, and in accordance with natural justice. That seems to me to be a fallacy. If there was no contractual duty to hold an inquiry, how can there be a breach of contract in withdrawing the licence, however the inquiry was conducted? It is admitted that the licence might have been withdrawn without any inquiry. I can see no ground for implying any condition, nor any evidence of a breach of contract. Consequently, there was no case to go to the jury on the cause of action so far as it is laid in contract. I may say that I have had an opportunity of considering all the cases referred to by counsel, and I can find nothing in them which leads to another conclusion. If it is part of a contract that expulsion from a society or the withdrawal of a licence can only follow on an inquiry, or if a statute obliges a professional or other domestic tribunal to make due inquiry, as in the case of the General Medical Council, different considerations at once arise, but I desire to express my respectful agreement with what MAUGHAM, J. said ([1929] 1 Ch. 623) in *MacLean* v. *Workers' Union* (3):

> If, for instance, there was a clearly expressed rule stating that a member might be expelled by a defined body without calling upon the member in question to explain his conduct, I see no reason for supposing that the courts would interfere with such a rule on the ground of public policy.

As to the issue of libel, I am bound by the decision of the Court of Appeal in *Chapman* v. *Lord Ellesmere* (4), a case on this point in no material respect different from the present, to hold that the occasion was privileged. That case also shows that the court cannot leave the innuendo here pleaded to the jury. The plaintiff has agreed to the decision of the stewards being published. The publication gives their decision, which, so far as the plaintiff was concerned, is that his licence was withdrawn, and that was true. It is said that it is not true, because to an ordinary reader it would mean that the plaintiff doped the horse, whereas the stewards did not find that he had, but only (if "only" be a proper word) that he was guilty of negligence amounting to grave misconduct. That is exactly what the case to which I have referred decides cannot be left to the jury. Moreover, there is no obligation on the stewards to give any reasons. It is right, however, that I should refer to one passage in the judgment of Lord Hanworth, M.R., in *Chapman* v. *Lord Ellesmere* (4), in which he said ([1932] 2 K.B. 450) :

> It is argued that the plea of privilege is lost, because the right to publish in the Racing Calendar as the paper proper to receive and make public the result of the stewards' inquiry can only relate to what is true, and the jury have found the words used conveyed an untrue signification.

I pause there to say that in that case Chapman's licence had been withdrawn on exactly the same grounds as in the present case, namely, gross negligence, and the announcement in the Racing Calendar was, I think, in terms indistinguishable from these. The judgment continues :

> This argument does not prevail with me. What was published was the decision of an agreed domestic tribunal in the terms reached by that tribunal. It was for that tribunal to embody its decision in its own terms, provided it acted *bona fide*, honestly intending to act in accordance with its determination. If it does this, I do not think that after the communication has been published in the course of the ordinary duty of the tribunal the privilege will be lost, because a jury put a different interpretation upon the words used to that honestly intended by the tribunal and which the words *simpliciter* convey : see *Toogood* v. *Spyring* (5). The matter was within the jurisdiction of the stewards and, if the inquiry is conducted fairly and properly, there is no appeal from their decision. They must formulate that decision. It cannot be treated as untrue or malicious, because some critic would prefer to draw it in other terms and to add words excluding something which persons outside the jurisdiction of the tribunal read into the actual judgment given. The case of *Cookson* v. *Harewood* (6) fell to be decided upon issues somewhat different from the present, but I agree with the observations of Scrutton, L.J., in the course of his judgment upon that case, and I do not agree with the view presented by the learned judge to the jury. The domestic tribunal uses terms which are intended to convey the proper meaning to those who understand the terms and have knowledge of the jurisdiction exercised. It does not establish a good cause of action to prove that by some others, outside and beyond, one or other different meanings are placed upon the words for which a responsibility is sought to be charged upon the members of the domestic tribunal. This principle is of far-reaching importance. Many disputes are settled by arbitration, by tribunals in particular trades, in trade unions, and in societies of many kinds. It would be, indeed, of serious import if the terms used by the agreed tribunal are to be conned over again by others outside, and a liability imposed upon the members of the tribunal for words used, because of an omission that the others would prefer to have seen introduced ; provided always that the conduct of the tribunal has been honest and *bona fide* . . . Parke, B.'s words in *Wright* v. *Woodgate* (7) state the principle : " the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact." " The occasion is privileged, the communication is protected," says Lord Shaw, in *Adam* v. *Ward* (8).

It seems to me clear that what that passage implies is that, if the conduct of the tribunal has not been honest and *bona fide*, that affords evidence of malice. In his opening, however, counsel for the plaintiff expressly disclaimed malice in the defendants, and, if there is no malice, it follows that the qualified privilege is not displaced. Qualified privilege, as I understand it, arises from the fact that the stewards and the trainer have a common interest in the matter and also from the fact that the trainer agreed, by the terms on which he accepted his licence, that the decision of the stewards should be published. Accordingly, it appeared to me that there was no question, in view of the disclaimer of malice, to be left to the jury, that the publication was privileged, and on that ground that the cause of action in libel failed. Consequently, on both the suggested causes of action, in my opinion, there was no case made out by the plaintiff, and, accordingly, there will be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors : *W. R. Bennett & Co.* (for the plaintiff) ; *Charles Russell & Co.* (for the defendants).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

GILCHESTER PROPERTIES, LTD. *v.* GOMM.

[CHANCERY DIVISION (Romer, J.), January 22, 27, 29, 30, February 2, 1948.]

Sale of Land—Misrepresentation—Innocent misrepresentation—Statement of rents—Representation or warranty—Remedy—Reduction in purchase price.

In the course of correspondence relating to the proposed sale of certain leasehold premises comprising four tenanted flats, the vendor's solicitors stated in answer to enquiries by the purchasers that the total rents payable by the tenants was £449. This was an innocent misrepresentation on their part, and, in fact, the rents amounted to less than the figure stated. A contract was concluded in which no reference was made to the details thus supplied, and the purchasers then entered into a sub-contract to re-sell the premises, stating to the sub-purchasers that the rents totalled £449. When the sub-purchasers became aware of the correct amount of the rents they resiled from the sub-contract. The purchasers thereupon claimed specific performance of their contract with the vendor and an abatement of £550 in the purchase price.

HELD: (i) the statements complained of were inducements to the contract and did not constitute any part of the contract or a warranty or a collateral agreement.

(ii) the form of relief claimed was inappropriate as it would amount to an award of damages in respect of an innocent misrepresentation.

Rutherford v. *Acton-Adams* ([1915] A.C. 866; 113 L.T. 931), and *Heilbut, Symons & Co.* v. *Buckleton* ([1913] A.C. 30; 107 L.T. 769), *applied.*

Powell v. *Elliot,* (1875) (10 Ch. App. 424; 33 L.T. 110), *explained.*

[AS TO WHEN MISREPRESENTATION ACTIONABLE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 76-81, paras. 106-112; and FOR CASES, see DIGEST, Vol. 35, pp. 53-56, Nos. *472-510.*]

Cases referred to:

(1) *Heilbut, Symons & Co.* v. *Buckleton,* [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769; 35 Digest 54, *486.*

(2) *Derry* v. *Peek,* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; *revsg. S.C. sub nom. Peek* v. *Derry,* (1887), 37 Ch.D. 541; 35 Digest 27, *185.*

(3) *Rutherford* v. *Acton-Adams,* [1915] A.C. 866; 84 L.J.P.C. 238; 113 L.T. 931 P.C.; 42 Digest 572, *1366.*

(4) *Powell* v. *Elliot,* (1875), 10 Ch. App. 424; 33 L.T. 110; 42 Digest 575, *1405.*

WITNESS ACTION.

The plaintiffs, Gilchester Properties, Ltd., who had contracted with the defendant, Victor Henry Gomm, for the purchase of certain leasehold premises, claimed specific performance of the contract and an abatement of £550 in the purchase price in respect of an innocent misrepresentation by the vendor's agent during the preliminary negotiations to the effect that the rents payable by the tenants of the property amounted to £449 10*s.* whereas, in fact, they amounted only to £398 10*s.* ROMER, J., refused the relief claimed. The facts appear in the judgment.

Lindner for the purchasers.

Pascoe Hayward, K.C., and *Burnett-Hall* for the vendor.

ROMER, J.: The contract on which the plaintiffs sue was made on July 18, 1946, and by it the plaintiffs agreed to purchase the property in question for £2,200, of which they then paid as a deposit the sum of £220. The property was described as "leasehold premises known as Hayne Court, No. 18 Hayne Road, Beckenham, Kent," and it was held for a term of 99 years from June 24, 1936, at a ground rent of £50 a year. By cl. 6 of the special conditions of sale it was provided that:

> The property is sold subject to the covenants and conditions contained in the lease of June 26, 1936, a copy of which having been supplied to the purchaser the purchaser shall be deemed to purchase with full notice thereof and to the existing tenancies.

The contract embodied the National Conditions of Sale, and of these the 10th condition provides:

> (1) Without prejudice to the duty of the vendor to disclose, on or before the date of the contract, all latent easements and other liabilities known to the vendor to affect the property, the property is sold subject to any land tax, tithe redemption annuity, rights of way and water and other rights, easements, quasi-easements liabilities and public rights affecting the same, and to tenancies, whether mentioned in the particulars of sale or not, and to the rights and claims of tenants not attributable to breaches of obligations imposed on the landlord which occurred and ought to have been discharged before the sale. No error, misstatement or omission in the particulars, sale plan or conditions, shall annul the sale, nor (save where the error, statement or omission relates to a matter materially affecting the description or value of the property) shall any compensation be allowed either by the vendor or purchaser in respect thereof.

Condition 12 provides :

> (1) Abstracts or copies of the leases or agreements (if in writing) under which the tenants hold may be inspected at the office of the vendor's solicitor during a period of five working days next preceding the day of sale, or in the sale room at the time of sale, and the purchaser (whether he inspects the same or not) shall be deemed to have notice of and shall take subject to the terms of all the existing tenancies, whether arising during the continuance of or after the expiration thereof, and such notice shall not be affected by any partial or incomplete statement in the particulars with reference to the tenancies, and no objection shall be made on account of there not being an agreement in writing with any tenant.

[His Lordship dealt with the correspondence between the parties and said that, after negotiation, the purchasers' offer of £2,200 was accepted, and, on June 12, 1946, the purchasers' solicitor addressed the following inquiries to the vendor's solicitors :—] .

> Mr. B. Gomm and Gilchester Properties, Ltd. Re Hayne Court, 18 Hayne Road. Note : Perusal of the draft contract for sale and purchase of the above property will be much facilitated if the vendor's solicitor will be good enough to reply to the following questions : (1) Please supply copies of 4 tenancy agreements and state which are or have been statutory tenancies, either under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, or under the Rent and Mortgage Interest Restrictions Act, 1939, and give the standard rent of each flat.

The reply was :

> (1) Copy already supplied. All four agreements are identical. So far as vendor knows the premises are controlled at the following rentals. Ground floor let to Cecil Martin under agreement dated Mar. 3, 1936 for three years from May 1, 1936 at inclusive yearly rental of £105 payable quarterly in advance. First floor let to Sidney Wilson for three years from Mar. 25, 1936 at inclusive yearly rent of £130 including garage payable quarterly in advance. Top floor flat let to Emil Henhas for three years from Mar. 25, 1936, at [inclusive] yearly rental of £78 payable monthly in advance. Flat 3 copy agreement supplied.

The copy agreement supplied was an agreement between Gertrude Janet Churchill, who was called the landlord, and Alexander Beer, who was called the tenant, for the letting of a flat in the premises, together with the use of part of the garage, for the term of two years from Oct. 29, 1945, at an inclusive yearly rental of £136 10*s*., and other provisions as therein appearing. At the foot of the printed document on which the preliminary enquiries were made and answered there are these notes :

> N.B.—(1) This form, which extends only to matters of common occurrence, must be adapted or added to according to circumstances. (2) The contract itself should deal with the description of the property and estate sold, ownership of mines, minerals, exact nature of the document proposed as root of title, and other such matters.

On July 17, in reply to further inquiries, the vendor's solicitors stated that, " to the best of the vendor's belief, these rents appear to be standard rents." On July 18, the contract was signed. Subsequently, the purchasers entered into a sub-contract in relation to the property, making therein a statement, which, of course, would be binding on them that the rentals payable by the tenants of the flats were those given by the vendor's solicitors in their reply to the preliminary enquiries. It transpired that, in fact, those were not the rents which were being paid by the tenants, whereupon the sub-purchasers resiled from their contract, and the purchasers under the original contract (the present plaintiffs) say that they lost a very good bargain. They are not, however, suing for anything in the nature of damages for loss of the bargain. They say that they are entitled to have a fair deduction made from the contract price of £2,200 as between themselves and their vendor on the ground of misrepresentation.

Taking as an example the ground floor flat, the representation, according to the purchasers, was that that flat at the date of the reply to the preliminary enquiry was let to Mr. Cecil Martin under the agreement referred to in the reply, at the stated rent, and that he was still in occupation of the flat and holding over under that agreement. The purchasers say that that was a continuing representation up to the date of the contract, that they subsequently entered into the contract in reliance on that representation, that it was confirmed by the subsequent correspondence, and that, the purchasers should be compensated by way of a suitable deduction from the purchase price payable under the contract. The vendor's answer to that may be stated in the form of three propositions: first, that a statement made in the course of negotiations during the making of a contract is either a representation inducing the contract or is a warranty or promise forming part of the contract, moving from the person making the statement; secondly, that specific performance and compensation may be granted at the suit of a purchaser where a vendor has made a statement of the second class, namely, a warranty or promise, but it will never be granted where a vendor has made a statement of the first class; and, thirdly, that the statement in this case was a representation and was not a warranty or promise collateral to the main contract as distinct from a statement. To that, counsel for the purchasers replied that the replies were not representations, but were statements of fact descriptive of the subject-matter of the contract, facts known only to the vendor, and that they were carried into the contract as part of the description of the property, so that it might be said that they were additional, in some sense, to cl. 6 of the special conditions.

I am not entirely satisfied that the replies to the preliminary enquiries did constitute sufficiently definite statements of fact to amount to a representation. In the first place, they were cautiously qualified by the phrase, "so far as the vendor knows." Secondly, three of the tenancies referred to in the replies had, on the face of the description given, already expired, a point which plainly, I should have thought, would have created in the mind of anybody reading it some inquisitiveness as to the true position and an inclination to carry the enquiry further. Thirdly, it seems from the subsequent correspondence that the purchasers did repeatedly make further requests by letter for information in relation to these tenancies and the tenants, information which the purchasers probably would have insisted on obtaining before signing the contract if they had not been in such a hurry to effect this sub-sale. I am prepared, however, to assume that the replies were sufficiently definite and that the purchasers acted on the faith of the statements contained in those replies.

I now have to consider the question whether the right way of looking at this matter was that these statements amounted to a representation inducing the contract or whether they amounted to something in the nature of a warranty. The authority on which counsel for the vendor principally relied on this point was *Heilbut, Symons & Co.* v. *Buckleton* (1). The principle to which I wish to refer is stated in a general way by LORD MOULTON, where he said ([1913] A.C. at p. 47):

> It is, evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by £100, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it

> possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter. There is in the present case an entire absence of any evidence to support the existence of such a collateral contract. [HIS LORDSHIP referred to the statement which was relied upon in that case, and said :] No doubt it was a representation as to fact, and indeed it was the actual representation upon which the main case of the plaintiff rested. It was this representation which he alleged to have been false and fraudulent and which he alleged induced him to enter into the contracts and take the shares. There is no suggestion throughout the whole of his evidence that he regarded it as anything but a representation. Neither the plaintiff nor the defendants were asked any question or gave any evidence tending to show the existence of any *animus contrahendi* other than as regards the main contracts. The whole case for the existence of a collateral contract therefore rests on the mere fact that the statement was made as to the character of the company, and if this is to be treated as evidence sufficient to establish the existence of a collateral contract of the kind alleged the same result must follow with regard to any other statement relating to the subject-matter of a contract made by a contracting party prior to its execution. This would negative entirely the firmly established rule that an innocent representation gives no right to damages. It would amount to saying that the making of any representation prior to a contract relating to its subject-matter is sufficient to establish the existence of a collateral contract that the statement is true and therefore to give a right to damages if such should not be the case. In the history of English law we find many attempts to make persons responsible in damages by reason of innocent misrepresentations, and at times it has seemed as though the attempts would succeed. On the chancery side of the court the decisions favouring this view usually took the form of extending the scope of the action for deceit. There was a tendency to recognise the existence of what was sometimes called "legal fraud," *i.e.*, that the making of an incorrect statement of fact without reasonable grounds, or of one which was inconsistent with information which the person had received or had the means of obtaining, entailed the same legal consequences as making it fraudulently. Such a doctrine would make a man liable for forgetfulness or mistake or even for honestly interpreting the facts known to him or drawing conclusions from them in a way which the court did not think to be legally warranted.

LORD MOULTON referred to the case of *Peek* v. *Derry* (2) which he said was the high-water mark of those decisions, and then (at p. 51) he said :

> It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made. In the present case the statement was made in answer to an inquiry for information. There is nothing which can by any possibility be taken as evidence of an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement. It is a representation as to a specific thing and nothing more. The judge, therefore, ought not to have left the question of warranty to the jury, and if, as a matter of prudence, he did so in order to obtain their opinion in case of appeal, he ought then to have entered judgment for the defendants notwithstanding the verdict.

It is to be borne in mind that the representation here has never been suggested to have been one of a fraudulent character. It is admitted frankly by the purchasers that it was an innocent statement, albeit a mistaken one. The vendor argued that the statement contained in the reply was a representation and nothing more. It was not only outside the contract, but was also a representation inducing the contract. It was made in reply to a request for information, and the purchasers gave no evidence of any *animus contrahendi* in the matter. The relevance of those two points emerges from the passages of the speech of LORD MOULTON which I have just read. Further, it was said that the statement was made by a solicitor who had no authority to contract or to give a warranty, nor did he profess to do so in the replies, and, finally, it was said that no collateral contract had been pleaded, the whole case having been presented on the footing of representation inducing the contract. I think those submissions are well founded, and that the statements contained in the replies were mere information given in response to a request for information in the course of negotiations leading up to the contract, and that they did not constitute a part of the contract itself or anything in the nature of a warranty or a collateral agreement.

That being so, the next question is whether, in cases where an innocent representation is made in the course of negotiations, that representation being erroneous, the person to whom it is made is entitled to the form of relief that is sought by the purchasers, namely, specific performance, with a deduction from the purchase money by way of compensation. In my judgment, he is not. It seems to me that so to hold would be to cut across the principle which Lord Moulton so clearly and emphatically stated in his speech in *Heilbut Symons & Co.* v. *Buckleton* (1), that no damages can be given for innocent misrepresentation, for it appears to me that to enforce the contract on the vendor with a compulsory deduction of part of the purchase money is in a sense to award against the vendor damages for an innocent misrepresentation. Apart from authority, I think that view is the true view, but I should, perhaps, refer to the Privy Council case of *Rutherford* v. *Acton-Adams* (3) the headnote of which is ([1915] A.C. 866) :

> The right of a purchaser of land to obtain a decree for specific performance of the contract with compensation applies only where there is a deficiency in the subject-matter described in the contract. It does not apply to a claim based upon a representation made not in the contract but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there is fraud, or for breach of a collateral contract if there has been one.

In that case the contract was for the sale of certain freehold and leasehold lands in New Zealand, and the representation made to the purchaser, of which he complained and in respect of which he was trying to get compensation, was that the fencing on the land was 232 miles, whereas, in fact, there was only 164 miles of fencing, and he claimed to deduct £3,570 from the balance of the purchase price in respect of this deficiency. Lord Haldane said (*ibid.*, 868) :

> The real question in this case is whether the appellant, the purchaser of a large tract of land, can, after entering into possession and taking a conveyance, claim compensation for misrepresentation as to the mileage of fencing on the land. The contract was silent as to the fencing, but it is contended that on this subject the respondent's agent made a material misrepresentation as to the mileage which induced the appellant to enter into the contract. Their Lordships will proceed on the assumption that this was so. As, shortly after the payment of the deposit, the purchaser entered into possession and has taken profits, rescission is now impossible. It is equally true that as there is no charge made of fraudulent misrepresentation, no claim can be made for damages for deceit. The only possible remedy open to the appellant as purchaser is to claim compensation against the vendor for the deficiency in the mileage of fencing by invoking the well-known jurisdiction of a court of equity in cases of specific performance to order compensation for discrepancy between what was agreed to be conveyed and what can be conveyed. . . They [their Lordships] are further of opinion that the purchaser cannot counterclaim for compensation. They have examined the cases on the point decided both in this country and in the courts of New Zealand. The result of this examination is to satisfy them that the principle which applies ought to be laid down as follows. In exercising its jurisdiction over specific performance the court of equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing the court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement from the purchase-money. But this right applies only to a deficiency in the subject-matter described in the contract. It does not apply to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for breach of a collateral contract if there has been such a contract. Their Lordships have arrived at the conclusion that as rescission cannot now be asked for, and as there is no such collateral contract as has been referred to, the claim of the purchaser, the appellant, fails.

There is only one other case to which I need refer, and that at first sight would seem to have supported the contrary proposition, that where there is a mere statement (inaccurate, but innocent) inducing a contract, such as I hold the present one to be, a purchaser can get a decree for specific performance with an abatement of the purchase price. That was *Powell* v. *Elliot* (4), but counsel have been good enough to look up the earlier records in that litigation and have extracted from the records of the earlier proceedings the substance of the matter so far as it is relevant to the present case, and it seems from the statement with which I have been supplied, giving the results of their researches, that the description which was found to be an inaccurate description and one which misled the purchasers was incorporated in the contract itself, and it was, therefore, the reverse of the present case because the description relied on was not merely a matter of inducing the contract, but was actually tied to the contract by being incorporated in the contract to which the vendors were parties. Therefore, it becomes merely an illustration of the kind of simple case on which this whole doctrine was originally founded—where A agrees to sell to B the property Blackacre and it is described in the contract as consisting of one thousand acres whereas, in fact, it only consists of 950 acres. There the vendor states in the contract itself that he is in a position to sell, and is proposing to sell, property of a certain area, and, if it is found subsequently that he can substantially, but not wholly, carry out his contract, the deficiency in the acreage being small, he is compelled to convey what he can and the contract price is reduced by a proportionate amount. I, therefore, think as I say, that that case, which at first sight appeared to raise some difficulty in the way of the conclusion at which I have arrived, is not at all inconsistent with that conclusion, and the conclusion at which I arrive is that the vendor's proposition has been made good, namely, that this answer in the reply given to the first preliminary enquiries was a statement made in the course of preliminary investigations in answer to a request for information by the purchaser, and that it was a statement inducing in the purchaser the intention to contract and that he did contract having that statement in mind, but that, when it turned out, as it did turn out, that the statement was not accurate, his remedy was rescission and not an action for specific performance with compensation. That kind of relief is not appropriate, in my judgment, to statements in the category to which this statement belongs, and, accordingly, I have no alternative but to refuse to intervene and order compensation by reduction of the purchase money, and the action, accordingly, fails.

Action dismissed with costs.

Solicitors: *Harry Baker* (for the purchasers); *Murray Napier & Co.* (for the vendor).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

Applied. *Re* Northcote's Will Trusts. [1949] 1 All E.R. 442.

Re GEE. WOOD AND OTHERS *v.* STAPLES AND OTHERS.

[Chancery Division (Harman, J.), January 28, 29, 30, February 2, 3, 4, 5, 6, March 1, 1948.]

Trustee—Benefit—Duty to account to estate—Estate holding shares in company—Trustee appointed managing director—Appointment and remuneration recommended by all shareholders—Trust estate without majority interest in company.

The capital of a private company was £5,000 in £1 shares, of which the testator's father held 4,948 and the testator 51, the remaining share being held by the father's solicitor and acquired later by the testator. The first directors were the testator and his father. The father, who died in 1913, left (*a*) 1,948 shares to the testator absolutely, (*b*) 1,000 shares to be equally divided, in the events which happened, between the testator and his two sisters, G. and H., and (*c*) 2,000 shares to be transferred after the death of the testator's mother to G. and H. to be held by them on trust for themselves and H.'s son. On the father's death, the mother became a director in his place. The testator acted as managing director until his death, but while he was seriously ill, early in 1937, S., a former employee of the company, was appointed temporary managing director, without remuneration, for 2 months. In June, 1937, four of the testator's shares were transferred, as to one each, to his wife, to the sister, G., to S., and to a daughter, and S. was appointed an additional director but without any remuneration. The testator's mother died in November, 1937, and the testator died in

December, 1937. He appointed his widow, his daughter and S. trustees and executors of his will and bequeathed one share in the company to each executor who accepted office. At his death he held 2,320 shares of which 100 were transferable to his widow under a marriage settlement, 100 were bequeathed to his daughter, and the remainder were to be held on certain trusts. The company being in a critical situation, the other shareholders asked S. to assume the testator's position in the company, and, at an extraordinary general meeting held on Jan. 6, 1938, and attended by all the shareholders then on the company's register, after the appointment of two new directors, S. was appointed chairman of the board and managing director for 5 years at a remuneration of £600 per annum and a percentage on net profits. At a meeting of the directors held in 1942, his appointment was continued for another 5 years. Some of the beneficiaries under the testator's will now claimed for the benefit of the estate all remuneration received by S., on the ground that he had obtained it through his position of trust under the will. S. sought to rely on a charging clause in the testator's will as a defence :—

HELD : (i) the remuneration complained of did not come within the words of the charging clause which applied only to remuneration paid out of the estate.

Re Chapple, Newton v. *Chapman* (1884) (27 Ch.D. 584; 51 L.T. 748) and *Clarkson* v. *Robinson* ([1900] 2 Ch. 722), *considered.*

(ii) since the majority interest in the shares of the company belonged, not to the testator's estate, but to the beneficiaries under the father's will who were in favour of the appointment and the payment of the stipulated remuneration, the appointment was not procured by the use of the trust interest vested in the executors by the testator's will, and, therefore, S. was entitled to retain the remuneration received.

Dictum of WARRINGTON, J., in *Re Dover Coalfield Extension, Ltd.* ([1907] 2 Ch. at p. 83), *criticised.*

Re Dover Coalfield Extension, Ltd. ([1908] 1 Ch. 65 ; 98 L.T. 31), *explained and applied.*

Re Lewis, Lewis v. *Lewis,* (1910) (103 L.T. 495), *applied.*

Williams v. *Barton* ([1927] 2 Ch. 9 ; 137 L.T. 294) and *Re Macadam, Dallow* v. *Codd* ([1945] 2 All E.R. 664 ; 173 L.T. 395), *distinguished.*

[AS TO DUTY OF TRUSTEE NOT TO OBTAIN PERSONAL ADVANTAGE FROM POSITION, see HALSBURY, Hailsham Edn., Vol. 33, pp. 220, 221, para. 402 ; and FOR CASES, see DIGEST, Vol. 43, pp. 863-866, Nos. *3097-3117*.]

Cases referred to :—

(1) *Foster* v. *Foster*, [1916] 1 Ch. 532 ; 85 L.J.Ch. 305 ; 114 L.T. 405 ; 9 Digest 440, *2856*.

(2) *Re Chapple, Newton* v. *Chapman*, (1884), 27 Ch.D. 584 ; 51 L.T. 748 ; 24 Digest 603, *6337*.

(3) *Clarkson* v. *Robinson*, [1900] 2 Ch. 722 ; 69 L.J.Ch. 859 ; 24 Digest 603, *6339*.

(4) *Robinson* v. *Pett*, (1734), 3 P. Wms. 249 ; 2 Eq. Cas. Abr. 454 ; *sub nom. Robinson* v. *Lorkin*, 2 Barn. K.B. 435 ; 43 Digest 775, *2151*.

(5) *Bray* v. *Ford*, [1896] A.C. 44 ; 65 L.J.Q.B. 213 ; 73 L.T. 609 ; 43 Digest 865, *3112*.

(6) *Re Francis, Barrett* v. *Fisher*, (1905), 74 L.J.Ch. 198 ; 92 L.T. 77 ; 9 Digest 464, *3013*.

(7) *Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65 ; 77 L.J.Ch. 94 ; 98 L.T. 31 ; 9 Digest 464, *3014* ; *affg.*, [1907] 2 Ch. 76.

(8) *Re Lewis, Lewis* v. *Lewis*, (1910), 103 L.T. 495 ; 43 Digest 638, *764*.

(9) *Williams* v. *Barton*, [1927] 2 Ch. 9 ; 96 L.J.Ch. 355 ; 137 L.T. 294 ; 43 Digest 866, *3117*.

(10) *Re Macadam, Dallow* v. *Codd*, [1945] 2 All E.R. 664 ; [1946] Ch. 73 ; 115 L.J.Ch. 14 ; 173 L.T. 395 ; 2nd Digest Supp.

ACTION by some of the beneficiaries under a testator's will claiming (*inter alia*) that the remuneration received by one of the trustees as director of a company in which the trust estate held shares was obtained by reason of his position of trust under the will and should be recovered for the benefit of the estate. HARMAN, J., held that the claim failed and the trustee was entitled to retain the remuneration. The facts appear in the judgment.

Armstrong Cowan for the plaintiffs.
Upjohn, K.C., and *T. D. D. Divine* for the defendants other than Mrs. Haynes.
Richmount for the defendant, Mrs. Haynes.

Cur. adv. vult.

Mar. 1. **HARMAN, J.,** read the following judgment. The plaintiffs in this action are beneficiaries under the will of Alfred Lionel Gee, whom I shall hereafter call the testator. Each of them is interested in certain shares specifically bequeathed by the testator's will in a company known as Gee & Co. (Publishers), Ltd., which I shall hereafter call the company. The second, third and fourth plaintiffs are also interested in the residue of the testator's estate. The first three defendants are the testator's executors. Each of them is beneficially interested in certain shares in the company specifically bequeathed by the will and the third defendant is also interested in residue. The last two defendants, to whom I shall hereafter refer severally as Miss Gee and Mrs. Heaton, are sisters of the testator, not interested under his will, but largely interested in the company under his father's will, and also, as it is alleged, persons wrongfully benefiting by reason of one of the breaches of trust complained of in the action.

The action as originally framed raises in effect three claims. The first concerns certain bonus shares (called " B " shares) issued in 1938 to the last two defendants. It is said that these were a gift to them and were issued in breach of trust procured by the votes of the defendant executors, and that the shares ought to be held as part of the testator's estate. The second claim is for an account of all moneys due to the plaintiffs under the trusts of the will, and payment of the sums found due. This claim was based on an allegation that the executors had not paid to the plaintiffs all the dividends and bonus to which they were entitled on the shares specifically bequeathed to them. There was no complaint of any refusal to deliver accounts, nor was the action headed in the matter of the testator's estate, though there was a claim in the prayer for administration if and so far as necessary. This claim was amended at the hearing by leave by adding an allegation that the executors had failed to render proper accounts of the sums due to the plaintiffs both as specific legatees and residuary legatees, and that there had been a refusal to transfer certain of the shares in the company. At the same time the prayer was amended to ask for administration by the court with all necessary inquiries and accounts. The third claim is against the first defendant alone, and seeks to recover from him for the benefit of the estate all remuneration received by him since the testator's death as director or managing director of the company.

In order to understand the issues, certain matters of history require to be stated. The company was incorporated in 1911 in order to take over (as it did) the publishing business of Robert Gee, the testator's father. It was a private company with a capital of £5,000 in £1 shares, of which during his lifetime Robert Gee held 4,948 and the testator 51. The remaining share was registered in the name of one Leviansky, Robert Gee's solicitor and a signatory to the memorandum of association. The quorum of directors was two, and their qualification the holding of one £1 share. The first directors were Robert Gee and the testator, who so continued till the death of the former, when his place was taken by his widow, Kate Agnes Gee. This state of affairs continued till 1937, the testator acting as managing director. The company was a prosperous one, publishing a technical journal, and doing some printing business. The first defendant, to whom I shall refer as Mr. Staples, was a salaried employee of the company from about 1927. The testator and he were also equally interested in another company, called Taxation Publishing Co., Ltd., formed by Mr. Staples in 1932 with himself as managing director and the testator as chairman. Robert Gee died in 1913, having by his will appointed his wife, the testator and one Baxter (who is long since dead) to be executors and trustees, and having bequeathed 1,000 shares in the company to his trustees on certain trusts during the lifetime of his son Horace Randolph (who died in 1933) and thereafter to be equally divided between his other children, namely, the testator, Miss Gee and Mrs. Heaton, equally. Robert Gee also bequeathed 1,948 shares in the company to the testator absolutely and 2,000 like shares to his trustees on trusts (in effect) to pay the income to his widow during her life, and thereafter to transfer the shares to Miss Gee and Mrs. Heaton, who were directed to hold them on trusts under which they and Mrs. Heaton's only child Peter (not a party) are the only persons interested. The 1,948 shares so bequeathed to the testator were in due course transferred to him, making his holding up to 1,999 shares. One share was still held by Mr. Leviansky, and the remaining 3,000 became vested in Kate Agnes Gee and the testator as trustees of Robert Gee's will. This was the state of the register till June, 1937.

The testator was married twice. There was issue of his first marriage one child, *viz.*, the third defendant, now Mrs. Hunter. The first wife is still living, but is not concerned with this suit. In or about 1920 the testator formed an association with the first plaintiff, by whom he had three children, namely, the second, third and fourth plaintiffs, who were born in 1921, 1924 and 1926 respectively. In 1936 the testator's first wife divorced him, and by way of providing for her he, on Nov. 30, 1936, entered into a deed of covenant whereby (so far as material) he agreed to hold 1,000 of his shares in the company on trust after his death to pay the dividends up to but not exceeding £160 a year less tax to her during the residue of her life. Subject to this burden, these 1,000 shares remained the testator's own property. On the same day he executed a settlement in contemplation of his marriage to the second defendant (who re-married in March, 1946, and is now Mrs. Haynes) under which (so far as material) he agreed to hold a further 100 shares in the company on trust for her absolutely, if she survived him. Immediately after his second marriage, the testator made his will whereby he appointed as executors and trustees Mrs. Haynes, Mrs. Hunter and Mr. Staples, and bequeathed one share in the company to each of his executors who accepted office. He also bequeathed 100 shares in the company to Mrs. Hunter and 2,150 like shares to his trustees on the trusts following: (*a*) 400 on the trusts applicable to residue; (*b*) 350 for the second plaintiff at 21; (*c*) 400 in trust to pay the income to the first plaintiff till marriage (an event which occurred in 1940) and thereafter to pay her one half of the income for the remainder of her life; (*d*) 400 for Mrs. Hunter for life; (*e*) 250 for the third plaintiff for life; (*f*) 200 for the fourth plaintiff for life; (*g*) 100 for the first defendant for life; and (*h*) 50 for the last plaintiff for life. Subject to these several interests, the last mentioned 1,400 shares were directed to fall into residue, which the testator directed to be held on the following trusts: (*a*) to pay the income to Mrs. Haynes during her widowhood, and thereafter to pay her one half of the income during the rest of her life; (*b*) as to capital and income, subject as aforesaid in the event (which happened) of his having no children by his second wife, as to two-sixths for Mrs. Hunter, two-sixths for the second plaintiff, one-sixth for the third plaintiff, and one-sixth for the fourth plaintiff.

Early in 1937 the testator fell ill, and application was made to the court for directions as to carrying on the business of the company. As a result, an extraordinary general meeting of the company was held on Feb. 14, 1937, at which Mr. Staples was appointed a temporary additional director, he having signed a declaration that he wished to resign as soon as the testator should be well enough to act again himself. At a directors' meeting held on the same day, Mr. Staples was appointed temporary managing director of the company without remuneration until the testator should by writing under his hand notify the company of his recovery from his illness. Under the company's articles of association, these appointments lapsed two months after they were made, Mr. Staples not having by that time acquired any qualification share. At a directors' meeting of the company held on June 10, 1937, and attended by the testator and his mother, Mr. Leviansky's share was transferred to the testator, and four of the testator's shares were transferred as to one each to Mrs. Haynes, Miss Gee, Mr. Staples and Mrs. Hunter. No consideration was paid for the last four transfers. At another directors' meeting held on the same date and attended by the testator and his mother, Mr. Staples was appointed an additional director. As he was already the holder of the necessary qualifying share, this appointment was effectual. The appointment of Mr. Staples as director did not entitle him to any remuneration unless and until the board so determined.

Kate Agnes Gee died on Nov. 27, 1937, and the testator on Dec. 2, 1937. The situation thus created was a critical one. The testator's only substantial asset (apart from some shares in Taxation Publishing Company, Ltd., valued for probate at £1,150 or so) was his holding in the company. He stood on the register as holding 1,996 shares, but of these 1,000 stood burdened with the covenant in favour of the first wife, and 100 were transferable to Mrs. Haynes. On the other hand, he was absolutely entitled under his father's will to 334 further shares. As a result, he was in a position to dispose immediately of no more than 1,230 shares, though by his will he had affected to dispose of 2,603. He was heavily in debt, partly to a number of comparatively small creditors, but mainly to the company to which he owed over £26,000. The company was left with only one director, namely, Mr. Staples. The testator's death left Mrs. Woods and her infant children, *i.e.*, the first four plaintiffs—in a precarious position owing to the cesser of the allowance he had been in the habit of making to her, and she was already in straits by Dec. 17, 1937. The defendants, except Mr. Staples, were also largely dependent on the company's fortunes.

In these circumstances, it is not surprising to find the defendants turning to Mr. Staples for help. That he enjoyed the testator's confidence and was considered by him to be the right person to carry on the company's business is clear from the facts I have recited. Some at least of the defendants appear to have approached Mr. Staples and to have asked him to assume the testator's position in the company, and to draw remuneration at the same rate (*viz.*, £1,500 per annum plus £500 expenses). Mr. Staples says (and I believe him) that he declined this rate of pay as being more than the company could afford, but agreed to act and to take what was, on the basis of profits then being earned, a smaller sum.

Accordingly, on Jan. 6, 1938, there was held a meeting, described in the company's minute book as an extraordinary general meeting, which was attended by all the corporators then on the register of the company, namely, the three persons nominated as executors by the testator's will and Miss Gee, Mr. Staples being described as chairman. The minute is in the following terms:

> The chairman reported that in order to facilitate the company's business, and in accordance with the company's articles of association, it was proposed for the directors to pass the under-mentioned resolutions, and these were approved accordingly. (1) Under art. 75: That Miss Kate Dorothy Gee and Miss Vera Maud Snelling be and are hereby appointed directors of the company in accordance with cl. 75 of the articles of association of the company at a remuneration of £150 per annum each. (2) Under art. 83 (*b*): That Mr. Ronald Staples be and is hereby appointed chairman of the board and managing director of the company for a period of 5 years at a remuneration of £600 per annum, and that he be paid a further sum as managing director of 10 per cent. of the net profits of the business (before charging income tax) as certified by the company's auditors.

The minute is subscribed by all the registered corporators, *i.e.*, the executors and Miss Gee. It will be observed that it purports to approve the passing of the specified resolutions by the directors. This accords with arts. 75 and 83 (*b*) there mentioned, which confer powers on the board and not on a general meeting. The directors, in fact, passed no such resolutions. This was, however, a meeting attended by all the corporators. The resolutions set out are not *ultra vires* the company, and I must take it on the authority of ***Foster* v. *Foster*** (1) that they were properly passed by the company and effectual, even though in the absence of Miss Snelling, who did not attend the meeting, there would have been no board capable of making the appointment of Mr. Staples as managing director and awarding him remuneration. Indeed, it is not suggested that as between the company and Mr. Staples there is any invalidity; what is said is that Mr. Staples holds the remuneration which he obtained by virtue of this resolution as a trustee for the testator's estate. At the annual general meeting of the company held on Nov. 8, 1938, and again attended by all the corporators, a resolution was passed that the sum of £600 a year voted to Mr. Staples on Jan. 6, 1938, was divisible as to £450 a year as salary as managing director, and £150 a year as director's fee.

The testator's will was proved on Mar. 24, 1939, by all three executors. In January, 1941, the 1,000 shares in the company bequeathed by Robert Gee's will were transferred as to 334 to the testator, 333 to Miss Gee and 333 to Mrs. Heaton. At the same time the remaining 2,000 shares included in Robert Gee's estate were transferred into the names of all the defendants. This last transfer should have been made in favour of Miss Gee and Mrs. Heaton alone. At a meeting of directors of the company held on July 21, 1942, it was resolved that Mr. Staples' appointment as chairman of the board and managing director be continued for five years from Jan. 6, 1943, and that his remuneration as managing director be at the rate of £1,500 a year, or £600 a year with a certain commission, whichever were the greater. This resolution may have been invalid by reason of the absence of an independent quorum, but no complaint of that kind is raised here. By virtue of the foregoing resolutions, Mr. Staples has received between the testator's death and Mar. 31, 1947, sums amounting in the aggregate to £15,721. Further remuneration has been paid to Mr. Staples since that date down to the present time. His co-defendants are satisfied that he should retain these sums, and this is not surprising when it is realised that under his management the company's business has earned profits sufficient to permit of the payment of yearly dividends at an average rate of about 75 per cent. free of tax.

[His Lordship then disposed of the first two claims in favour of the defendants and continued :]

There remains the third claim which has caused me not a little anxiety as it raises in a complicated form the vexed question of the liability of trustees who become salaried officers of companies in which their testator's estate is largely interested. The defendants by amendment sought to rely on a charging clause in the testator's will as a defence, and it is well to deal with this first. In my judgment, it affords no defence. It authorises the trustees, instead of acting personally, to employ and pay a solicitor or any other person :

> . . . to transact any business or do any act of whatsoever nature required to be done in the premises including the receipt and payment of money and that any trustee of this my will being a solicitor or other person engaged in any profession or business may be so employed or act and shall be entitled to charge and be paid all professional or other charges for any business or act done by him or her or his or her firm in connection with the trust.

This type of clause has always received a strict interpretation from the courts (see, for instance, *Re Chapple, Newton* v. *Chapman* (2) and *Clarkson* v. *Robinson* (3)), and I hold that the remuneration complained of in the present case does not come within the words of charge. True it is that it extends to a " person engaged in . . . business," and that such a person " shall be entitled to . . . be paid all . . . charges for any business . . . done by him." This, however, only applies to remuneration paid out of the trust estate, which this is not. It is a payment by the company which, it is said, ought to be added to the trust estate by reason of the position of the recipient. Moreover, I think that this remuneration cannot fairly be described as a charge for business done.

The allegation made against Mr. Staples is that he made use of his position of trust under the testator's will to obtain his remuneration, and it is this which needs examination. The cases on the subject are not numerous, nor do I find them very helpful. None of them deals with a position where more than one trust estate is involved. The principle that a trustee, in the absence of a special contract, cannot make a profit out of his trust, nor be paid for his time and trouble, is an old one, and is spoken of as established in *Robinson* v. *Pett* (4) decided in 1734 (3 P. Wms. 250, 251). It is most clearly stated by LORD HERSCHELL ([1896] A.C. 51) in *Bray* v. *Ford* (5) in these words :

> It is an inflexible rule of a court of equity that a person in a fiduciary position . . . is not, unless otherwise expressly provided, entitled to make a profit ; he is not allowed to put himself in a position where his interest and duty conflict.

The difficulty of applying this principle arises where the payment is made not directly out of the trust estate, but by a third party or body, and, in particular, by a limited company. The modern cases begin with *Re Francis, Barrett* v. *Fisher* (6), from which it appears—though the case is not reported on this point—that KEKEWICH, J., declined to allow trustees to retain for their own use remuneration received by them from a company in which the testator held substantially all the shares. The remuneration was voted at a general meeting, and appears to have been procured by the trustees by the exercise of the voting powers attached to the trust shares which had become registered in their names. This case was not cited in *Re Dover Coalfield Extension, Ltd.* (7), which has been sometimes thought to be inconsistent with it : see, for instance, UNDERHILL ON TRUSTS AND TRUSTEES, 9th ed., p. 353. This, however, in my judgment is not so. The *Dover* case (7) appears, when examined, to have been what COZENS-HARDY, M.R., called it ([1908] 1 Ch. 69), " a very plain case." The trustees there had become directors before they held any trust shares. The trust shares were, by their own procurement, registered in their names in order to qualify them to continue as directors, but it was not by virtue of the use of these shares that they either became entitled or continued to earn their fees. WARRINGTON, J., however, in this case does suggest ([1907] 2 Ch. 83) that remuneration paid for acting as a director of a company can never be a profit for which a trustee needs to account, and it is this expression of opinion which is reflected in the headnote and has given rise to a good deal of misconception about the case. This view was not necessary to the decision, and may be regarded as mere *obiter dictum*. It is, in my judgment, too wide, if applied to a case where either the use of the trust shares brings about the appointment, or there is no independent board of the employing company to strike a proper bargain with the employed trustee. Moreover, it leaves out of account the second leg of the principle stated by Lord Herschell ([1896] A.C. 51) in *Bray* v. *Ford* (5). The beneficiaries are entitled to the advantage of the unfettered use by the trustee of his judgment as to the government of the company in which they are interested. This they do not get if his judgment is clouded by the prospect of the pecuniary advantage he may acquire if he makes use of the trust shares to obtain for himself a directorship carrying remuneration. *Re Lewis, Lewis* v. *Lewis* (8) is again an instance where the trustee did not receive the remuneration by virtue of the use of his position as a trustee, but by an independent bargain with the firm employing him.

There follow two cases on the other side of the line, first *Williams* v. *Barton* (9) where one of the trustees, a half commission agent on the Stock Exchange, had persuaded his co-trustees to employ his firm to value the trust securities, thus increasing his commission from his firm and making a profit directly by the use of his position as a trustee. Russell, J., held him accountable. Last, there is the decision of Cohen, J., in *Re Macadam, Dallow* v. *Codd* (10), where the cases are reviewed. There certain trustees had a power as such, and by virtue of the articles of the company, to appoint two directors of it. By the exercise of this power they appointed themselves, and were held liable to account for the remuneration they received because they had acquired it by the direct use of their trust powers. Cohen, J., felt (and I respectfully concur) that he ought to do nothing to weaken the principle, and he expressed the view ([1945] 2 All E.R. 672) that:

> . . . the root of the matter . . . is: Did the trustee acquire the position in respect of which he drew the remuneration by virtue of his position as trustee?

The judge also held (*ibid.*) that the liability to account for a profit could not "be confined to cases where the profit is derived directly from the trust estate."

I conclude from this review that a trustee who either uses a power vested in him as such to obtain a benefit, as in *Re Macadam* (10), or who (as in *Barton's* case (9)) procures his co-trustees to give him, or those associated with him, remunerative employment, must account for the benefit obtained. Further, it appears to me that a trustee who has the power, by the use of trust votes, to control his own appointment to a remunerative position, and refrains from using them with the result that he is elected to the position of profit, would also be accountable. On the other hand, it appears not to be the law that every man who becomes a trustee, holding, as such, shares in a limited company, is made *ipso facto* accountable for remuneration received from that company independently of any use by him of the trust holding, whether by voting or refraining from so doing. For instance, A, who holds the majority of the shares in a limited company, becomes the trustee of the estate of B, a holder of a minority interest. This cannot, I think, disentitle A to use his own shares to procure his appointment as an officer of the company, nor compel him to disgorge the remuneration he so receives, for he cannot be disentitled to the use of his own voting powers, nor could the use of the trust votes in a contrary sense prevent the majority prevailing. Many other instances could be given of a similar kind. Of these, *Re Dover Coalfield Extension, Ltd.* (7) is really one. There the trustees did not earn their fees by virtue of the trust shares, though, no doubt, the holding of those shares was a qualification necessary for the continued earning of the fees. In so far as Warrington, J., goes further than this, as he seems to do by suggesting ([1907] 2 Ch. 83) that remuneration paid by a company could not be a "profit," it being a mere wage equivalent in value to the work done for it, I feel he goes too far. Certainly this view was not taken in *Re Macadam* (10). It would gravely encroach on the principle which Cohen, J. ([1945] 2 All E.R. 672), and Russell, J. ([1927] 2 Ch. 11) in *Williams* v. *Barton* (9), felt to be so important.

I turn now to an examination of the facts in this case to see what (if any) use was made of the trust shares in the appointment of Mr. Staples. In my judgment, when the facts are examined, no such use was made. After the death of the testator, only four persons remained on the register of this company, and they alone could attend meetings of it. As I have said before, the meeting of Jan. 6, 1938, was attended by all the corporators. Each of them held one share, and, as the resolutions were passed unanimously, they must be supposed to have voted in favour by the use of that share. If the corporators, as I think, held their shares beneficially, they were entitled to vote as they chose. If, on the other hand, they were nominees of the testator, there were still three of them whose votes outweighed the vote of Mr. Staples if it was his duty to vote against his own interest. In neither event did the trust shares come into the picture at all. If this be too narrow a view to take, and it is right for this purpose to look behind the register at the beneficial interests in the shares in the company, then it will be seen that the majority interest belonged to the estate of Robert Gee, and that the persons entitled to have his shares registered in their names, namely, Miss Gee and Mrs. Heaton, were in favour of the appointment and the payment of the stipulated remuneration. If, then, the shares in which the testator's estate was interested had all been used against the resolutions, they would still have been carried, and, therefore, the appointment was not procured by the use of the trust interest vested in the defendant executors, or any of them, by the will of the testator, in which alone the plaintiffs are interested. On the evidence tendered to me, I think it is clear that the persons present at this meeting had no notion that they were using trust votes, or that trust votes controlled the company. They merely met as the four corporators to decide the company's future and were entitled to come to the conclusion at which they arrived. It is to be observed that no suggestion is contained in the pleadings, nor was any serious attempt made at the trial, to show that the remuneration was excessive or that the executors acted in bad faith. This disposes of the first five years' period. For the second period the remuneration rests on a resolution of the board, and, though the resolution was irregular, it could, and would on the evidence before me, have been ratified (if questioned) at a general meeting by votes which overbore the voting power of the testator's estate, namely, the votes of Robert Gee's beneficiaries, and, therefore, there was no possibility that the trust votes either were or could have been used to decide the question. In my judgment, therefore, this claim also fails.

I ought, perhaps, to add that the defendant executors sought to rely on the Trustee Act, 1925, s. 61. In the upshot this point does not arise, but, if I had held that either of the alleged breaches of trust had been committed, I should not have felt able to absolve the executors under this section. No doubt, they behaved honestly, but, having chosen to act without the directions of the court, always available to them, they would not, in my judgment, have satisfied the second condition, that of acting reasonably, and, therefore, they ought not to be excused.

In the result, I make the common order for administration of the estate, and as the action was, until the hearing, an action raising allegations of breach of trust which I have found to be unfounded, and as, moreover, I find no misconduct on the part of the executors as such, I order the plaintiffs to pay the defendants' costs to date. Mrs. Haynes was separately represented, and I have felt much doubt whether separate costs ought to be awarded her. I have come to the conclusion, however, that she was entitled to sever, having regard to the claim made against Mr. Staples alone. This would have entitled Mrs. Haynes and Mrs. Hunter to be represented separately from him, and, in my judgment, the fact that only one of them has chosen so to do does not disentitle her from doing so. The last two defendants might also have been separately represented and were not, and to that extent the plaintiffs are relieved. I, therefore, order the plaintiffs to pay Mrs. Haynes her costs. Costs will include costs reserved. I order proceedings to be stayed against the last two defendants. I make the common decree for administration, and I adjourn further consideration.

Judgment accordingly. Plaintiffs to pay defendants' costs.

Solicitors: *Telfer & Co.* (for the plaintiffs); *Skan & Skan* (for the defendants other than Mrs. Haynes); *Hirst, Miles Griffiths & Co.* (for the defendant, Mrs. Haynes).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

TENNANT PLAYS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Tucker, Somervell and Cohen, L.JJ.), March 4, 5, 1948.]

Income Tax—Exemption—Charity—Trade carried on by charity—Company "established for charitable purposes only"—Objects—Statement in memorandum—Relevance of motives of formation and subsequent acts—Main and subsidiary objects—Finance Act, 1921 (*c.* 32), *s.* 30 (1) (*c*), (*as substituted by Finance Act,* 1927 (*c.* 10), *s.* 24), (3).

The Finance Act, 1921, s. 30 (1) (as substituted by the Finance Act, 1927, s. 24), provides: "Exemption shall be granted . . . (*c*) from income tax under sched. D in respect of the profits of a trade carried on by any charity, if the profits are applied solely to the purposes of the charity and . . . the trade is exercised in the course of the actual carrying out of a primary purpose of the charity . . ." By s. 30 (3): "In this section the expression 'charity' means any body of persons or trust established for charitable purposes only."

A company was incorporated as a company limited by guarantee and as non-profit making. It became an associate of the Council for the Encouragement of Music and the Arts (later known as the Arts Council of Great Britain), a body formed "for charitable purposes only," and conducted all its operations in accordance with that body's conditions, but its functions were not limited by its memorandum of association to those approved by C.E.M.A., nor was it thereby prevented from functioning if its connection with C.E.M.A. were severed. The memorandum defined its objects, *inter alia*, as: "(A) to formulate and prepare schemes for and establish and take all necessary steps for the promotion, maintenance, improvement and advancement of education and of educational plays and arts of all kinds and the arts of drama, dance, singing and music, and also any other forms of art in any way allied to the said arts or any of them. (B) to present, promote, organise, provide, manage, conduct such plays, dramas, comedies, operas, operettas, burlesques, promenade and other concerts, musical and other pieces, ballads, shows, educational and other entertainments, exhibitions, dances, competitions, amusements, recreations and compositions of all kinds whether educational, partly educational, or scientific, or partly scientific, or otherwise, for philanthropic or charitable purposes, and whether on any premises of the company or elsewhere. (C) to purchase, acquire and obtain interests in the copyright of, or the rights to perform or show any opera, play, comedy, drama, stage piece or musical composition which can be used or adapted in any way for any educational or allied play; enter into agreements, if desirable, with authors, dancers, actors or others in connection with all or any of the objects of the company and to produce, distribute, rent, or otherwise deal in cinematographic films. (D) as ancillary to the foregoing objects of the company and with a view to finding income and funds for the purposes of the company to carry on business as theatre, music hall, concert hall, dance hall, ballroom, public hall, cinema and picture house proprietors and managers." The company contended that it was "established for charitable purposes only," and was, therefore, entitled to exemption under s. 30 (1) (*c*) (as substituted).

Held: (i) the company's connection with the C.E.M.A. a body formed for charitable purposes only, was irrelevant, since the company was registered with a memorandum of association, which set out the objects of the company and neither the documents preliminary to incorporation nor the action of the directors after formation could properly be received in evidence to determine what the objects of the company were.

Bowman v. *Secular Society, Ltd.*, ([1917] A.C. 406; 117 L.T. 161), *applied.*

(ii) while the objects contained in cl. (A) of the memorandum might be charitable only, on the proper construction of the memorandum, cl. (B) and the latter part of cl. (C) specified independent main objects of the company, and, since those objects were not charitable, the company was not established for charitable purposes only.

Observations of LORD TOMLIN in *Keren Kayemeth le Jisroel, Ltd.*, v. *Inland Revenue Comrs.* ([1932] A.C. 650, 658; 147 L.T. 161, 164) *applied.*

[AS TO CHARITABLE PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 111-127, paras. 147-168; and FOR CASES, see DIGEST, Vol. 8, pp. 241-265, Nos. *1-272.*]

Cases referred to:

(1) *Keren Kayemeth le Jisroel, Ltd.* v. *Inland Revenue Comrs.*, [1932] A.C. 650; 101 L.J.K.B. 459; 147 L.T. 161; 17 Tax Cas. 27; Digest Supp.

(2) *Bowman* v. *Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 8 Digest 265, *270.*

(3) *Inland Revenue Comrs.* v. *Yorkshire Agricultural Society*, [1928] 1 K.B. 611; 97 L.J.K.B. 100; 138 L.T. 192; 13 Tax Cas. 58; Digest Supp.

(4) *Peterborough Royal Foxhound Show Society* v. *Inland Revenue Comrs.*, [1936] 1 All E.R. 813; [1936] 2 K.B. 497; 105 L.J.K.B. 427; 155 L.T. 134; 20 Tax Cas. 249; Digest Supp.

(5) *National Anti-Vivisection Society* v. *Inland Revenue Comrs.*, [1947] 2 All E.R. 217; [1948] A.C. 31; [1947] L.J.R. 1112; 177 L.T. 226.

(6) *Inland Revenue Comrs.* v. *Falkirk Temperance Cafe Trust*, 1927 S.C. 261; 11 Tax Cas. 353; Digest Supp.

(7) *Re Hood, Public Trustee* v. *Hood*, [1931] 1 Ch. 240; 100 L.J.Ch. 115; 143 L.T. 691; Digest Supp.

APPEAL by the company from an order of MACNAGHTEN, J., made on July 28, 1947, affirming a decision of the Special Commissioners of Income Tax, who rejected a claim for exemption from income tax under sched. D.

The claim was made under the Finance Act, 1921, s. 30 (1) (*c*) (as substituted by the Finance Act, 1927, s. 24) on the ground that the company was a "body . . . established for charitable purposes only" and its trade was "exercised in the course of the actual carrying out of a primary purpose of the charity." The Special Commissioners held that the objects set out in para. (A) of the objects clause in the company's memorandum were charitable, but that para. (B), which was in no way limited by para. (A), was in terms so wide that the company had objects which were not strictly charitable. MACNAGHTEN, J., affirmed their decision on somewhat different grounds and the Court of Appeal now dismissed the company's appeal on grounds similar to those on which the Special Commissioners had based their decision. The facts appear in the judgment of COHEN, L.J.

Upjohn, K.C., *Scrimgeour, K.C.*, and *William Lindsay* for the company.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. H. Stamp* and *R. P. Hills* for the Crown.

TUCKER, L.J.: I will ask COHEN, L.J., to give the first judgment in this case.

COHEN, L.J.: Section 30 of the Finance Act, 1921, in its amended form, so far as material to the point we have to decide, is in the following terms:

> (1) Exemption shall be granted . . . (*c*) from income tax under sched. D in respect of the profits of a trade carried on by any charity, if the profits are applied solely to the purposes of the charity and . . . (i) the trade is exercised in the course of the actual carrying out of a primary purpose of the charity . . .

Section 30 (3) provides:

> In this section the expression "charity" means any body of persons or trust established for charitable purposes only.

The question in this case is whether the appellant company, having regard to its objects, is "established for charitable purposes only."

The company was incorporated on July 6, 1942, as a company limited by guarantee and as a non-profit making company. The promoters of the company were H. M. Tennant, Ltd., and the Case contains information as to their motives in forming it. I agree with the commissioners that, to quote LAWRENCE, L.J., in *Keren Kayemeth Le Jisroel, Ltd.* v. *Inland Revenue Comrs.* (1) (17 Tax Cas. 43), the court "is not concerned with the motives or ultimate aims of the founders . . . but is solely concerned with the meaning and effect of the language employed in the memorandum." Suffice it to say that the company was formed after consultation with the Council for the Encouragement of Music and the Arts, shortly known as C.E.M.A. and now known as the Arts Council of Great Britain. It became an associate of C.E.M.A. in accordance with that body's conditions of association and has, in fact, conducted all its operations in accordance with conditions prescribed by C.E.M.A., but there is nothing in its memorandum of association limiting its functions to functions approved by C.E.M.A. or preventing it from continuing to function if its connection with C.E.M.A. is severed. It follows, therefore, that the fact that C.E.M.A. was, and the Arts Council of Great Britain is, a body formed for "charitable purposes only," or that only non-profit making companies and bodies functioning under charitable trusts are eligible to be associate members of C.E.M.A., has no relevance to the point we have to decide.

In this connection, I would refer to certain observations made by LORD BUCKMASTER in *Bowman* v. *Secular Society, Ltd.* (2). In that case their Lordships were considering whether, having regard to its objects, the Secular Society was either criminal or illegal, and to reach a decision on that point it was necessary to decide what its main object was. In that connection LORD BUCKMASTER said ([1917] A.C. 468) :

> Neither the documents preliminary to the incorporation of a company registered with a memorandum of association, nor the action of directors after a company has been formed, can properly be received in evidence for the purpose of determining what the objects of the company may be.

Therefore, I turn to the memorandum of association on which the question before us has to be decided. Clause 3 of the memorandum defines its objects :

> The objects for which the company is established are : (A) to formulate and prepare schemes for and establish and take all necessary steps for the promotion, maintenance, improvement and advancement of education and of educational plays and arts of all kinds and the arts of drama, dance, singing and music, and also any other forms of art in any way allied to the said arts or any of them. (B) to present, promote, organise, provide, manage, conduct such plays, dramas, comedies, operas, operettas, burlesques, promenade and other concerts, musical and other pieces, ballads, shows, educational and other entertainments, exhibitions, dances, competitions, amusements, recreations and compositions of all kinds, whether educational, partly educational, or scientific, or partly scientific, or otherwise, for philanthropic or charitable purposes, and whether on any premises of the company or elsewhere.

I pause there to point out that the word "such" has no grammatical meaning in that clause. I shall have to consider later what, if any, its effect is. Then :

> (C) to purchase, acquire and obtain interests in the copyright of, or the right to perform or show any opera, play, comedy, drama, stage piece or musical composition which can be used or adapted in any way for any educational or allied play ; enter into agreements, if desirable, with authors, dancers, actors or others in connection with all or any of the objects of the company and to produce, distribute, rent, or otherwise deal in cinematographic films. (D) as ancillary to the foregoing objects of the company and with a view to finding income and funds for the purposes of the company to carry on business as theatre, music hall, concert hall, dance hall, ballroom, public hall, cinema and picture house proprietors and managers.

Then follow a number of other objects and powers which are intended to facilitate the carrying out of the objects already mentioned. I must read two of those clauses in full as they were relied on to some extent in the course of the arguments before us, and by the commissioners in their finding :

> (O) to establish and support or to aid in the establishment and support of any schools and any educational, scientific, literary, religious or charitable institution, whether such societies be connected with any of the objects of the company or not, and any club or other establishment calculated to advance the interests of the company, and to make any donation whether charitable or otherwise either in cash or assets which the company may deem expedient. (S) to do all such other things as are incidental or conducive to the attainment of the above objects or any of them.

The company's work was, as I have said, carried out entirely in connection with C.E.M.A. An account of its work is contained in the annual report of the Arts Council for the year 1945 which says that it produced a number of "fine revivals of plays of a definite educational value." It applied for and obtained exemption from entertainment tax under the Finance (New Duties), Act, 1916, s. 1 (5), which exempts from entertainment duty : H

> . . . payments for admission to any entertainment where the commissioners are satisfied—(*a*) that the whole of the takings thereof are devoted to philanthropic or charitable purposes without any charge on the takings for any expenses of the entertainment ; or . . . (*d*) that the entertainment is provided for partly educational or partly scientific purposes by a society, institution, or committee not conducted or established for profit . . .

I do not think we can get any assistance from the fact that that relief was granted, since it is plain that under para. (*d*) it could be granted notwithstanding that the objects of the body giving the entertainment were not wholly charitable, it being sufficient that the entertainment is provided partly for educational purposes and that the body producing it is, as this company was, a non-profit making company.

Evidence was given of the nature of the work carried on by the company. It led to the commissioners finding that the company did nothing but foster dramatic art subject to the guidance of C.E.M.A. and the Arts Council, but, as I think appears from the words of the section, that is not conclusive, because it is necessary to show that the company was "established for charitable purposes only." The commissioners came to the conclusion, after consideration of the documents and the evidence, that they could not, in face of the objects stated in the memorandum, regard the company as confined to the pursuit of charitable purposes either by way of education or of benefit to the community. Their conclusions can be summarised as follows. They find that para. (A) of the memorandum was clearly charitable. Indeed, it appears from the judgment of MACNAGHTEN, J., that before the commissioners there had been really no dispute that that object was a charitable object, though before the judge and before us the SOLICITOR-GENERAL was not prepared to make that admission. We do not find it necessary to reach a conclusion on the point, and, indeed, did not call on him to argue it, because we think that, even if that matter were decided in favour of the company, the result would not be affected. The commissioners analyse the aspects of the work comprised in para. (A) and point out that it was partly educational and partly to enable thinking persons to enjoy high class drama. They say in the Case that, in their opinion: "The provision of that experience must fall within the fourth case of charitable purposes as being beneficial to the community." Turning to para. (B), they hold that the terms of that paragraph were so wide that, read with para. (D), it necessarily showed that the company had wide objects which were not strictly charitable. They rejected the argument that para. (B) must be regarded as overridden or limited by para. (A). Their conclusion was really based on that finding, though they did say that they thought the provisions of cll. 3 (O) and 3 (S) of the memorandum "which might in themselves be of little weight, are, when read in connection with the wide objects above referred to, a further impediment to the company's claim."

MACNAGHTEN, J., affirmed their judgment on a somewhat different ground. After referring to the dispute that had arisen under cl. 3 (A), he says:

> It is, however, unnecessary to decide that question or to read cll. 3 (B) and 3 (C), which follow on the objects set out in cl. 3 (A), because in this court it was admitted by counsel for the company that the objects set forth in cl. 3 (D) cannot be considered to be charitable purposes.

I think it is clear from the rest of his judgment—certainly it was clear before us—that counsel never admitted that, reading the articles as a whole, the objects to be found in cl. 3 (D) did not constitute a charitable purpose. All that they admitted was that, if the concluding portion of that article had stood without the introductory words, it would have disclosed a non-charitable purpose. They submitted in the court below, as they did here, that, having regard to the fact that the power "to carry on business as theatre, music hall, concert hall, dance hall, ballroom, public hall, cinema and picture house proprietors and managers," was only to be undertaken "as ancillary to the foregoing objects of the company and with a view of finding income and funds for the purposes of the company," that power was subsidiary to, and to be used in support of, the earlier clauses, and, in particular, cl. 3 (A), and was, therefore, no bar to their succeeding in their appeal. MACNAGHTEN, J., however, rejected that argument, giving his reasons in these words:

> It was suggested that cl. 3 (D) of the memorandum might be excused on the ground that it begins with the word "ancillary"—that it was only a humble handmaid subordinate to cl. 3 (A) and only a small handmaid, and, therefore, the court could overlook it. I do not think I can take that view. The founders of the company chose to include these seemingly ridiculous objects among the objects for which it was established, and, the company having chosen to insert those objects in the memorandum, the court must accept it that those are, indeed, some of the objects of the company.

He, therefore, affirmed the decision of the commissioners, and from that decision the company has appealed to us.

Counsel for the company attacked the judgment of Macnaghten, J., by saying that he had not given due weight to the introductory words of the memorandum. He said that it was clear that the mere fact that, in carrying out a charitable object, some non-charitable activities might be undertaken, did not deprive the company or the body of its charitable character. He relied on the decision of this court in *Inland Revenue Comrs.* v. *Yorkshire Agricultural Society* (3). I do not think I need refer to the facts of that case, but the passage on which reliance was particularly placed is to be found in the judgment of Lawrence, L.J., where he said (13 Tax Cas. 81):

> It is a common thing for a charitable institution to offer all kinds of privileges and benefits which are in no sense charitable in order to obtain funds for the purpose of carrying out its objects. As an instance I might mention the giving of dinners, dances and theatrical entertainments, all of which entail an expenditure of money on non-charitable objects incurred for the purpose of obtaining funds to be applied for the charitable objects of the institution. Many charitable institutions, in return for annual subscriptions or donations, offer special benefits to the persons who become their members. None of the operations of this kind results in making the purposes of the institution non-charitable.

I cannot help feeling that there is some force in the view expressed by Macnaghten, J., that, where powers so wide are included in a memorandum, and it is not made clear that they can only be exercised temporarily, it is impossible to hold that they are merely an ancillary consequence of the company's activities such as was referred to by Lawrence, L.J., in the passage I have read. I do not think, however, that it is necessary to reach a conclusion on this point since I am satisfied that the commissioners were right in the conclusion which they reached and in the main reasons they gave for that conclusion.

Counsel for the company attacked their opinion on the following lines. He said, first, that the question whether a company is established for "charitable purposes only" depends on what its main or dominant purpose is. He relied, in support of that statement, on a passage in the judgment of Lawrence, J., in *Peterborough Royal Foxhound Show Society* v. *Inland Revenue Comrs.* (4), where he said: "The question then, in my opinion, is whether the society's main or dominant purpose is charitable." Counsel further relied on some passages in the speech of Lord Normand in *National Anti-Vivisection Society* v. *Inland Revenue Comrs.* (5) where the noble Lord said ([1947] 2 All E.R. 240):

> In *Bowman* v. *Secular Society* (2) Lord Parker said: ". . . a trust for the attainment of political objects has always been held invalid, not because it is illegal . . . but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit." That was said in a case in which the society was advocating a very important change in the relations of the State and the community towards religion. I respectfully agree with the comment of Lord Greene, M.R. ([1946] 1 All E.R. 214) that Lord Parker's words do not apply when the legislation is merely ancillary to the attainment of what is *ex hypothesi* a good charitable object. For the charitable purpose, being dominant, would prevail as it did in *Inland Revenue Comrs.* v. *Falkirk Temperance Cafe Trust* (6) and in *Public Trustee* v. *Hood* (7), where it was held that, the main object of the gift being charitable, the gift was none the less valid because the testator had pointed out one of the means by which, in his opinion, the main object could best be attained and which in itself might not have been charitable if it had stood alone.

I think the principle that one must look only at the main or dominant purpose of the company must be taken with a little reserve. I feel some doubt whether a company can be said to be established "for charitable purposes only" if it carried on a substantial non-charitable purpose, for instance, to take the case suggested by Somervell, L.J., during the argument, if it took power permanently to run a public house in order to produce funds for its charitable purpose. In this connection, I would refer to certain observations which were made both in this court and in the House of Lords in *Keren Kayemeth Le Jisroel, Ltd.* v. *Inland Revenue Comrs.* (1). Lawrence, L.J., said (17 Tax Cas. 40):

> The instrument with which this case is concerned consists of the memorandum of association of the company and it is essential to bear in mind that in order to obtain exemption from income tax under the section it is not enough that the purposes described in the memorandum should include charitable purposes, the memorandum must be confined to those purposes so that any application by the company of its funds to non-charitable purposes would be *ultra vires* . . . The extensive powers conferred on the company by sub-cll. (2) to (22) (to some of which I have referred

in order to indicate their character), although purporting to be secondary to the object mentioned in sub-cl. (1), are nevertheless objects for which the company is established. The company can exercise any or all of these powers whenever in its opinion such an exercise would be conducive to the attainment of the so-called primary object which, from a practical point of view, means that it can exercise them whenever it is minded to do so, and whether such exercise is in fact conducive to the attainment of that object or not, as neither the court nor any one else can control the company's opinion, or otherwise interfere with the manner in which it chooses to carry out its objects. It would be difficult in any case to determine whether any particular enterprise undertaken by the company under its wide powers was or was not in fact conducive to the attainment of the primary object, but when the question of whether it is or is not so conducive is left to the decision of the company itself, I cannot avoid the conclusion that the objects mentioned in sub-cll. (2) to (22) can be carried out by the company just as freely as the object mentioned in sub-cl. (1) and that there is no substantial difference in degree between them.

In the House of Lords Lord Thankerton expressed agreement with Lawrence, L.J.'s judgment and gave his own reasons shortly, but Lord Tomlin gave a full opinion, and, as it is on certain observations in his opinion that counsel for the company relied, I must read a passage from it where he says (*ibid.*, 55):

> There are a great number of objects in this memorandum. They are all expressed to be ancillary to the main object, and I well appreciate the argument which says that if you once find the main object is charitable you cannot destroy the charitable character of the main object because the ancillary powers, which are incidental to it, are, some of them, in themselves, not charitable. That argument may indeed be well-founded, but, when the question is whether the primary object is itself charitable, it is legitimate, in reaching a conclusion upon that head, to consider the effect of the incidental powers, and it may well be that the incidental powers are such as to indicate or give some indication that the primary object is not itself charitable.

I am prepared to accept, for the purpose of this case, the rather narrower way in which Lord Tomlin cites the principle as being more correct than the wider phraseology of Lawrence, L.J., but, even so, I think we arrive at the same conclusion.

How are we to ascertain what is the main purpose of the company? Counsel for the company said (and I think rightly) that we can find some guidance from cases that have been decided in the winding-up court when it has been sought to wind-up a company when its substratum has gone. I do not think I need refer to the cases themselves, since the principle is well stated in Palmer's Companies Precedents, 15th ed., pt. I, p. 436. I am reading from the 14th ed., p. 431, where the learned author says:

> . . . where the objects of a company are expressed in a series of paragraphs, the true rule of construction is to seek for the paragraph or paragraphs (commonly the first) which appear to embody the main or dominant object of the company, and to treat all the other paragraphs, however generally expressed, as merely ancillary to this main object and as limited and controlled thereby. Assuming that there is any such rule of construction it is, of course, to be borne in mind that, like every other rule of construction it may be excluded or modified by the contents of the document to be construed, for every rule of construction contains by implication the saving clause "unless a contrary intention appears by the document."

He then refers to the rather unfortunate habit which has grown up of making each object an independent object, and says that where there is such a clause all must be regarded as independent objects. I think that that sufficiently states the principle to be applied, and it is clear that it is not necessarily to be assumed that the first paragraph, by itself, expresses the main object. Indeed, I think in one case to which counsel for the company referred us the first three paragraphs were found by the court to contain the main object. It becomes a matter of construction in each case.

How did counsel for the company seek to apply that principle here? He said that para. (A) laid down the main purpose of the company. He contended that it was expressed in such wide terms that the company would have had power to do all the things that were afterwards set out in greater detail, and that they had been merely inserted in order to remove any doubt and prevent any question being raised, for instance, by bankers, if money were sought to be borrowed for carrying out some of the objects specified, particularly in cl. 3 (B). He said there was no reason for drawing a distinction between para. (B), to which particular importance was attached by the commissioners, and any of the other subsequent paragraphs of the clause. He reinforced this argument by the language of the document itself, and, in particular, by the use of the word " such." When I was reading that clause, I pointed out that, grammatically, it did not make sense at all. At first I was inclined to think that there was some force in counsel's argument that the only way of giving it any meaning was by reading it as meaning " such plays as conduce to the object specified in para. (A)." I think that argument would have had great force if the paragraph had stopped at the words " amusements, recreations and compositions," but when it goes on to say " of all kinds whether educational, partly educational, or scientific, or partly scientific, or otherwise, or for philanthropic or charitable purposes," it seems to me impossible to read the word " such " in the sense in which counsel for the company asked us to read it, and I think we can only disregard it as having no meaning at all. Once you do that, it seems to me necessarily to follow that this is an independent object, an object which by its very terms need not be either purely educational or for other charitable purposes.

The matter does not stop there. True it is that in para. (C) some of the objects are expressly stated to be subsidiary to other objects. Thus, the power to " enter into agreements, if desirable, with authors, dancers, actors or others " is a power to do so " in connection with all or any of the objects of the company," but there is no such limitation on the power " to produce, distribute, rent, or otherwise deal in cinematograph films." In para. (D), to which I have already referred in dealing with the argument based on the judgment of MACNAGHTEN, J., we find a power " to carry on business as theatre, music hall, etc., proprietors." In that connection it seems to me that the introductory words on which counsel for the company relied in his effort to dispose of the judgment of MACNAGHTEN, J., tell against him when he seeks to dispose of the argument of the commissioners because the words are : " as ancillary to the foregoing objects of the company and with a view to finding income and funds for the purposes of the company." If I were to seek any intelligible dividing line between the main and subsidiary objects, I think I should say that (D) has drawn the line and has provided that what has gone before is to be regarded as the object and purpose of the company and what follows may, perhaps, be regarded as subsidiary. It is true that one of the objects which has gone before is in itself in part subsidiary, but, if one can give any meaning to this rather inept specimen of draftsmanship, I think the only way in which one can do so is by saying : " You have to look at (A), (B) and (C) and there you will find the purposes of the company. Paragraph (B) clearly lays down objects which are not charitable." I think the conclusion reached by the commissioners on these paragraphs was right and fully justifies their judgment.

I do not find it necessary to reinforce this conclusion by reference to cl. 3 (O) or cl. 3 (S). Indeed, I think, so far as cl. 3 (S) is concerned, it really throws no light on the subject. It is the common type of clause, in its mildest form, which is found in every memorandum of association. For these reasons, I think the judgment appealed from and the decision of the commissioners were right, and this appeal fails.

SOMERVELL, L.J. : I agree. I will not repeat the statutory provisions as I agree completely with the statement of the question which we have to decide which has just been given by COHEN, L.J. With the rest of his judgment I also agree.

The main burden of the argument of counsel for the company was that we must seek in these clauses a dominant purpose—*prima facie* in the first and early paragraphs—and then construe the words setting out other objects or conferring other powers as limited and confined to the carrying out of the primary purpose. In support of that argument he quoted a number of authorities which have been referred to by COHEN, L.J. It seems to me that, in construing the clauses of a memorandum—and, indeed, in construing any document—the first thing is to see what they say without having any preconceived notion in one's mind of what one is going to find. No doubt, it may often happen that one finds a dominant purpose stated at the outset to which the paragraphs which come later must be regarded as subordinate. A good example of that was given by LORD SUMNER in *Bowman* v. *Secular Society* (2). The first paragraph of the objects of the Secular Society was in the following words :

> To promote, in such ways as may from time to time be determined, the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action.

Object (K) was to publish books generally and without qualification. I agree with LORD SUMNER that that power must be construed as meaning to publish books for the purpose of carrying out the principle set in the forefront of the society's objects in the paragraph which I have read. He says it would be absurd to construe it as giving the society power to publish bibles and prayer books, for example, which would be designed to defeat the object which the society was established to promote. But whether and to what extent and to which provisions that principle of construction applies must depend on the actual words which are to be found in the document to be construed. I will assume, without deciding, that the powers and objects of the company as set out in para. (A), if one stopped there, would be charitable objects, but para. (B), as it seems to me, not only introduces new objects, for example, the promotion and organisation of amusements and recreations, which in themselves would have been outside para. (A), but it also goes on to emphasise that the various purposes which are set out include "amusements, recreations and compositions of all kinds, whether educational, partly educational, or scientific, or partly scientific, or otherwise." I agree with COHEN, L.J., when he says that, in the light of those words, it is impossible to regard the word "such" as limiting this paragraph to the object which has already been formulated in para. (A). It seems to me that the draftsman has expressly chosen words to give the company, if it so desires, a general power to organise and promote amusements and recreations of any kind, and I agree that that is plainly beyond any charitable purpose.

When we come to para. (C), which starts by giving powers of purchasing and acquiring copyrights and so on, the wording is obscure, but it provides that those powers must be exercised "in connection with all or any of the objects of the company." It goes on to confer a right "to produce, distribute, rent, or otherwise deal in cinematograph films" without any such limitation. There, again, I think, that goes far beyond any charitable purpose. I would also like to say one word about para. (O), because I think it illustrates that this memorandum has been drafted in what may well be a very proper way when one is dealing with a trading company and the draftsman wants to throw the net as wide as possible and take in any unexpected thing which the company may find it desires to do, but which is clearly not the method if it is sought to satisfy a court that the company is established "for charitable purposes only." The point in para. (O) is not so much connected with whether any of the objects of this company are outside the scope of charity, but with the application of what I may call the subsidiary or subordinate method of construction of later clauses. It is said that para. (O) was put in merely to deal with the case of the company having surplus income with which it desires to make donations to societies or institutions of whose objects it approved. If so, it is very curiously drafted. It goes far beyond the use of surplus funds for such purposes. It gives the company power to establish a school or "any educational, scientific, literary, religious or charitable institution." I think that is going a long way beyond the necessary power to make a donation to a suitable institution from its surplus funds. I do not desire to add anything to what my brother COHEN, L.J., has said, and what the judge said, with regard to para. (D).

For these reasons, I agree that the appeal must be dismissed. I agree with the decision of the commissioners which, if I may say so, is extremely clearly and accurately expressed. Relying, in particular, on the provisions of paras. (B) and (C), it seems to me impossible to hold that this company was established "for charitable purposes only."

TUCKER, L.J.: I am completely in agreement with the judgments which have been delivered, and I have nothing to add thereto.

Appeal dismissed with costs.

Solicitors: *McKenna & Co.* (for the company); *Solicitors of Inland Revenue* (for the Crown).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

ELLIGOTT *v.* NEBBETT.

[King's Bench Division (Morris, J.), March 4, 5, 1948.]

Workmen's Compensation Alternative remedies—Recovery of compensation—Conditional payments by employer—Right of action against third party not to be prejudiced—Repayment if action successful—Payments to be treated as compensation if action failed—Workmen's Compensation Act, 1925 (c. 84), *s.* 30 (1).

An injured workman received payments from his employer on the understanding that they were not to prejudice his right of action at common law against a third party in respect of his injury, and would be repayable by him in the event of his succeeding in such action, but would otherwise be treated as payments of workmen's compensation.

Held: in accepting the payments on the conditions mentioned the workman had not "recovered compensation" within s. 30 (1) of the Workmen's Compensation Act, 1925, and so was not precluded by that subsection from recovering damages in an action against the third party.

[As to Damages Made Irrecoverable by Acceptance of Workmen's Compensation, see HALSBURY, Vol. 24, pp. 966-7.

For s. 30 of the Workmen's Compensation Act, 1925, see HALSBURY'S STATUTES, Vol. 11, pp. 570-1.]

Action for damages for negligence.

The plaintiff, Edward Patrick Elligott, was employed by Radio Transmitting Equipment, Ltd., from whose premises the defendant, Jack Nebbett, a haulage contractor, undertook the removal of certain refuse. On Mar. 25, 1947, a lorry belonging to the defendant entered the yard of the premises to collect rubbish. The plaintiff brought a bin containing rubbish to the side of the lorry to be emptied therein. His case was that thereafter the bin was handled by the defendant's son, who was acting as the defendant's servant or agent, that he (the plaintiff) stooped to pick up a piece of paper that had fallen to the ground, and that as he was rising he was struck on the head by the bin which was descending from the lorry, having been emptied. The case for the defendant was that the plaintiff was invited by the defendant's son to assist in putting the bin on the vehicle and that for some reason, while he was doing so, he let go, with the result that the bin fell on his face. As a result, his forehead was cut and he had since suffered from headaches and dizziness. While the plaintiff was away from work he applied for advances from his employers and he received certain payments from them. The facts relating to these payments appear in the judgment. On them the defendant based a plea in the present action that the plaintiff was precluded from claiming damages by s. 30 (1) of the Workmen's Compensation Act, 1925, because he had already recovered workmen's compensation from his employers.

Edgedale, K.C., and *Solley* for the plaintiff.
R. Marven Everitt for the defendant.

MORRIS, J., stated the facts as summarised above, held that the defendant, by his servant, was guilty of negligence, subject to the plea under s. 30 (1) of the Workmen's Compensation Act, 1925, and continued:—After the accident the plaintiff was taken to hospital, where he received some stitches. Then he went home and was in bed for a time, after which he attended the hospital as an out-patient. On Mar. 31 he asked his employers for an advance and received the sum of £1. He signed a receipt on a "wages sub. requisition form." He wished to have an advance because he had dependants to support and wished to consider his legal position. Later, he asked for further money, and he then saw Mrs. Pennock, the secretary to the personnel officer of Radio Transmitting Equipment, Ltd., who suggested that he applied for workmen's compensation. The facts, as I find them, are that he told Mrs. Pennock that, if he accepted those sums, he was doubtful whether any further claim would be possible, and that he asked her whether, if he accepted the workmen's compensation payments, it would prevent his making any other claim. Mrs. Pennock said that, so far as she knew, it would not. Payments were made to the plaintiff on Apr. 11 of two sums, each of £2 5*s.* 0*d.*, and a further payment of 12*s.* 10*d.* was made on Apr. 15. Mrs. Pennock said in evidence that the plaintiff was not prepared to accept any sums which would prejudice his rights. She believed that he would not be prejudiced if he accepted payments of workmen's compensation and she thinks she may have misled him. She said, and I accept it, that she told him that, if he succeeded in a common law action, he would have to pay back the monies that he was then receiving, but she said that the word "loan" was not mentioned. Had it been, she would have made a note of it, or, presumably, would have made an advance under the system of "wages sub. requisition."

The defendant relies on the provisions of s. 30 of the Workmen's Compensation Act, 1925, the relevant words of which are as follows:

> Where the injury for which compensation is payable under this Act, or any scheme certified under this Act, was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act or such scheme for such compensation, but shall not be entitled to recover both damages and compensation.

I have, therefore, to consider whether the plaintiff has recovered compensation. Whatever were the precise words used between the plaintiff and Mrs. Pennock, it seems to me that it was understood by both of them that the plaintiff was saying that he would only accept a payment provided it did not prejudice his common law right to sue some one else and that he would return the money if the action that he brought proved successful. In those circumstances the payment by the employers and the acceptance by the plaintiff of the money were entirely conditional. The money was paid and received as sums which, in the event of a common law action being brought which failed, would be retained by the plaintiff as workmen's compensation, but which, in the event of a common law action being brought which succeeded, would be regarded as a loan and would be returned by the plaintiff to his employers.

In my judgment, on the evidence of Mrs. Pennock coupled with that of the plaintiff, it was made clear between them, not only that the plaintiff was not doing anything to prejudice his common law rights, but that the money that he was receiving would, in a certain event, be returnable. That is quite different from a case in which a man has received workmen's compensation as such, without condition or qualification, and later wishes, for some reason or another, to return the money he has paid. This payment was expressly made conditionally and expressly had a qualification attached to its receipt. The nature of the payment was not defined for all time at the moment when it was made. According to the way in which later events worked out, it would be deemed to be a loan or be accepted fully as workmen's compensation. In my view, the plaintiff has not recovered compensation in such circumstances as to make the bar imposed by s. 30 (1) of the Workmen's Compensation Act available to the defendant in the present action. It, therefore, follows that the plaintiff is entitled to succeed. [HIS LORDSHIP assessed the general damages at £85, making, with the special damages, agreed at £15, a total of £100.]

Judgment for the plaintiff with costs.

Solicitors: *Frank E. Fine & Co.* (for the plaintiff); *Hewitt, Woollacott & Chown* (for the defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

DYER *v.* SOUTHERN RAILWAY CO.

[KING'S BENCH DIVISION (Humphreys, J.), February 5, 6, 10, 11, 25, 1948.]

Railway—Injury to employee working on line—Failure to provide safe working system—Duty to provide look-out—Provision of one look-out insufficient—Prevention of Accidents Rules, 1902 (*S.R. & O.*, 1902, *No.* 616), *r.* 9.

The Prevention of Accidents Rules, 1902, r. 9, provides: "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of re-laying or repairing the permanent way of such lines, the railway companies shall . . . in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out."

By r. 234 (*a*) of a railway company's rules: "When a train is approaching, men at work on the permanent way must not remain on any running lines, nor between them if the space is less than 8 feet, but must at once move clear of all lines unless they can distinctly see that they are in a position of safety, and in no danger from another train approaching unobserved."

A gang was repairing the down line of a railway track between the entrance of a tunnel and a station, a distance of some 80 yards, in a position which was exceptionally dangerous owing to the frequency of trains. A train arrived at the station on the up line, and almost immediately restarted towards the tunnel. The look-out gave the men proper warning of this, but, owing to the noise of that train and of motor traffic passing over a bridge and to smoke in the mouth of the tunnel, he failed to observe the approach of a down train. In consequence, his warning was late, and, in avoiding the train, a member of the gang was fatally injured. The conditions were not abnormal for that part of the track, and were such as had existed there for years. The ganger (or foreman) had the power in an emergency to instruct a second man to act as additional look-out. The look-out, on appointment as such, had been instructed that, should he find he had not a clear view of approaching traffic, he must at once warn the men to stand clear and report the circumstances to the ganger.

HELD: (i) in the conditions known to exist at the place of the accident, the railway company had not provided a safe working system, and was, therefore, liable in negligence.

(ii) the provision of one man stationed outside the tunnel was not the effective protection of the men required by r. 9 of the rules of 1902, and the company was liable in respect of its breach.

[AS TO PREVENTION OF ACCIDENTS ON RAILWAYS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 281-283, paras. 606, 607; and FOR CASES, see DIGEST Supp., Railways.]

Cases referred to:—

(1) *Speed* v. *Swift* (*Thomas & Co.*), *Ltd.*, [1943] 1 All E.R. 539; [1943] 1 K.B. 557; 112 L.J.K.B. 487; 169 L.T. 67; 87 Sol. Jo. 336, C.A.; 2nd Digest Supp.

(2) *Hutchinson* v. *London & North Eastern Ry. Co.*, [1942] 1 All E.R. 330; [1942] 1 K.B. 481; 111 L.J.K.B. 369; 166 L.T. 228, C.A.; 2nd Digest Supp.

(3) *Caswell* v. *Powell Duffryn Associated Collieries*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 83 Sol. Jo. 976, H.L.; Digest Supp.

(4) *Vincent* v. *Southern Ry. Co.*, [1927] A.C. 430; 96 L.J.K.B. 597; 136 L.T. 513; 71 Sol. Jo. 34, H.L.; Digest Supp.

ACTION for damages for negligence and breach of statutory duty tried by HUMPHREYS, J.

A member of a railway gang who had been working on the permanent way injured himself fatally while avoiding a train, of which late warning was given by the look-out man owing to conditions prevailing at the time. His widow brought an action under the Fatal Accidents Act, 1846, against the railway company on the ground that the safety of the men had not been sufficiently ensured by means of persons or apparatus to give warning of approaching trains and that the company was negligent and in breach of the

Prevention of Accidents Rules, 1902, r. 9. HUMPHREYS, J., gave judgment in favour of the widow. The facts appear in the judgment.

Berryman, K.C., and *H. Salter Nichols* for the plaintiff.
Edgedale, K.C., and *Neil Lawson* for the defendants.

Cur. adv. vult.

Feb. 25. **HUMPHREYS, J.,** read the following judgment. This was an action for damages under the provisions of the Fatal Accidents Act, 1846, brought A by the widow of John Dyer, 46 years of age, who was killed on Dec. 4, 1946, while working as a "lengthman" in a gang of five employed in repairing the permanent way at Crystal Palace low level station on the Southern Railway. Dyer had been so working for 25 years and was in all respects a healthy man. The gang, in addition to Dyer, consisted of Cayley, the ganger or foreman, a man with 28 years' experience on the line; Fuller, the sub-ganger, who had worked for the defendants for 46 years; Gibbs, with 9 years' experience on the B line; and Morris, the look-out man, 62 years old, with 28 years' service on the permanent way, for the last 5 years of which he had been employed as look-out man owing to his inability through asthma to do strenuous work. Morris had, in fact, been working the whole of those 5 years on this stretch of the line. He was highly spoken of by all the witnesses, who knew him as a careful and efficient man in that position. He was qualified by examination (which takes the form C of a catechism) to perform those duties.

The lay-out at the spot in question is best seen from the plan and photographs produced. It is sufficient to say that the men were employed on the down line next to platform no. 7. The gang had started that morning at 7.30 at the spot marked "staff crossing," and had worked their way northward by 3.45 p.m. to the spot where platform 7 ceases and becomes a ramp descending to the level of the lines. Continuing northward, the down line runs under a bridge and D then on to the mouth of a tunnel, half-a-mile long, leading to Gipsy Hill station. The mouth of the tunnel is roughly about 70 to 80 yards from the end of the ramp.

At the material time the gang was spread out. Cayley was nearest the tunnel, Gibbs and Fuller were next to him working opposite the ramp and Dyer was farthest from the tunnel opposite the platform which was said to be 3 feet, 4 inches, high. He had been directed by Cayley to put his jack in the points E so that Cayley could slew them away from the wall. While he was doing that work a down train came through from the tunnel. Morris, the look-out man, was stationed opposite the far end of the tunnel signal-box close to the exit of the tunnel. He sounded his whistle, the proper signal for the men to get off the line, but so late that the men were all put in extreme danger. Cayley flattened himself against the wall of the bridge. Gibbs and Fuller got on to the ramp, and the deceased man, either afraid to crowd the ramp, or, perhaps, F because he was not agile enough to vault on to the platform which was opposite to him, started to run down the 4 feet way in front of the train and then threw himself on his face. The train, or part of it, passed over him without injuring him, but the exertion had ruptured his spleen, from which injury he died. It is clear that the immediate cause of the accident was the absence of timely warning from Morris of the on-coming down train. All the witnesses on both G sides gave evidence very well, and I have no hesitation in accepting their evidence as to fact. There was, indeed, substantially no dispute as to the material facts. Very shortly before 3.52, which may be taken as the time when the down train passed the tunnel signal-box, an up train had arrived at platform No. 8 and had stopped. It started again almost immediately and reached the mouth of the tunnel at the moment when the down train emerged from it. Morris was able to see the up signal for that train, and, as soon as the H arm dropped, he gave a signal to the men to clear the up line, that is, not to attempt to cross the line since they were working on the down line. Cayley, apparently, saw or heard the down train at almost the same moment as Morris. He had just shouted to the gang: "Mind there is not a down train about," when he saw the train, as he said, "coming out of the smoke."

This spot is, in my opinion, a very dangerous place for the men who have to work on the permanent way. All work on the permanent way while the service of trains is continuing is dangerous, but this place is, in my view, exceptionally so, an opinion shared by the very experienced gentleman in the signal engineers' department called by the defence, Mr. Obert, who said of it that: "It is the sort of place which may require special careful attention." The evidence satisfied me that the look-out man would not be able to see into the tunnel more than 25 yards in the best conditions. Throughout the day steam goods trains pass through the tunnel leaving the mouth of the tunnel full of steam and smoke, and particularly so in dull damp weather as on the day in question. The smoke may then hang about the mouth for at least ten minutes so as to prevent the look-out man from seeing any train until it has left the tunnel. In fact, on the day in question, a steam train had passed on the down line at 3.48 p.m. Mr. Pearman, the chief permanent way inspector, agreed with Morris that he could only tell an approaching down train by sound. As to sound, I accept the evidence that, at this time, there was very heavy traffic along the road passing over the bridge leading to the Crystal Palace grounds and that created a great deal of noise, and also that the up train crossing over the points just before entering the tunnel would make a clattering noise, increasing the difficulty in hearing the sound of a down train in the tunnel. Those matters lead me to the conclusion that it was not due to any fault on the part of Morris that he failed to hear the oncoming train until too late for his whistle to be effective. There was nothing very unusual about the conditions of the afternoon of Dec. 4, and I was not surprised to learn from the men, including both Cayley and Morris, that on many occasions the men had to "look pretty slippy" to get out of the way. "We have had to make a very smart move" were the words of Morris.

I will read a few questions and answers from Cayley's evidence, when recalled on Feb. 11. I put this question to him:

> You have worked at this spot, on this length, for some time? *A.*—About two years. *Q.*—Did it sometimes happen that you got a long notice of a train a minute or two before the train actually came in? *A.*—That all depends where we were working on the length, my Lord. If Morris could see the signal which is lowered, he will give us a blast on the whistle then and shout out there is an up road or down road on. *Q.*—I want to know what in practice did happen. Sometimes you get longer notice than at others? *A.*—Yes, my Lord. *Q.*—It depended on where you were working? *A.*—Yes, my Lord. *Q.*—Has it happened on previous occasions that you got very short notice, and, although there is no accident, do you have to . . . *A.*—Very often. *Q.*—You understand what I mean, you have to jump for it. You understand that expression? *A.*—Yes. *Q.*—And nothing had gone wrong? *A.*—Nothing, no. *Q.*—You got to safety on this occasion? *A.*—Yes, my Lord—well, near enough safety. I stood by the side of the wall which was about three feet away from the rails whereby any passenger could have opened a door and I should have gone.

On the question of the conditions, I asked this question:

> Have you often had conditions similar to those of that day, that is to say, traffic going over the bridge, which made it very noisy, and a damp, dull day and steamers coming through at intervals? *A.*—Always the same there, my Lord. *Q.*—That is the usual thing? *A.*—Until they closed the Palace up, of course. [He explained that meant that the dump was now closed.] *Q.*—But at that time it was the regular thing in December, 1946, to find this stream of traffic going over the bridge, making a noise? *A.*—Yes. *Q.*—So the conditions on this day, as far as you remember, were not worse than they had been on other days? *A.*—Not at all, my Lord, no.

Evidence was given that on this particular day between 3 p.m. and 4 p.m., five up and seven down trains passed through the station, an average of one every five minutes, exclusive of steam goods trains, of which there were eight on the down line between 10 a.m. and 5 p.m.

In those circumstances, the plaintiff brings her action alleging breach of the statutory duty imposed on the defendants by r. 9 of the Prevention of Accidents Rules, 1902, and negligence at common law, the allegation under that head being that the defendants failed to provide and maintain a safe system of working. It is necessary, I think, to bear in mind that what is a safe system can only be determined in the light of the actual situation on the spot at the relevant time: *per* Lord Greene, M.R., in *Speed* v. *Swift* (1). It seems to me that the plaintiff has made out a very formidable case against the defendants on the common law count. The duty on the part of the employer to take all reasonable precaution for the safety of the men working on the permanent way is not, and cannot be, denied. The necessity for maintaining a good look-out for oncoming trains which may endanger the men so working is recognised.

A look-out man is employed for that purpose, but the conditions are such that for a great part of the working day the look-out man is wholly unable to look-out. His eyes are virtually useless and he has to trust to his ears. Again, the conditions at this spot are such that hearing is rendered most difficult. The muffling of the sounds caused by smoke and the noise going on overhead tend to diminish the usefulness of his ears. The place is, therefore, an unusually dangerous one, yet no extra precaution of any kind was taken. It is not for me to decide what form those extra precautions should take, but I am satisfied that the system in use on Dec. 4, 1946, exposed the men to unnecessary risks and that a safer system could be employed. A good deal of evidence was given on the subject.

By r. 234 (*f*) of the defendant company's rules:

> In tunnels and certain other places where the approach of trains cannot be observed or heard in time for the men to get out of the way the ganger or man in charge must appoint one or more look-out man to give the necessary warning.

There is no doubt that the ganger is the person to select the men to be employed as look-outs, and, in an emergency or on a sudden change of conditions, he has the power to take off a second man from the work he is doing and post him as an additional look-out, but, in my opinion, that does not absolve the defendants from the duty of instituting a system of look-outs which is safe in conditions to be expected at the particular time and place. In my view, the duty of the employer does not end, though it may begin, with the appointment of suitable persons as foremen. If, however, contrary to my belief, there is, in truth, no way of safeguarding the lives of men so working, then, in my view, the duty of the defendants is to treat this short stretch of line for about 100 yards southwards from the mouth of the tunnel in the same way as the permanent way inside the tunnel is now treated, that is, only to be repaired when the trains are not running. Mr. Obert expressed the view that the look-out man ought to be able to see or hear a train coming. If, in fact, he could not do one or the other, the witness agreed that "some other arrangement would have to be made." With that view I agree, and I hold that the absence of "other arrangements" rendered the system of working unsafe in that it exposed the men to unnecessary risk.

The defendants, in their defence, in addition to the usual denials, pleaded (*a*) contributory negligence by Dyer and (*b*) that the death of Dyer was caused by the causal negligence of Cayley, the ganger, and/or Morris, the look-out man. As to (*a*), counsel for the defendants abandoned that point and rightly so. I regret that it was ever pleaded. As to Cayley, the defendants relied on r. 234 (*a*) of their domestic rules—rules, be it observed, tending, if not designed, to shift as much responsibility as possible from the defendants on to the shoulders of the men. They have been described by GODDARD, L.J., in *Hutchinson* v. *London and North Eastern Ry. Co.* (2) as counsels of perfection. The rule in question provides:

> When a train is approaching, men at work on the permanent way must not remain on any running lines, nor between them if the space is less than 8 feet, but must at once move clear of all lines unless they can distinctly see that they are in a position of safety, and in no danger from another train approaching them unobserved.

In this case, it was argued for the defendants that Cayley should have ordered all men off the down line as soon as the up train was seen to be approaching. That may be the view of the hierarchy of the Southern Railway, but it was not the view of the working staff, nor was it agreed with by the chief permanent way inspector, Mr. Pearman, who plainly considered there was no danger until the up train started to move out. Cayley said that, if the defendants' view of the rule were to prevail, no work would be done on the line at such a spot as the one in question where the traffic was almost continuous, as the time of the men would be fully occupied in moving to and from their place of work. He added that in 16 years as a ganger the practice had been uniform, *viz.*, that, if a gang was working on the down line and they got a warning that there was an up train coming, unless they got a further warning that there was a down train coming which made both lines dangerous, the gang went on working on the down line. [HIS LORDSHIP referred to the evidence and continued:—] I do not find that any action on the part of Cayley contributed to the death of Dyer.

Hutchinson v. *London and North Eastern Ry. Co.* (2) involved consideration both of r. 9 of the statutory rules and r. 234 of the railway company's rules. Speaking of the latter, Lord Greene, M.R., said ([1942] 1 All E.R. 334) :

> It may very well be that a man who knows the rule, and who in fact does not carry it out, nevertheless, when all the circumstances are known, cannot be held guilty of contributory negligence.

Goddard, L.J., quotes (*ibid.*, 337), in the course of his judgment, from Lord Wright's opinion given in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (3) ([1939] 3 All E.R. 722, 740) and this is part of that quotation :

> Contributory negligence involves two elements, negligence and contributing negligence. The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which, though trivial in itself, threw him into the danger consequent on the breach by his employer of the statutory duty. It is the breach of statute, not the act of inadvertence or carelessness, which is then the dominant or effective cause of the injury.

Goddard, L.J., continues :

> I ask myself how those words apply to this case. The statute throws upon the railway company a duty to provide a look-out to guard against the very accident which happened. Why do these accidents happen ? It is because the men working on the line, through inadvertence, or through, as I think the evidence strongly points to in this case, being absorbed in their work, do not hear the approach of a train. It is true that they have been told that if a train approaches from one direction they are to step off all running lines, unless they can see that there is no danger coming from the other direction. In other words, that when a train is travelling on one line, they are to look down the other to see if it is free. That is a rule, but it is very much more a counsel of perfection. The men may have been absorbed in their work so that they did not realise . . . that a train was approaching from that direction. It may be . . . they would take a slight risk and not look up, and it is because those things happen that Parliament has authorised the making of a rule [such as r. 9], which imposes a definite duty on the employer to provide a look-out.

I think these observations on contributory negligence on the part of a plaintiff may be usefully kept in mind in considering the effect to be given to the alleged neglect by Cayley and/or Morris to obey the defendants' rules in this case. It is true that in the present case a look-out man was appointed, but that was done in circumstances which rendered his look-out quite ineffective.

As to Morris, his negligence is said to consist in not having complied with r. 7 of what I have referred to as the catechism. Question 7 reads :

> If, from any cause a look-out man finds that he is no longer in a position where he has a clear view of approaching traffic and from which he can also see and warn the working party, what must he do ? *A.*—He must at once warn the men to stand clear, and report the circumstances to the ganger or man in charge.

At what period of the day it is suggested that he ought to have warned the men off and reported the circumstances was not made clear, but Morris's answer was to the effect that he had done all he could in the difficult circumstances and had done so successfully for many hours on that day. Conditions, he said, were no worse at the moment of the accident than they had been before. Indeed, he said that the conditions had been much the same for years though the evidence was that this particular length near the tunnel would only be visited for the purpose of repair about once a month—and the work would take a few hours. I do not think it would be right to blame Morris for this unfortunate accident which, in my view, was due to the absence of a safe system of working.

I now turn to the alleged breach of the Prevention of Accidents Rules, 1902, r. 9, which provides :

> With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of re-laying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out.

The requirement, then, is to provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train approaching men repairing the permanent way. I am not aware of any case where the employer has been held guilty of a breach of that rule when a competent man, expressly instructed and furnished with appliances (I suppose a whistle is an appliance), has been provided and is actually engaged on the work of a looker-out at the material time. In *Vincent* v. *Southern Ry. Co.* (4), in the House of Lords, all their Lordships appear to have taken the view that in such circumstances a company has complied with the rule. The questions on which there were divergent views in that case do not arise in the present one. Counsel for the defendants, therefore, answers that the defendants have complied precisely with the wording of the rule. Counsel for the plaintiff, on the other hand, answers that compliance with the rule only takes place when apparatus reasonably effective or persons effective for the purpose required have been provided. I think that contention is correct. Dealing with the actual situation on the spot at the relevant time and applying the language of the rule to those circumstances, I come to the conclusion that this was a case where danger was likely to arise, that the defendants elected to rely on persons rather than apparatus for the purpose of maintaining a good look-out and giving warning against any train approaching the men, and that the provision of a single man stationed outside the tunnel was not a sufficient compliance with the rule, which plainly contemplates a case where more than one look-out man may be required to effect the object of the rule as stated, that is to say, to protect men working on the permanent way. The plaintiff, in my opinion, is entitled to judgment in this case. I award her as damages £1,913, in addition to the funeral expenses. Therefore, there will be judgment for the plaintiff for £1,942 0*s.* 6*d.*

Judgment for the plaintiff with costs.

Solicitors: *Pattinson & Brewer* (for the plaintiff); *H. F. Burt,* solicitor to the Railway Executive, Southern Region (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Affirmed. H.L. [1949] 1 All E.R. 848.

Re COATS' TRUSTS. COATS AND ANOTHER *v.* GILMOUR AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., Asquith and Evershed, L.JJ.), February 3, 4, 5, 6, March 9, 1948.]

Charity—Charitable purpose—Advancement of religion—Public benefit—Carmelite convent—Association of strictly cloistered and purely contemplative nuns.

The income of a trust fund was to be applied to the purposes of a Carmelite convent, if those purposes were charitable. The convent comprised an association of strictly cloistered and purely contemplative nuns who devoted themselves entirely to worship, prayers and meditation and engaged in no activities for the benefit of anyone outside their own association. They were regarded, however, in the Roman Catholic Church as causing, by means of their private worship, prayers and meditations, the intervention of God to bring about the spiritual improvement of members of the public (both Catholic and non-Catholic) outside the convent, and also as providing an example of self-denial and concentration on religious matters which was of spiritual benefit to the public. It was contended on behalf of the convent (i) that, in the case of religious charities, the element of public benefit must be assumed unless the evidence in any particular case showed that an alleged religious charity was harmful to the public; (ii) that, since the evidence in this case established that in the belief of the Roman Catholic community the prayers of the sisters of the convent and the sanctity of their lives brought Divine Grace on mankind in general and Roman Catholics in particular, this belief must be accepted by the court as true for the purpose of establishing public benefit; (iii) that, as a fact (as distinguished from a matter of belief), the sisters, by the holiness of their lives, afforded such measure of edification by example as to provide the requisite public benefit:—

HELD: (i) public benefit was a necessary element in religious as in other charitable trusts; for a trust to be a valid charitable trust, it must be, not merely not detrimental, but beneficial to the public; and, as the evidence showed that that element was missing, the trust, although beneficial to those intended to benefit by it, was not a valid charitable trust.

Cocks v. *Manners* (1871) (L.R. 12 Eq. 574; 24 L.T. 869), *followed.*

National Anti-Vivisection Society v. *Inland Revenue Comrs.* ([1947] 2 All E.R. 217; 177 L.T. 226), *applied.*

(ii) in deciding whether a gift is for the advancement of religion the court does not concern itself with the truth of the religion, a matter which is not susceptible of proof. Once a religion is recognised by the court as such, the beneficial character of a gift for its advancement will *prima facie* be assumed, but a gift, to be a valid charitable gift, must be not only for the advancement of religion, but also for public, and not merely, private benefit. A trust will not be accepted by the court as being for the public benefit on the simple ground that the church concerned believes it to be for the public benefit, such belief being in its very nature incapable of proof in a court of law, but when the question is whether a particular gift for the advancement of religion satisfies the requirement of public benefit, a question of fact arises which must be answered by the court in the same manner as any other question of fact, *i.e.*, by means of evidence cognisable by the court. The assumption that the benefit of a religion extends to the public generally or to a section of the public will not be made merely in the absence of evidence that the religious activities in question are positively detrimental to the public. An act of a private character, in which the public had no share otherwise than by supernatural intervention believed to be obtained by means of its performance, was a private act, and the belief of the Roman Catholic Church that the prayers of the sisters and the sanctity of their lives brought Divine Grace on the public could not be accepted as admissible evidence to entitle the trust to be regarded as charitable.

Re Caus, Lindeboom v. *Camille* ([1934] Ch. 162; 150 L.T. 131), *criticised and distinguished.*

(iii) the edification derived from observing the life of a devout community was not enough to provide the necessary element of public benefit so as to make the trust a good charitable trust.

Decision of JENKINS, J. ([1947] 2 All E.R. 422; 177 L.T. 543), *affirmed.*

[AS TO RELIGIOUS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-122, paras. 155-160; and FOR CASES, see DIGEST, Vol. 8, pp. 248-254, Nos. *74-160*, and Supplements.]

Cases referred to:

(1) *Cocks* v. *Manners,* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 8 Digest 248, *75.*
(2) *National Anti-Vivisection Society* v. *Inland Revenue Comrs.,* [1947] 2 All E.R. 217; [1948] A.C. 31; [1947] L.J.R. 1112; 177 L.T. 226.
(3) *Re Compton, Powell* v. *Compton,* [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 2nd Digest Supp.
(4) *Hoare* v. *Hoare,* (1886), 56 L.T. 147; 8 Digest 264, *262.*
(5) *Re Caus, Lindeboom* v. *Camille,* [1934] Ch. 162; 103 L.J.Ch. 49; 150 L.T. 131; Digest Supp.
(6) *O'Hanlon* v. *Logue,* [1906] 1 I.R. 247; 8 Digest 251, *a.*
(7) *Bourne* v. *Keane,* [1919] A.C. 815; 89 L.J.Ch. 17; 121 L.T. 426; 8 Digest 250, *106.*
(8) *Re White, White* v. *White,* [1893] 2 Ch. 41; 62 L.J.Ch. 342; 68 L.T. 187; 8 Digest 249, *89.*
(9) *Morice* v. *Durham (Bp.),* (1805), 10 Ves. 522; 8 Digest 293, *705.*
(10) *Income Tax Special Purposes Comrs.* v. *Pemsel,* [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest 241, *1.*
(11) *Re Macduff, Macduff* v. *Macduff,* [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 8 Digest 296, *731.*
(12) *Re Hummeltenberg, Beatty* v. *London Spiritualistic Alliance,* [1923] 1 Ch. 237; 92 L.J.Ch. 326; 129 L.T. 124; Digest Supp.
(13) *Dunne* v. *Byrne,* [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 8 Digest 294, *718.*
(14) *Bowman* v. *Secular Society, Ltd.,* [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 8 Digest 265, *270.*
(15) *A.-G.* v. *Delaney,* (1875), I.R. 10 C.L. 104.
(16) *Re Barnes, Simpson* v. *Barnes,* (1922), [1930] 2 Ch. 80, *n.*; 99 L.J.Ch. 380, *n.*; 143 L.T. 332, *n.*; Digest Supp.

APPEAL by the first defendant, the prioress of the Carmelite Priory, St. Charles' Square, Notting Hill, against an order of JENKINS, J., dated July 16, 1947, and reported [1947] 2 All E.R. 422.

The trustees of a declaration of trust took out a summons to determine whether the purposes of a Carmelite convent were charitable purposes within the legal definition of charity. The nuns of the convent belonged to one of the strictly cloistered and purely contemplative orders of the Roman Catholic Church. JENKINS, J., held that the purposes of the convent were not charitable purposes and his judgment was now upheld by the Court of Appeal. The facts appear in the judgment of LORD GREENE, M.R.

Hewins for the prioress.
R. R. A. Walker for the trustees.
Humphrey King for the trustees of the Converts' Aid Society.

Cur. adv. vult.

Mar. 9. The following judgments were read.

LORD GREENE, M.R.: In these proceedings the appellant, the prioress of the community, has set out to establish that in the present state of the law relating to charities and on the evidence which she produces, a gift in favour of a community known as the Carmelite Priory, Notting Hill, which is an inclosed order of Roman Catholic nuns similar to that concerned in the well-known case of *Cocks* v. *Manners* (1), is a good charitable gift. A settlement was made for the express purpose of enabling this question to be determined and the originating summons was issued accordingly. The trusts of the settlement which we have to consider are as follows :

> . . . upon trust if the purposes of the Roman Catholic community situate and known as the Carmelite Priory, St. Charles Square, Notting Hill, in the county of London, are charitable to apply the income of the trust fund to all or any such purposes with power to pay the same to the prioress for the time being of the said community for the purposes aforesaid without seeing to the application thereof but if the purposes of the said community are not charitable then upon trust to apply the trust fund to all or any of the purposes of the Converts' Aid Society of 20 Holmes Road, Twickenham, Middlesex . . .

JENKINS, J., in a closely reasoned judgment, subjected the arguments and the relevant authorities—some of them in the courts in Ireland—to a careful examination. He decided that the gift was not a valid charitable gift. I agree with his conclusion and (with a minor exception, *i.e.*, the beginning of the last paragraph ([1947] 2 All E.R. 429)) with his reasoning, but, in view of the importance of the issues raised, I feel it my duty to express my reasons in my own language. In doing so, I am freed from the necessity of traversing a great deal of the ground since that has already been done in the judgment under appeal.

Counsel for the prioress, by way of preface, disclaimed any intention of asking us to overrule *Cocks* v. *Manners* (1), although at times in the course of his argument he came, as it seemed to me, very near to doing so. He admitted, however, that on the facts which were in evidence in that case it was rightly decided, but he claimed that the evidence adduced in the present case was of such a character as to make the decision in *Cocks* v. *Manners* (1) inapplicable and to establish the trust in favour of the Carmelite Priory as a good charitable trust. As the decision in *Cocks* v. *Manners* (1) is the point from which the argument starts, it is desirable to examine it at the outset. It has stood, not only unquestioned, but accepted as undoubted law, for three quarters of a century. The facts were as follows. The testatrix bequeathed the residue of her estate to be divided equally between four Roman Catholic institutions. Of these it is only necessary to mention two, *viz.*, the Dominican Convent at Carisbrooke, and the Sisters of the Charity of St. Paul at Selley Oak. The findings of the chief clerk with regard to these two institutions were as follows. The Dominican Convent was :

> . . . an institution consisting of Roman Catholic females living together by mutual agreement in a state of celibacy, and under a common superior, for the purpose of sanctifying their own souls by prayer and pious contemplation within their institution, and without performing external works or providing for public worship, or engaging in education, or receiving or visiting the sick or poor, or indigent or children, and without relieving the poor except casually and accidentally, and not as one of the objects of the institution, and without engaging in any of the corporeal works of

mercy; and it has not been and is not any part of the duties or objects or ordinary functions of the institution to perform works of charity, and that a small portion of the chapel attached to the institution is registered and open to the use of the public.

The Sisters of the Charity of St. Paul were an institution:

> . . . composed of Roman Catholic women living together by mutual consent . . . that the primary object of the congregation is the personal sanctification of the members, who, as a means thereto, employ themselves in the exercise of works of piety and charity, principally in teaching the children of the poor and in nursing the sick; that they are enjoined to employ themselves sedulously to acquire sufficient A skill and knowledge to enable them to become teachers in schools and nurses of the sick, and when found to be fully competent they are chiefly employed in those capacities in localities where their services are required, and they receive small stipends for their services from those at whose instance they render them . . .

It will be noticed, therefore, that in the case of the Dominican convent "the purpose" of the members was that of "sanctifying their own souls by prayer B and pious contemplation" without engaging in any kind of what may, for convenience, be called "practical" work, *i.e.*, they were a purely contemplative community. The sisters of charity, on the other hand, had as their "primary object" the "personal sanctification of the members," but the means of achieving this object was the performance of practical works of a charitable nature. On these facts WICKENS, V.-C., held that the legacy to the sisterhood at Selley Oak was, and that to the Dominican convent was not, a good charitable gift. C With regard to the latter gift, he said that it was neither within the letter nor the spirit of the preamble to the statute 43 Eliz., c. 4. He went on to say (L.R. 12 Eq. 585):

> A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word "charitable" is used in its popular sense or in its legal sense. It is said, in some of the cases, that religious purposes are D charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public; an annuity to an individual, so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so long as they lived together in retirement and performed acts of devotion, be charitable. Therefore the gift to the Dominican convent is not, in my opinion, a gift on a charitable trust.

The points taken on behalf of the prioress may be stated summarily as follows. E The first related to what, for brevity, I may call the element of public benefit, by which I mean the requirement common to all valid charitable gifts, that they must be beneficial to the community or to a substantial section of it. While not disputing the necessity of this element being present in the case of religious charities, counsel for the prioress argued that its presence will be assumed unless the evidence in any particular case shows that an alleged religious charity is, on balance, positively harmful to the public. Secondly, it was said that, assuming F public benefit to be an essential requirement to constitute a valid charitable gift, the evidence in the present case established that in the belief of the body concerned, *i.e.*, the Roman Catholic community, the prayers of the sisters and the sanctity of their lives are efficacious in drawing down grace from heaven on mankind in general and Roman Catholics in particular, and that this belief must be accepted by the court as true for the purpose of establishing public G benefit. Thirdly, assuming, again, the necessity of public benefit, it was said that the sisters, by the holiness of their lives, afforded such measure of edification by example as to provide the requisite public benefit, and that the fact of this measure of edification was proved, not as a mere matter of belief (as was the case under the second head) but as a fact. I will deal with these three points in the order named.

That public benefit is a necessary element in religious, as it is in other, charitable trusts is quite clearly recognised in the opinions given in the House of Lords H in *National Anti-Vivisection Society* v. *Inland Revenue Comrs.* (2). There, LORD WRIGHT said ([1947] 2 All E.R. 220):

> The test of benefit to the community goes through the whole of LORD MACNAGHTEN's classification, though, as regards the first three heads, it may be *prima facie* assumed unless the contrary appears.

LORD SIMONDS (*ibid.*, 233) used words to the same effect. Counsel for the prioress interpreted the words "unless the contrary appears" as meaning that, in order to displace the *prima facie* assumption, it must be shown that the gift is detrimental to the community. I do not agree. The contrary of "beneficial to the public" is, not "detrimental to the public," but "non-beneficial to the public." The gift may be a most beneficial one, it may tend to the advancement of religion, yet, if it appears that the benefit is a private and not a public one, the gift fails to satisfy the conditions requisite in the case of a valid charitable gift. A gift for the religious instruction of a man's grandchildren tends to the A advancement of religion. It is beneficial, but, on the face of it, the gift is a private one and any *prima facie* assumption is displaced. A discussion of the nature of the public element in the case of educational trusts will be found in *Re Compton, Powell* v. *Compton* (3) in this court. I am, therefore, of opinion that, if the evidence shows that the "public" element is missing, a gift, however beneficial it may be to those intended to benefit by it, must fail to attain to the status of a valid charitable gift. *Cocks* v. *Manners* (1) itself is a good illustration B of this principle. The gift to the Dominican convent was, undoubtedly, a gift for the advancement of religion and in that respect it was beneficial to the members, but the benefit was not a public benefit. Having regard to the way in which the lives of the members were spent, the benefit was a purely private one. That this was the reason for which WICKENS, V.-C., decided as he did is clear, I think, from the following passage (L.R. 12 Eq. 585), which I will quote again :

C

> It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public ; an annuity to an individual, so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so long as they lived together in retirement and performed acts of devotion, be charitable. Therefore the gift to the Dominican convent is not, in my opinion, a gift on a charitable trust.

D

Another example of a gift for the advancement of religion, but lacking the element of public benefit, is to be found in *Hoare* v. *Hoare* (4) where the gift was to endow a private chapel in a country house.

I now turn to the second point. The manner of life of the nuns (known as Discalced Carmelite nuns) is thus fully described in the affidavit of the prioress :

> The purposes of the Discalced Carmelite Nuns are conveniently summarised in the E prologue to the Constitutions of the Discalced Carmelite Friars which states that "two vocations in their due order have been divinely ordained. The more important aim of our life shall be the love and contemplation of divine things and the secondary aim the apostolate, particularly all that pertains to our neighbours' salvation."

The nuns live in complete seclusion and do not engage in any practical or outside work of any description, charitable or otherwise. The only public benefit which, it is said, is to be derived from the gift in their favour (apart, of course, F from the matter of edification referred to on the third point) lies in the effect of their prayers and of the sanctity of their lives in procuring Divine Grace for the Roman Catholic community in particular and for mankind in general. The belief of the church in this efficacy of the prayers and sanctity of the nuns is fully explained in the affidavit of His Eminence Cardinal Griffin. A further exposition of this belief, which applies to all contemplative orders of religious, G is to be found in the Apostolic Constitution Umbratilem. I shall not be thought disrespectful if I say that the relevant matters, although expounded at considerable length, may be summarised by saying that in the belief of the Roman Catholic Church the lives and prayers of the contemplative orders are particularly efficacious in securing grace from heaven for the human race and particularly for Roman Catholics. This belief, so the argument goes, must be accepted by the court as conclusive evidence of the facts believed ; and, as the facts believed H are that the public is benefited, it follows necessarily that a gift for the maintenance of this community of contemplative nuns is beneficial to the public. The argument starts with the proposition that the court does not inquire into the truth or otherwise of religious doctrine. Up to a point this, no doubt, is true. In deciding whether a gift is for the advancement of religion, the court does not concern itself with the truth of the religion, a matter which is not susceptible of proof. This does not mean that the court will recognise as a religion everything that chooses to call itself a religion. Once, however, the religion is recognised by the court as a religion, the beneficial character of a gift for its advancement will *prima facie* be assumed. But this is not enough. The trust, in order to have all the necessary characteristics, must not only be for the advancement of religion, it must not only be of benefit, but it must be of public, not merely of private benefit. Save to the extent which I shall presently mention, no English authority has been quoted to us, and I know of none, in which the existence of a benefit of the necessary public character has, when challenged, been shown to exist otherwise than by proof of works which have a demonstrable impact on the community or a section of it. I use the word " impact " for want of a better word as covering the benefits conferred by teaching and ministration, by the performance of religious services, by the provision or repair of churches and church ornaments, and so forth. I use the word " demonstrable " as meaning that the benefit must be capable of proof in a court of law.

In my opinion, the question whether a trust is beneficial to the public is an entirely different one from the question whether a trust is for the advancement of religion. In answering the latter question the court is not concerned with the truth or otherwise of the religious beliefs entertained by particular religions which it recognises as such. When, however, the question is whether a particular gift for the advancement of religion satisfies the requirement of public benefit, a question of fact arises which must be answered by the court in the same manner as any other question of fact, *i.e.*, by means of evidence cognisable by the court. If this be right (and I entertain no doubts about it) religious beliefs, which in their nature are incapable of proof, cannot be accepted as having for this purpose probative force. The argument, however, not only predicates that are such beliefs evidence on which the court can act. It asserts that they are evidence which the court is bound to accept, and not merely bound to accept, but bound to accept as conclusive. The argument, if accepted, would lead to remarkable results. It is not disputed that, according to the beliefs of the Roman Catholic Church, the prayers of a saint are particularly efficacious in calling down grace from heaven on, at least, the members of the faith. Counsel for the prioress was constrained to admit that his argument necessarily means that a trust for the support of such a saint would be a valid charitable trust. A trust which *prima facie* would be of a purely private nature would have to be accepted by the court as being for the public benefit on the simple ground that the church believed it to be for the public benefit, such belief being in its very nature incapable of proof in a court of law.

The English authority on which counsel for the prioress mainly relied is *Re Caus, Lindeboom* v. *Camille* (5), a decision of LUXMOORE, J. A testator bequeathed money for masses, foundation and others, and four freehold houses for one foundation mass to be said for his soul and the souls of his parents and relatives during the space of twenty-five years. A " foundation mass " is a mass the saying of which is provided for out of the income only of an invested fund. LUXMOORE, J., held that a gift for the saying of masses is a valid charitable gift, on two grounds ([1934] 1 Ch. 170) :

> . . . first, that it enables a ritual act to be performed which is recognised by a large proportion of Christian people to be the central act of their religion, and, secondly, because it assists in the endowment of priests whose duty it is to perform that ritual act.

Neither of these grounds exists in the present case, but the prioress relies on certain expressions of LUXMOORE, J. After referring to the agreed evidence as to the nature of the mass, he said (*ibid.*, 168) :

> On that evidence . . . could there be any real doubt but that a gift for masses was charitable in the sense which is derived from 43 Eliz., c. 4, because the object must necessarily be one which is not only for the public benefit, but for the advancement of religion, when one bears in mind, as one is bound to do, that the court, in such cases, refuses to entertain an inquiry as to the truth or soundness of any religious doctrine, provided it is not contrary to morals or contains nothing contrary to law.

A careful reading of the judgment shows that LUXMOORE, J., expressed these views rather as an acceptance of the opinion expressed by the Lord Chancellor of Ireland [WALKER, L.C.] in *O'Hanlon* v. *Logue* (6) than as a conclusion to which his own reasoning had led him. In particular, there is no other explanation of how the judge came to conclude that " the object must necessarily be one which is . . . for the public benefit." In support of this view he quoted a passage from the judgment of the Lord Chancellor in *O'Hanlon* v. *Logue* (6). In that case it was held that by the law of Ireland a gift for the celebration of masses for the dead is a valid charitable gift, not only where there is a direction to celebrate in public, but also (contrary to what had previously been held in Ireland) where under the gift it is permissible to celebrate in private. In the passage quoted, WALKER, L.C., said ([1906] 1 I.R. 261) :

> It is settled by authority which binds us that where there is a direction to celebrate the mass in public, the gift is a valid charitable one ; but what makes it charitable A is the performance of an act of the church of the most solemn kind, which results in benefit to the whole body of the faithful, and the results of that benefit cannot depend upon the presence or absence of a congregation.

If the statement that a gift for masses " results in benefit to the whole body of the faithful," and the statement of LUXMOORE, J., that " the object must necessarily be one which is . . . for the public benefit " are based on the view that the benefit is a supernatural one coming from on high, the existence of B which the court is bound to accept as proved because the church so believes, I cannot agree so far as English law is concerned, whatever may be the view held in Ireland. The truth of the belief is, no doubt, a matter into which the court does not and cannot inquire when deciding whether or not the gift is for the advancement of religion, but an act of a private character in which the public has no lot or share otherwise than by supernatural intervention believed to be C obtained by means of its performance, remains, in my opinion, a private act in the eye of English law. If, on the other hand, the observations quoted are based on the fact that the mass is to be regarded as so vital and fundamental a matter that its celebration, even in private, is the culminating act of the faith of the church and to that extent may be regarded as in a sense public, different considerations may well apply. On some such view as that, the faithful may be regarded as, in effect, present at the celebration even though it is held in private, D but any special considerations of this kind cannot, in my opinion, be extended to cover a case such as the present, where the life of the sisterhood is, on the face of it, merely self-regarding and the only impact on the public which is suggested in this branch of the case is the unprovable descent of Divine Grace by reason of their prayers and the sanctity of their lives. I may add, with reference to the judgment in *Re Caus* (5), that I have been unable to identify the passages in the speeches in *Bourne* v. *Keane* (7) to which LUXMOORE, J., E referred ([1934] 1 Ch. 169). I must not be understood as intending to throw doubt on the actual decision in *Re Caus* (5), which may well be supported on one or other of the two grounds on which LUXMOORE, J., expressly decided it. Nothing is more firmly settled than that the belief of the creator of a trust that it is charitable is ineffectual to make it so. I cannot myself see how the belief of the section of the public said to be benefited can be effectual to confer on the F trust the essential characteristic of public benefit, at any rate, where that belief is a religious belief which in its nature is incapable of proof in a court of law. To hold otherwise would involve the abdication by the court of its proper functions and would open the door to some very curious results. According to the argument, a hermit who devoted his life to praying for the salvation of his fellow believers would be a proper object of a charitable trust once those who held his faith believed that his prayers were effective for the purpose.

G The third argument for the appellant is founded on the following paragraph of the affidavit of Cardinal Griffin :

> Lastly it is an undoubted fact that the practice of the religious life by the Carmelite nuns and other religious is a source of great edification to other Catholics—and, indeed, in innumerable cases to non-Catholics—leading them to a higher estimation of spiritual things and to a greater striving after their own spiritual perfection and that the knowledge that there are men and women who are prepared to sacrifice all H that the worldly in man holds dear in order to attain a greater love of God and union with Him inculcates in them a greater estimation of the value and importance of the things which are eternal than they would have if they had not these examples before them.

This paragraph does, I think, deal with matters of fact and not merely with matters of belief. That others, Catholics and non-Catholics, receive spiritual edification from the lives of the religious orders is a matter susceptible of proof in a court of law and no one could dispute the qualifications of His Eminence to depose to a matter of fact so particularly within his cognisance. But the question remains: Is this a public benefit which satisfies the test and brings the gift within the spirit and intendment of the statute? No case has been cited to us in which this question has arisen. The argument is really based on certain words in the passage already quoted from the judgment of WICKENS, V.-C. (L.R. 12 Eq. 585) in *Cocks* v. *Manners* (1):

> It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public . . . A

The present is a case where the manner of the sisters by itself is said to be a source of edification, and that I do not in the least dispute, but the argument asserts that because of this the sisters are necessarily a good object of a charitable gift. Now, it should be observed that WICKENS, V.-C., did not say that every gift that results in religious edification is *ipso facto* charitable. He merely said that edification of the public (and the emphasis is on the word "public") B was one of two elements, one or other of which is required to be present before a religious trust can be held to be charitable—a very different thing. It seems to me to be going much too far to treat these words as amounting to an expression of opinion that this particular kind of edification, *i.e.*, that derived from observing the lives of a devout community, is enough to provide the necessary element of public benefit. If this be admissible, where is the line to be drawn? I apprehend that edification of this character is not confined to the contemplation C of the lives of the members of a community. Indeed, counsel for the prioress agreed (and he could not have done otherwise) that precisely the same argument would apply to the contemplation of the life of an individual of saintly life with the result that there could be a valid charitable trust which was directed solely to the support of a hermit, the sanctity of whose life was a source of edification. I am not prepared to admit edification in any such sense as that for which the prioress contends into the category of benefits to the public within D the spirit and intendment of the statute. Emphasis was placed by counsel for the prioress on the words "directly or indirectly" in the passage which I have cited from *Cocks* v. *Manners* (1). He said that the word "directly" pointed to such matters tending to public edification as teaching, preaching, provision of places of worship, and similar matters where the public are directly affected by good works. The word "indirectly," on the other hand, he says, must refer E to cases where there is, so to speak, no direct impact of good works on the public, but where the public receives the benefit of edification by the contemplation of good works or holy lives in others. I am unable to find anything in the word "indirectly" which persuades me to reach such a result. The phrase "directly or indirectly" is a common phrase in the law and is found in a variety of contexts. In the present case it does not, in my opinion, include a reference to cases where the only benefit to be derived by the public is the contemplation of good works F or holy lives in others. As applied to the case where the good works are good works to the public, the word "indirectly" clearly covers (and, in my opinion, covers only) the case where the gift tends indirectly to the promotion of such good works, *e.g.*, a gift to build a church would be a case of "direct" tendency while a gift to provide transport for the inhabitants of a sufficiently large area to enable them to attend the church would be a case of "indirect" tendency. In the ordinary case of a charitable trust for payments to be made to an individual, G they are made to enable him, not merely to live and move and have his being in his own way, but to perform some outward act for the benefit of those who are to be advantaged by the payment, *e.g.*, payment for the support of a priest who is to minister to the faithful or (in the case of educational trusts) payment to a professor for giving lectures. In the present case the payment is to be to the nuns, but, in this branch of the argument, they are paid, not to perform some positive outward act, but merely to enable them to be themselves. They are H to be paid, not to do good, but to be good, and (on this branch of the argument) the only good they are said to do is by way of being an example to others. This conception appears to me to be unlike anything that has been considered in the past to be a good charity and cannot, in my opinion, be justified by any known principle. In the result, the appeal must be dismissed.

EVERSHED, L.J.: I agree that this appeal fails. It is plain at first blush that the circumstances of the present case bear a close resemblance to the circumstances affecting the claim of the Dominican nuns in *Cocks* v. *Manners* (1). The argument of counsel for the prioress of the Carmelite Priory (hereafter called "the convent"), by which he sought to persuade JENKINS, J., not to follow the decision of WICKENS, V.-C., was summarised by the judge as follows ([1947] 2 All E.R. 429):

> Counsel for the prioress of the convent contended that I was not bound to follow, and ought not to follow, *Cocks* v. *Manners* (1), and the numerous later cases in which that case has been followed and approved, on grounds which are, I think, fairly summarised in the following three propositions:—(i) The evidence on which *Cocks* v. *Manners* (1) was decided was incomplete, inasmuch as it contained no mention (*a*) of the fact that the prayers of a cloistered Roman Catholic community are never confined in intention to the benefits of its own members, but invariably include an intention to benefit the public outside the cloister; or (*b*) of the Roman Catholic belief and teaching to the effect that the prayers of such a community cause and stimulate divine intervention to bring about the spiritual improvement of the public outside the cloister; or (*c*) of the spiritual improvement or edification held by the Roman Catholic Church to be derived by the public outside the cloister from the example of self-denial and devotion to the life of the spirit set by the members of the cloistered community. (ii) In considering whether a particular religious purpose is for the benefit of the public, and, therefore, charitable, the court will assume the tenets or beliefs of the particular religion in question to be true. (iii) If the objects of a given religious society are necessarily charitable, it matters not that the motive for pursuing those objects may be the spiritual improvement of its own members and, therefore, self-seeking as opposed to charitable or altruistic. Counsel for the prioress says, in effect, that acceptance of these three propositions not only throws the question open to me as a judge of first instance, notwithstanding *Cocks* v. *Manners* (1), but leads inevitably to the conclusion that the convent is a charitable institution because its purpose is the advancement of religion in such a way as necessarily to benefit the public, first, by means of the divine intervention to the spiritual advantage of the public (which must be assumed, in fact, to flow from, or be effectively stimulated by, the private devotions of the nuns in the convent); and, secondly, by means of the spiritual improvement or edification which the public must be assumed, in fact, to draw from the example of self-denial and religious devotion set by the nuns, the fact that the motive or ultimate aim of the nuns is their own spiritual perfection being irrelevant.

I cannot improve on this summary, which is equally applicable to the argument presented by counsel for the prioress to this court.

It is not open to doubt, as JENKINS, J., observed, that those responsible for formulating the present claim on the part of the convent have substantially improved on the evidence which, according to the report, was before WICKENS, V.-C., when he was considering the purposes and the activities of the Dominican nuns in relation to their claim to qualify as a charity by English law. It is plainly shown by the evidence of His Eminence Cardinal Griffin and the Apostolic Constitution Umbratilem to be a fundamental part of the belief of the Roman Catholic Church that the prayers of the contemplative nuns, part of which are offered on behalf of the rest of erring humanity, attain before God a special efficacy attributable to the saintly lives which they lead. Thus, according to the doctrines of the church, as I understand the Cardinal Archbishop, it is the duty of all devout Catholics to pray for their fellow men, and all true Catholics believe that, in some degree, the grace of God is bestowed on them as a result of the intercession of others. But they further believe it to be the peculiar province of cloistered men and women, by virtue of their sacrificial and holy lives, to attain, before God, a kind of mystic significance and thus to have the power through God of conferring on their fellow members in the church, and, indeed, on the rest of the world, divine consideration and benefit. If it be true that the primary motive of the nuns is self-sanctification, nevertheless it is to the saintly character of the nuns' lives that, according to the doctrines of the Roman Catholic Church, the special efficacy of their prayers is due. Counsel for the trustees of the Converts' Aid Society attempted to show, by reference to para. 5 of the affidavit of the prioress, that, on any view, only a part of the activities of the nuns was directed to intercession for others, the greater part being essentially selfish, and that, therefore, according to well-recognised principles, the activities of the nuns as a whole could not qualify as charitable. For reasons which will be apparent—and it is convenient to deal here with the point made by counsel for the society—it seems to be clear that, once the truth of the doctrine is accepted, it is impossible to sever the beneficent characteristics of the convent's activities from the rest of their regime. The whole lives of the nuns are the offering to God which moves Him to bestow His Grace on the rest of us. Nothing of this kind (to judge from the report) had any place in the evidence before Wickens, V.-C., in *Cocks* v. *Manners* (1) or in the evidence hitherto put before the court in reference to cloistered religious communities. Equally, in previous cases there appears to have been no reference to what has in the present case been called the "edification" derived by the rest of humanity from regarding the example of lives dedicated to the highest ideals A of piety and self-sacrifice. This is, indeed, a matter of fact capable of proof by the standards normally applicable in these courts. If the whole earth is the tomb of distinguished men, the beneficial influence of example calls for no doctrinal sanction, and though a "living textbook" may be as valuable for the purpose of instruction as the lives of saints long departed, the Cardinal Archbishop in his affidavit referred to the "well-known fact" of the influence of example and based this part of his case rather on that simple fact itself than its B more indirect influence in teaching.

From what I have said it is plain that the argument on behalf of the prioress, seeking to distinguish the present case from *Cocks* v. *Manners* (1) and other cases which have followed *Cocks* v. *Manners* (1), has turned on two distinct points, cumulative or alternative in their effect, *viz.* (i) whether the requirement of "public benefit" is satisfied by the doctrinal belief, proved by Cardinal Griffin and the Papal Constitution, in the efficacy of the intercessory prayers C offered by the nuns in the convent, and (ii) whether that requirement is satisfied by the proved beneficial effect, referred to as "edification," accorded by the exemplary conduct of the nuns' lives. It is to be noted that both branches of the argument accept the condition of "public benefit" as a necessary qualification for a religious charity. Notwithstanding the forceful argument to the contrary of Professor Newark in The Law Quarterly Review, vol. 62, D p. 234 [Public Benefit and Religious Trusts], counsel for the prioress has felt constrained to accept the requirement, particularly in the light of the most recent decision of the House of Lords in *National Anti-Vivisection Society* v. *Inland Revenue Comrs.* (2), but he did contend that, in the case of religious trusts (at any rate), the general rule as to the requirement of public benefit was so far relaxed that public benefit would in the case of all well-recognised and accepted religions be assumed in the absence of some evidence to the E contrary, *i.e.*, that the trusts operated to the public detriment. For this contention he relied on the language of Lord Wright and Lord Simonds in the *Anti-Vivisection* case (2) and on the decision of this court in *Re White, White* v. *White* (8). In the *Anti-Vivisection* case (2) Lord Wright said ([1947] 2 All E.R. 220) :

> The test of benefit to the community goes through the whole of Lord Macnaghten's F classification, though, as regards the first three heads, it may be *prima facie* assumed unless the contrary appears.

From Lord Simonds' opinion I desire to quote at greater length. Lord Simonds said (*ibid.*, 233, 234) :

> My Lords, this then being the position, that the court determined "one by one" whether particular named purposes were charitable, applying always the over-riding G test whether the purpose was for the public benefit, and that the King as *parens patriae* intervened *pro bono publico* for the protection of charities, what room is there for the doctrine, which has found favour with Lord Greene, M.R., and has been so vigorously supported at the Bar of the House, that the court may disregard the evils that will ensue from the achievement by the society of its ends ? It is to me a strange and bewildering idea that the court must look so far and no farther, must see a charitable purpose in the intention of the society to benefit animals, and thus elevate the moral character of men, but must shut its eyes to the injurious results H to the whole human and animal creation. I will readily concede, that, if the purpose is within one of the heads of charity forming the first three classes in the classification which Lord Macnaghten borrowed from Sir Samuel Romilly's argument in *Morice* v. *Bishop of Durham* (9), the court will easily conclude that it is a charitable purpose. But even here to give the purpose the name of "religious" or "educational" is not to conclude the matter. It may yet not be charitable, if the religious purpose is illegal or the educational purpose is contrary to public policy. Still there remains the over-riding question : Is it *pro bono publico* ? It would be another strange misreading of Lord Macnaghten's speech in *Pemsel's* case (10)

(one was pointed out in *Re Macduff* (11)), to suggest that he intended anything to the contrary. I would rather say that, when a purpose appears broadly to fall within one of the familiar categories of charity, the court will assume it to be for the benefit of the community and therefore charitable unless the contrary is shown, and further that the court will not be astute in such a case to defeat upon doubtful evidence the avowed benevolent intention of a donor. But, my Lords, the next step is one that I cannot take. Where upon the evidence before it the court concludes that, however well-intentioned the donor, the achievement of his object will be greatly to the public disadvantage, there can be no justification for saying that it is a charitable object. If and so far as there is any judicial decision to the contrary, it must, in my opinion, be regarded as inconsistent with principle and be over-ruled. This proposition is clearly stated by RUSSELL, J., in *Re Hummeltenberg* (12), ([1923] 1 Ch. 242). He said: " In my opinion the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it " . . . if it is not the duty of the court to express an opinion whether the community will in fact be benefited, should the object of those, who intend to benefit it, be achieved, at what point in its long history did it cease to be its duty ? One by one the purposes enumerated in the preamble to the statute of Elizabeth were held to be charitable by a court which performed just this duty and applied this overriding test. And since the statute the court has performed the same duty in determining whether objects alleged to be charitable are within the spirit and intendment of the preamble.

In my judgment, there is nothing in the speeches of the noble Lords to which I have referred sufficient to establish the proposition that there is, in the case of religious trusts, a dispensation, as it were, from the condition generally applicable to all trusts claiming to be charitable and from the means of satisfying the condition formulated by RUSSELL, J., in *Re Hummeltenberg*, *Beatty* v. *London Spiritualistic Alliance* (12) where he said ([1923] 1 Ch. 242) :

> In my opinion the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it.

To that formulation the House of Lords in the *Anti-Vivisection* case (2) must be taken to have given express approval. It must, no doubt, be assumed—and taken to be within the spirit and intendment of the preamble to the statute 43 Eliz., c. 4—that it is beneficial to the public that they should be instructed by the teaching of any of what I have called the accepted religions. That is, no doubt, to say that religion is beneficial to man, but that proposition cannot, in my judgment, warrant the further assumption, in the absence of proper evidence, that the benefit of religion extends beyond the limited circle of participation in a particular mystery or creed to the public generally or to a section of the public. Nor do I think that the speeches in the *Anti-Vivisection* case (2) can be construed as meaning that this latter assumption can or will be made in the absence of evidence that the religious activities in question are positively detrimental to the general public or to a section of it.

In *Re White* (8) the question was whether a valid charitable intention could be found in a gift to " the following religious societies," the testator having failed to nominate the institutions which he had in mind. In giving an affirmative answer to the question, the court regarded itself entitled and bound by authority to hold that gifts for religious purposes or religious institutions were *prima facie* to be taken to be charitable. Though the actual decision in the case may be said to have given rise to some doubts (see, *e.g.*, *Dunne* v. *Byrne* (13) ([1912] A.C. 411)), the more general propositions may, in my judgment, be justified, because gifts in such a form are in effect synonymous with gifts for religious advancement. The decision, therefore, carries the prioress no further on her road, for, if there be a gift in favour of some particular institution or for some particular trust, the question formulated by RUSSELL. J., in *Re Hummeltenberg* (12) must still be answered. In *Re White* (8) LINDLEY, L.J., said ([1893] 2 Ch. 51) :

> A society for the promotion of private prayer and devotion by its own members, and which has no wider scope, no public element, no purposes of general utility, would be a " religious " society, but not a " charitable " one.

And in a case such as the present the decision in *Cocks* v. *Manners* (1), which must now be taken on its facts to be well established by later authority in this country, has laid it down that a secluded body existing for the single purpose of the self-sanctification of its members, however noble its aim and however strict and pious its mode of life, fails to satisfy the test. In such a case, therefore, any *prima facie* conclusion in favour of its charitable character is out of place. The question remains, applying the formula of RUSSELL, J., in *Re Hummeltenberg* (12): Does the evidence in the present case entitle the court to reach the conclusion for which the prioress contends ? I agree with JENKINS, J., that the answer must be in the negative.

I take, first, the first limb of the argument of counsel for the prioress, already formulated, which I can restate in the form : Ought the belief in the beneficent effect of the nuns' intercessory prayers to be accepted by the court as true ? In considering this part of the case for the prioress, I am prepared to accept the contention that we should not assume (as did JENKINS, J.) that these matters were present to the mind of WICKENS, V.-C., when he rejected [in *Cocks* v. *Manners* (1)] the claim of the Dominican nuns to charitable status. I shall not, of course, be thought to be casting any doubt on the sincerity of the beliefs expounded by the Cardinal Archbishop, but this is a court of temporal jurisdiction whose findings must be guided by temporal standards. In judging, aye or no, whether any condition is satisfied, these courts must necessarily reach their conclusions by reference to the common mundane rules of evidence. In *Bowman* v. *Secular Society, Ltd.* (14) LORD PARKER OF WADDINGTON observed ([1917] A.C. 442) :

> . . . a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit . . .

In like manner, in my judgment, the question whether a particular religious trust is or is not one for the public benefit must be determined on evidence on which a court is able to form and express its opinion. If it is correct that this matter-of-fact rule of evidence is to be applied in determining the question whether public benefit has been shown to exist, it is clear that the court must decline to found itself on acceptance of the doctrinal beliefs which have been shown to be a part of the central teaching of the Roman Catholic Church. Counsel for the prioress has, however, argued that matter-of-fact rules of evidence can have no application to trusts affecting religion, since, where religion is concerned, all assertions of fact must, in the last resort, rest on belief. In my judgment, this proposition is too widely stated. True, no doubt, it is, as I have already said, that the title of religious advancement to rank as charitable rests on the belief that man is benefited by religion and religious teaching, but, as I have also pointed out, the question whether the benefits of religion or religious teaching are "public," in the sense of being available to the "public" or to a section of the public, is one of fact capable of determination, and, therefore, proper to be determined in accordance with the ordinary rules of evidence on which a lay tribunal can be said to found its opinion. I cannot, indeed, see that the proposition of counsel for the prioress, if well founded, ought to be confined to religious trusts. Although the benefits of relief from poverty may perhaps be judged by purely material standards, the claim of educational trusts to rank as charities must, I should have thought, rest in the last analysis on the assumption that the mind of man benefits by training no less than is his spirit improved by religious instruction. If the question be whether the particular trusts are, in truth, religious, then it may well be that the court must or should accept evidence of the nature of the doctrines concerned in proof of the religiosity of the trusts, but, if the court must go further and accept the truth of these doctrines as proof of the public character of the benefits said to be conferred, then, as it seems to me, the court must surrender all discriminatory powers in applying the necessary conditions to religious trusts. For it is plain that there can be no check on such evidence. The court must throughout act on an unchallengeable hypothesis. In the eyes of the courts all established and accepted religions stand equal. The court cannot, therefore, and must not form any opinion on the validity of religious doctrine. Yet, if the doctrines of two religions be in conflict, the court would be compelled either to pronounce which represented the true faith or to confess itself impotent because confronted with an insoluble conflict.

According to counsel for the prioress, the court must, when considering whether a given religious institution benefits the public, "attribute to that institution the spiritual effect which it has according to the religion in question." To what does this lead ? I quote the language of Jenkins, J., in the present case ([1947] 2 All E.R. 431), on which I cannot myself improve :

> In short, the distinction, up to now considered vital, between public and private religious purposes would be for all practical purposes destroyed. Moreover, strange anomalies and subtle distinctions would arise. There might be two religious communities both equally cloistered, both equally rigid in their abstention from all works of preaching or teaching or of ministering to the poor or sick outside their walls, and in all discernible respects precisely alike. If the contention of counsel for the prioress were right a gift to a sect which believed that the prayers of such a community were effective to secure divine blessings for the public at large would be charitable, while a gift to a sect which believed that the prayers of such a community were effective only to secure the spiritual improvement of its own members would not be charitable. Thus, charitable status and its attendant advantages would be made to depend on an esoteric point of doctrine.

I would, indeed, carry the matter a stage further. Suppose that a settlor settled funds so that the income should be payable to religious sect A, provided that such trust should be held to be charitable according to law, and, in default, to religious sect B, and suppose it to be proved that, according to the tenets of sect A (assumed for this purpose to be a religious institution), the united prayers of its limited circle of devotees were efficacious to cure cancer in the rest of humanity, and suppose, finally, it to be no less clearly proved that the adherents of sect B (equally assumed to be a religious institution), though respecting the creeds of sect A, disbelieved and repudiated those creeds, how would the court stand ? To such a question counsel for the prioress, in the course of his argument, was constrained to suggest two alternative answers, mutually conflicting and destructive, namely, either that the evidence of the beliefs of sect A must be accepted as conclusive of their truth, or that, having regard to the conflict, sect A must be treated as failing to discharge the *onus* of proof laid on them. Both answers must, in my judgment, be rejected as unsatisfactory, but the example given is essentially by no means extravagant.

In this connection reference was made to what was said by Lord Eldon, L.C., as regards the court's powers of supervision over charities : see *Morice* v. *Bishop of Durham* (9), quoted by Lindley, L.J. ([1896] 2 Ch. 463) in *Re Macduff* (11). Lord Eldon, L.C., said (10 Ves. 539, 540) :

> As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that it can be under that control ; so that the administration of it can be reviewed by the court ; or, if the trustee dies, the court itself can execute the trust ; a trust therefore, which, in case of mal-administration could be reformed ; and a due administration directed ; and then, unless the subject and the objects can be ascertained, upon principles familiar in other cases, it must be decided, that the court can neither reform mal-administration, nor direct a due administration.

It is obvious that in such a case as the present there may be difficulties in the way of effective supervision. On the view that I take, it is unnecessary to pursue this aspect of the case. It is sufficient to say that, assuming (as I am prepared to do) that no practical obstacles would be found in the way of investigation of the affairs of the convent on behalf of the Attorney-General, even so the right of the institution to qualify as a charity would always continue to rest on a hypothesis (*viz.*, that the doctrinal belief of the church were true) which no instrument of the temporal power could ever challenge.

For these reasons, I do not think that the first branch of the argument of counsel for the prioress can be accepted. I must, however, before leaving this part of the case, say something of the Irish decisions, and, particularly, the decision of the Irish Court of Appeal in *O'Hanlon* v. *Logue* (6), and of the decision in these courts of Luxmoore, J., in *Re Caus* (5). As regards the Irish decisions, it is, I think, clear that since *O'Hanlon* v. *Logue* (6), the Irish courts have accepted the proposition which, in my judgment, must be rejected in this country, namely, that the evidence of the belief of the Roman Catholic Church of the efficacy of the prayers of cloistered men and women on behalf of the whole body of the Church must be accepted as sufficient or true. Social conditions in Ireland, no doubt, justify a conclusion which is in accord with Irish tradition and sentiment, but, for reasons which I have attempted to give, I am unable to find in English law any warrant for a similar assumption by our courts. In my judgment, therefore, the Irish decisions ought not to be followed here. *Re Caus* (5) requires further consideration. In that case the question arose of the validity of a gift of property on trust that the income should be applied in providing for the saying of masses. According to the report, there was nothing in the terms of the disposition which required that the masses should be publicly celebrated, and I assume, therefore, that the decision proceeded on the basis that the masses might be celebrated either publicly or privately. It is also to be noted that, so far as appears from the report, no reference was made to *Cocks* v. *Manners* (1), notwithstanding the significance of that case to all religious activities of a private character. As regards the nature and incidents of masses, the court, by agreement of the parties, accepted as evidence in the case the statement of Dr. Delaney, Bishop of Cork, in the Irish case of *Attorney-General* v. *Delaney* (15) [as set out in *O'Hanlon* v. *Logue* (6)]. In my judgment, it is not open to doubt that Luxmoore, J., accepted as proved and as true the whole of Dr. Delaney's evidence, including his reference to the calling down of divine blessings on the whole world, as part of the purpose and effect of the saying of masses. But in the formulation of his reasons for upholding the validity of the gift Luxmoore, J., founded himself (i) on the circumstances that the celebration of mass was the central rite of the Roman Catholic Church and (ii) on the fact that the testator's bounty served as an endowment to the priests whose function it is to advance the Roman Catholic faith. Counsel for the prioress, very naturally, relied strongly on this decision, and, particularly, on the acceptance by Luxmoore, J., of the doctrinal belief of the church as proved by Dr. Delaney, and he asked us, accordingly, to follow and approve the decision. In the present case we are not concerned with the mass, the central rite of the Roman Catholic Church, nor does any question here arise of the endowment of the priests whose function and duty it is to advance the teaching of the Roman Catholic Church. In so far, therefore, as the decision of Luxmoore, J., rested on these two aspects of the case before him, *Re Caus* (5) is by no means on all fours with the present case and cannot be regarded as an authority relevant to it. Further, in so far as the decision rested on those two aspects of the matter before him, I must not be taken to be casting doubt on the correctness of the decision. On the other hand, if and so far as the judge relied in support of his conclusion on the acceptance of the doctrinal evidence of Dr. Delaney as proof of public benefit, I must, with all respect to Luxmoore, J., decline to follow him. On grounds which I have already stated, such doctrinal evidence cannot, in my judgment, be accepted in the English courts as sufficient or, indeed, admissible evidence of benefit to the public so as on that ground to entitle the trusts in question to be regarded as "charitable."

I turn, accordingly, to the second branch of the argument of counsel for the prioress, founded on the so-called "edification" derived by the Catholic or the whole Christian community from contemplation of the saintly lives of the nuns. Jenkins, J., briefly answered this part of the case for the prioress in the following passage of his judgment ([1947] 2 All E.R. 431):

> As regards the public benefit claimed to be produced by the convent, through edification by mere example, this benefit is, in my judgment, too indirect and incidental to convert the main or substantial purpose of the convent from the advancement of religion amongst its own nuns to the advancement of religion amongst the public or a section of the public. I do not think decisions or *dicta* to the contrary from Southern Ireland should be followed here. By parity of reasoning, it might be argued that a thrift club qualifies for charitable status as tending to relieve poverty through the inculcation by example of provident habits, and that a private educational trust is charitable as tending to promote habits of study among the public at large.

By way of meeting the reasoning of the judge, counsel for the prioress contended that "edification" was an attribute peculiar to religious trusts, having no place or counterpart in trusts of other kinds. "Edification," according to the argument, is no more than the term properly descriptive of the effect on man of every kind of religious impact, and, though this effect might be said to be "incidental," it is, nevertheless, peculiarly and universally found wherever religious teaching is brought to bear. In support of this view, counsel for the prioress referred to the language used by ROMER, J. ([1930] 2 Ch. 81) in *Re Barnes, Simpson* v. *Barnes* (16) regarding the Church of England which the judge defined for the purpose of the case before him as :

> . . . the operative institution which ministers to religion and gives spiritual edification to its members.

Finally, argued counsel for the prioress, it matters not that in the present case the " edification " is produced, not as the direct result of participation in religious services, but indirectly by considering and reflecting on the pious lives of the nuns, imparted to their hearers by the teachers in the Church, or known to and accepted by all members of the Church though never, in fact, seen and observed.

In my judgment, the argument really involves a measure of confusion of cause and effect. No doubt, the word " edification " is commonly used and applied to moral or spiritual improvement, though etymologically it is not so confined. In speaking of the " edification " afforded by the lives of the nuns, one means, as it seems to me, no more than a reference to the beneficial effect of the force of religious example. There seems to me to be no ground for confining the force of example to religious trusts. Once the principle is conceded that in the case of religious trusts the test of public benefit may be satisfied by the force of the example set by pious and secluded persons, I can see no ground for excluding the application of the same principle to other kinds of trusts. The examples taken by JENKINS, J., may be extreme, but they are not extravagant. Certainly in educational trusts I can see no ground for denying the force of example set by learned men or the stimulus to mental improvement which knowledge of their habits and existence may provide. But once the principle is conceded, its effect will be, in substance, to override altogether the essential test of public benefit. What has been urged on behalf of a secluded convent of twenty or twenty-one persons must be no less capable of assertion of a single hermit, so that a trust for the endowment of a single named ascetic, to enable him to pursue alone his life of cloistered piety, would be justified on the ground of the " edification " derived by the public from reflection on his mode of life. Could it not equally be said that a trust to provide religious instruction for a settlor's children or grandchildren qualifies as a charitable trust because of the force of the example on the public generally of the more godly lives which, as a consequence, those children or grandchildren would be expected and encouraged to lead ?

In my judgment, therefore, the judge was right to reject this argument on the part of the prioress and to regard the beneficial effects of example on the public generally, or on the members generally of the Roman Catholic Church, as too remote to satisfy the test which our law requires. Nor do I think that counsel for the prioress can escape this result by praying in aid the formula of WICKENS, V.-C. [in *Cocks* v. *Manners* (1)] to justify " indirect edification " in the sense of edification not produced by direct contact with the edifying influence but produced indirectly and remotely and, as it were, at several removes from that which edifies. The formula used by WICKENS, V.-C., (L.R. 12 Eq. 585) was that religious trusts could not qualify as charities if they did not tend :

> . . . directly or indirectly towards the instruction or edification of the public. . .

Without attempting an exhaustive classification, trusts which tend directly to the instruction or edification of the public will be those trusts which directly provide the means for such instruction or edification—for example, by the endowment of priests or teachers or of churches to whom or to which the " public " can resort. Trusts indirectly so tending will *prima facie* comprehend trusts for the provision of means whereby the " public " may get the instruction or edification, *e.g.*, by the endowment of colleges for the training of teachers and priests or of means of transport to bring " the public " to the priests and teachers or to the churches. The formula by its language is not, in my judgment, apt to describe, nor was it intended to cover, indirect instruction or indirect edification, *i.e.*, instruction or edification derived, not from participation in religious worship or ability to hear and receive teaching, but from the operation on the mind or spirit of mankind, without more, of the force of the example set by the lives of saintly men and women, who have chosen to exchange the earthly joys and pleasures that the world can offer for seclusion, poverty and a life entirely dedicated to the worship of God. For these reasons, as well as those stated by LORD GREENE, M.R., I think that the second limb of the argument of counsel for the prioress also fails and, accordingly, that his appeal must be dismissed.

LORD GREENE, M.R.: I am authorised by **ASQUITH, L.J.,** to say that he has read the two judgments which have just been delivered and he agrees with them.

Appeal dismissed. Costs of all parties as between solicitor and client to be paid out of the fund.

Solicitors: *Witham & Co.* (for the convent and the trustees of the fund); *Ellis, Bickersteth, Aglionby & Hazel* (for the Converts' Aid Society).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re EASTES (*deceased*), PAIN *v.* PAXON.

[CHANCERY DIVISION (Jenkins, J.), February 25, 1948.]

Charity—Charitable purpose—Gift to vicar and churchwardens for time being of named church "for purposes in connection with the said church"—Added directions as to user—Requirements of children in parish—Prohibition of aid for overseas missions.

By her will a testatrix gave her real and residuary personal estate to trustees to pay the income arising therefrom to the vicar and churchwardens for the time being of St. George's Church, Deal, ". . . such income . . . to be used by the said vicar and churchwardens for any purposes in connection with the said church which they may select it being my wish that they shall especially bear in mind the requirements of the children in the said parish of St. George's Church and I declare that in no circumstances shall they the said vicar and churchwardens use any portion of the said moneys in connection with the furtherance of overseas missions . . ."

HELD: (i) the words "in connection with" the said church did not import something wider than the strictly religious purposes of the church.

Re Bain ([1930] 1 Ch. 224; 142 L.T. 344), *applied.*

Re Davies (1932) (49 T.L.R. 5), *distinguished.*

(ii) the words "it being my wish that they shall especially bear in mind the requirements of the children in the said parish of St. George's Church" did not enlarge the purposes of the gift, but merely comprised a request that the matters mentioned should be specially borne in mind; the reference to the parish was only a geographical expression denoting the children who, being in the parish, would normally go to the parish church; and, therefore, the words did not import parochial work as distinct from the religious purposes of the church.

(iii) as it was possible that some of the money might have been applied in connection with the furtherance of overseas missions without travelling outside the scope of purposes pertaining to the church, the words "in no circumstances shall the said vicar and churchwardens use any portion of the said moneys in connection with the furtherance of overseas missions . . ." could not be said to indicate that the purposes intended by the testatrix were outside the scope of the church, its fabric and its services.

Re Garrard, Gordon v. *Craigie*, ([1907] 1 Ch. 382; 96 L.T. 357), *applied.*

Farley v. *Westminster Bank, Ltd.*, ([1939] 3 All E.R. 491), *distinguished.*

[AS TO RELIGIOUS TRUSTS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 187-191, paras. 257-264; and FOR CASES, see DIGEST, Vol. 8, pp. 314-317, Nos. *949-981.*]

Cases referred to:

(1) *Re Garrard, Gordon* v. *Craigie*, [1907] 1 Ch. 382; 76 L.J.Ch. 240; 96 L.T. 357; 8 Digest 294, *716.*

(2) *Re Bain, Public Trustee* v. *Ross*, [1930] 1 Ch. 224; 99 L.J.Ch. 171; 142 L.T. 344; Digest Supp.

(3) *Farley* v. *Westminster Bank, Ltd. Re Ashton's Estate, Westminster Bank, Ltd.* v. *Farley*, [1939] 3 All E.R. 491; [1939] A.C. 430; 108 L.J.Ch. 307; 161 L.T. 103; Digest Supp. *affg. Re Ashton's Estate, Westminster Bank, Ltd.* v. *Farley*, [1938] 1 All E.R. 707; [1938] Ch. 482.

(4) *Re Stratton Knapman* v. *A.-G.*, [1931] 1 Ch. 197; 100 L.J.Ch. 62; 144 L.T. 169; Digest Supp.

(5) *Re Simson, Fowler* v. *Tinley*, [1946] 2 All E.R. 220; [1946] Ch. 299; 175 L.T. 314; Digest Supp.

(6) *Re Davies, Lloyd's Bank, Ltd.* v. *Mostyn*, (1932), 48 T.L.R. 539; *affd.* 49 T.L.R. 5, C.A.; Digest Supp.

ADJOURNED SUMMONS to determine whether a residuary gift to trustees to pay the income arising therefrom to the vicar and churchwardens for the time being of a named church, "for any purposes in connection with the said church" with certain super-added directions as to the use of the income, was a valid charitable gift. JENKINS, J., held that the gift was good. The facts appear in the judgment.

Droop for the plaintiffs (trustees and executors of the will).
Wigglesworth for the vicar and churchwardens.
Danckwerts for the Attorney-General.
Newsom for Treasury Solicitor.

JENKINS, J.: This summons raises a question of the validity of a residuary gift contained in the will of the testatrix, Ada Mary Eastes. The will is dated Mar. 29, 1943. The testatrix died on Jan. 4, 1946, and probate was granted to the plaintiffs on June 11, 1946. By her will the testatrix gave her real and residuary personal estate to the trustees of the will on trust to pay the income arising therefrom to the vicar and churchwardens for the time being of St. George's Church, Deal, with the following directions as to its use:

> . . . such income of both my real and residuary personal estate to be used by the said vicar and churchwardens for any purposes in connection with the said church which they may select it being my wish that they shall especially bear in mind the requirements of the children in the said parish of St. George's Church and I declare that in no circumstances shall they the said vicar and churchwardens use any portion of the said moneys in connection with the furtherance of overseas missions And my trustees shall accept the receipt of the treasurer or other responsible official of the said church for all payments to be made to such church under my will without being responsible further or otherwise to see to the due application thereof . . .

It is difficult to ascertain who would be entitled as next-of-kin in the event of a decision adverse to the claim that this is a valid charitable gift. Accordingly, the Treasury Solicitor has been added to represent those interested on the footing of an intestacy. The other defendants are the vicar and churchwardens of St. George's Church, Deal, and the Attorney-General as representing charity.

The question which I have to decide is whether, having regard to the testatrix's directions as to the purposes for which the income is to be used, and, in particular, to the super-added expression of the testatrix's wish "that they shall especially bear in mind the requirements of the children in the said parish . . ." and the prohibition against the use of any portion of the said moneys "in connection with the furtherance of overseas missions . . .", the vicar and churchwardens are given this income upon trusts which are valid charitable trusts or on trusts which are not necessarily and exclusively charitable, in which case the gift would fail both on the ground of perpetuity and on the ground of uncertainty. The question is one on which there is a good deal of authority. The cases draw distinctions which seem to me to be somewhat fine and I am anxious to avoid saying anything which would add any further degree of refinement.

One starts, first, with the proposition, which I apprehend no one would dispute, that a gift to the vicar and churchwardens of a parish in the name of their office—simply a gift to a vicar and churchwardens of such-and-such a parish—is a valid charitable gift, so that, if all the testatrix had done here was to give her real and residuary personal estate or the income thereof in perpetuity to the vicar and churchwardens for the time being of St. George's Church, Deal, there would be no question but that that would be a valid charitable gift for religious purposes, and the precise mode of its application for those purposes would, if necessary, have to be settled by a scheme. Next, it appears from *Re Garrard* (1) that the same result follows in the case of a gift "to the vicar and churchwardens for the time being" of a parish "to be applied by them in such manner as they shall in their sole discretion think fit . . ." That is just as much a valid charitable gift as a gift to the vicar and churchwardens for the time being *simpliciter*. The added words giving absolute discretion as to the application of the money make no difference for this purpose. JOYCE, J., put it in this way ([1907] 1 Ch. 384):

The churchwardens are the officers of the parish in ecclesiastical matters, so that a mere gift or legacy to the vicar and churchwardens for the time being of a parish, without more, is a gift or charitable legacy to them for ecclesiastical purposes in the parish. It was suggested that the words in the latter part of the gift were inconsistent with its being a charitable gift, and that they implied that the vicar and churchwardens were to take beneficially. In my opinion there is no contradiction or inconsistency in the will whatever. The words "to be applied by them in such manner as they shall in their sole discretion think fit," to my mind merely direct that the particular mode of application within the charitable purposes of the legacy is to be settled by those individuals, or rather that there is power given them to do it, subject always, of course, to the jurisdiction of the court. Therefore I declare this to be a good charitable legacy for the benefit of the parish of Kington for ecclesiastical purposes.

If the direction here had been that the vicar and churchwardens were to use the money for such purposes as they might select, on the authority of *Re Garrard* (1) that still would have been a good charitable gift. In the present case, however, the direction is not simply that they are to use the money for such purposes or in such manner as they think fit, but it is that the income is to be used for any purposes in connection with the said church which they may select, so that the question arises whether the reference to "purposes in connection with the said church" deprives the gift of the charitable character which it would otherwise possess. On that question there is the authority of *Re Bain* (2), where there was a residuary bequest to the vicar of St. Alban's Church, Holborn, E.C., "for such objects connected with the church as he shall think fit." It was held ([1930] 1 Ch. 224) (RUSSELL, L.J., dissenting) :

> . . . that the bequest, which was admittedly to the vicar as holder of his office on trust, was a valid charitable bequest, as on the true construction of the words "for such objects connected with the church as he shall think fit" the discretion vested in the vicar must be exercised within the scope of church and not parochial purposes.

I think the construction placed on the gift by the majority of the Court of Appeal is, for my purpose, sufficiently summed up in what was said by LORD HANWORTH, M.R. (*ibid.*, 232) :

> It appears to me that the words "such objects connected with the church," that is the Church of St. Alban's, are to be interpreted narrowly or rather, perhaps as relating to the church in contradistinction to relating to the parish ; and it is not disputed that if the objects were confined to the support of the church, its fabric and its services, that would be a good charitable bequest. I see no reason to import into "objects connected with the church" parochial activities which would embarrass our interpretation as against an interpretation connecting the use of the funds to the specific church indicated of which the recipient is the vicar.

That is an authority which still stands as a decision of the majority of the Court of Appeal and it is, of course, binding on me. It is to be observed that a distinction was drawn between "objects connected with the church"—that is to say, the church, its fabric and its services—and "parochial activities," an expression which is capable of wider significance.

That distinction was later brought out by *Re Ashton* (3) in the Court of Appeal, a case which went to the House of Lords, where it is reported as *Farley* v. *Westminster Bank* (3). In that case the gift was to the vicars and churchwardens of two named churches for parish work. The headnote ([1938] 1 Ch. 482) states that the Court of Appeal held, CLAUSON, L.J., dissenting :

> . . . that it was impossible to find any substantial distinction between the phrase "for parish work" and the phrase "parochial activities" or "parochial purposes" which were considered in the Court of Appeal in *Re Bain* (2) and *Re Stratton* (4) not to be charitable, and that the expression "parish work" could not as a matter of construction be read as equivalent to "church work," and that the gifts in question were not therefore charitable and consequently failed.

The House of Lords unanimously affirmed the decision of the Court of Appeal, holding that the objects apprehended in the expression "for parish work" were not necessarily charitable as they would, in the ordinary meaning, include objects which are not charitable in the legal sense, but it is quite clear, I think, that the House of Lords, in so holding, recognised the principle that a plain gift to the vicar and churchwardens of a church for the purposes of their spiritual duties as vicar and churchwardens would be a good charitable bequest. The difficulty arose simply on account of the added words in the case their Lordships were considering. That appears, I think clearly, from what LORD ATKIN said ([1939] 3 All E.R. 492).

I was then referred to *Re Simson* (5), the gift there being to the vicar of a church "to be used for his work in the parish." It was decided that the words "to be used for his work in the parish" did not deprive the gift of the charitable character it would have possessed if it had simply been a gift to the vicar *simpliciter*, ROMER, J., holding that the added words merely had the effect of imposing a limitation on the scope of the trust which would have been created simply by a gift to the vicar. Finally, I was referred to *Re Davies* (6) where the Court of Appeal had to consider a gift "to the archbishop for the time being of the Archdiocese of Cardiff for work connected with the Roman Catholic Church in the said archdiocese." LORD HANWORTH, M.R., in a judgment very shortly reported, said (49 T.L.R. 5) that that:

> CLAUSON, J., had put to himself the right test when he said that he could not escape from the conclusion that the words used would cover much work which was not in the strict sense charitable. It was not every bequest which could be called charitable because the testator intended his money to be used for purposes which commended themselves to him as right and proper ones. There were many purposes importing piety, philanthropy, or benevolence which, however meritorious in themselves, were not in the strict sense charitable. It was contended for the appellant that the words in the will meant to indicate simply the work of the Roman Catholic Church, but the words "connected with" had been used by the testatrix, and the court must construe them. They could only mean that something must be added to the scope of the ordinary work of the Roman Catholic Church, making the words used and the choice of work open to the appellant even wider than they would otherwise have been. The appeal should therefore be dismissed, with costs.

That case was relied on by counsel for the Treasury Solicitor as authority for the proposition that the words "connected with" or "in connection with" have an enlarging effect. He said, just as "work connected with the Roman Catholic Church" was held in *Re Davies* (6) to import something wider than the strictly religious purposes of the church, so, too, here "purposes in connection with the said church" must mean something wider than "the purposes of the said church," and he invited me to hold that these words "in connection with" bring in objects not necessarily of a charitable character. As to that, I would make two observations. In the first place, this is a very short report of *Re Davies* (6). In the second place, the gift clearly did not relate to any specific church, its fabric and services, but it related to the work carried on by the religious body known as the Roman Catholic Church in a particular archdiocese. It seems to me that that is a material distinction between *Re Davies* (6) and this case. I would also add that when the Court of Appeal in *Re Bain* (2) had to decide the effect of the expression "for such objects connected with the church" the majority did not hold that the words in that context had an enlarging effect of the kind contended for by counsel.

It seems to me that there is a limit to the fineness of distinctions which can reasonably be drawn between gifts of this type. In the present case, apart from the added directions—to which I will refer in a moment—there seems to me to be a gift which is, in all material respects, in terms indistinguishable from those used in *Re Bain* (2), where the majority of the Court of Appeal held that the gift was good. It seems to me, therefore, that, unless there is anything in the added words which constrains me to place some different construction on the primary trust, my proper course is to follow *Re Bain* (2), but I must first consider whether the added directions so enlarge the gift for "any purposes in connection with the said church" as to bring the case within the principle of *Farley* v. *Westminster Bank* (3), under which gifts "for parish work" are not charitable.

The words in question are first these: ". . . it being my wish that they shall especially bear in mind the requirements of the children in the said parish of St. George's Church . . ." It is said that the reference to the parish here brings in parochial purposes or considerations and shows that the testatrix was not using the phrase "purposes in connection with the said church" in the sense in which the substantially similar phrase was held to have been used in *Re Bain* (2). It does not seem to me that there is really anything in those words which would justify me in coming to that conclusion. They are not words of trust. They are precatory, and, all they request in terms is that the vicar and churchwardens shall specially bear in mind the requirements of the children. That is to say, the testatrix expresses a wish that the vicar and churchwardens shall specially bear in mind those requirements in selecting the purposes for which they are to use the income, which are still "purposes in connection with the said church." It seems to me that regarding "purposes in connection with the said church" as confined to the maintenance of the church, its fabric and its services, those purposes must be carried out with regard to the requirements—or needs—of certain people, namely, the people—primarily parishioners—who are members of the congregation attending the church. After all, the fabric of the church has to be maintained with a view to their requirements or needs and the services have to be conducted with a view to their requirements or needs, and it seems to me that the requirements or needs of the congregation in general include those of the children as well as of the adults comprised in it. Therefore, the testatrix does not seem to me to be enlarging the purposes by the words in question. I think they can well be satisfied within the scope of purposes pertaining to the fabric of the church by such things as the provision of a suitably furnished side chapel for children—that is not, of course, an exhaustive suggestion at all—and within the scope of purposes pertaining to the services of the church by the provision of services particularly suited to the requirements or needs of the young. As regards the reference to the parish in the passage referring to the children, that seems to me to be only a geographical expression denoting the children who, being in the parish, would normally go to the parish church. If the words had simply been "the requirements of the children," I think they would have come to exactly the same thing.

That is one of the added directions. The other is the declaration that ". . . in no circumstances shall the said vicar and churchwardens use any portion of the said moneys in connection with the furtherance of overseas missions . . ." That, again, is relied on by counsel for the Treasury Solicitor as enlarging the meaning to be attached to "purposes in connection with the said church." He says it purports to exclude something already altogether outside those purposes in the narrow sense of the maintenance of the church, its fabric and services, and by so doing shows that the testatrix, in making her will, had in mind purposes of an altogether wider range, and that, once one gets outside the narrow limits of the church, its fabric and its services, one can put no limit narrower than that of parish work, which is admittedly an unduly wide one. It does not seem to me that it is right to attribute this affect to the words in question. Even if they were wholly inappropriate, I would be loth to regard them as altering by implication the effect of that which had gone before. I would sooner regard them as imposing *ex abundanti cautela* a restriction which was, in fact, wholly superfluous in view of the limits already placed on the trust. In my view, however, it would not be impossible that, apart from this declaration, some part of the moneys might have been applied in connection with the furtherance of overseas missions without travelling outside the scope of purposes pertaining to the church, its fabric and services. For instance, sums might have been applied in holding special services for the purpose of promoting interest in or praying for overseas missions, and, if it were part of such services to have collections for overseas missions, conceivably the vicar and churchwardens might have thought that it would be a purpose pertaining to the services of the church to supplement such collections by some contribution out of the trust income. In any case, as I have already indicated, I think it would be wrong on the strength of doubtful inferences to be collected from this declaration to give the words "purposes in connection with the said church" some meaning other or wider than that attached to the substantially similar expression used in *Re Bain* (2). For these reasons, I propose to declare that the residuary gift of the testatrix's real and personal estate is a valid gift.

The matter was referred to chambers for the settlement of a scheme. Costs of all parties as between solicitor and client to be paid out of the estate. Further proceedings against the Treasury Solicitor stayed.

Solicitors: *Kinch & Richardson*, agents for *Gardner & Allard*, Whitstable (for the plaintiff); *Lee, Bolton & Lee* (for the vicar and churchwardens); *Treasury Solicitor* (for H.M. Attorney-General and those interested on intestacy).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

ied. *Re* SPENSLEY'S WILL
TS. [1952] 2 All E.R. 49.

deceased). PUBLIC TRUSTEE *v.* GRIFFIN.

N (Jenkins, J.), March 2, 1948.]

Charity—Charitable purpose—Gift "to His Eminence the Archbishop of Westminster Cathedral London for the time being . . . to be used by him for such purposes as he in his absolute discretion thinks fit."

By her will, dated Apr. 27, 1946, a testatrix who died on July 11, 1946, after making several pecuniary bequests, gave her residuary estate: "To A His Eminence the Archbishop of Westminster Cathedral London for the time being . . . to be used by him for such purposes as he shall in his absolute discretion think fit."

HELD: (i) the gift was to the archbishop *virtute officii* and not beneficially.

Thornber v. *Wilson*, (1858) (4 Drew. 350; 32 L.T.O.S. 115); *Re Delany, Conoley* v. *Quick*, ([1902] 2 Ch. 642; 87 L.T. 46); and *Re Garrard, Gordon* B v. *Craigie* ([1907] 1 Ch. 382; 96 L.T. 357), *applied.*

(ii) the words "to be used by him for such purposes as he shall in his sole discretion think fit" should not be given the effect of enlarging the ambit of the purposes to which the archbishop could properly apply the gift *virtute officii* beyond the scope of legal charity, but merely directed that the mode of application within the charitable purposes of the gift C was to be settled by "His Eminence the Archbishop of Westminster Cathedral London for the time being," and, therefore, the bequest was a valid charitable gift.

Re Garrard, Gordon v. *Craigie*, ([1907] 1 Ch. 382; 96 L.T. 357), *applied.*
Re Davidson, Minty v. *Bourne*, ([1909] 1 Ch. 567; 99 L.T. 222), *distinguished.*

[AS TO RELIGIOUS TRUSTS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 187-191, D paras. 257-264; and FOR CASES, see DIGEST, Vol. 8, pp. 314-317, Nos. *949-981.*]

Cases referred to:

(1) *Thornber* v. *Wilson*, (1858), 4 Drew. 350; 28 L.J.Ch. 145; 32 L.T.O.S. 115; 22 J.P. 769; 4 Jar. N.S. 1268; 7 W.R. 24; 62 E.R. 135; 8 Digest 317, *987.*
(2) *Re Delany, Conoley* v. *Quick*, [1902] 2 Ch. 642; 71 L.J.Ch. 811; 87 L.T. 46; 51 W.R. 27; 8 Digest 245, *50.*
(3) *Re Garrard, Gordon* v. *Craigie*, [1907] 1 Ch. 382; 76 L.J.Ch. 240; 96 L.T. 357; E 51 Sol. Jo. 209; 8 Digest 294, *716.*
(4) *Re Davidson, Minty* v. *Bourne*, [1909] 1 Ch. 567; 78 L.J.Ch. 437; 99 L.T. 222; 52 Sol. Jo. 622; 8 Digest 296, *735.*
(5) *Re Barclay, Gardner* v. *Barclay, Steuart* v. *Barclay*, [1929] 2 Ch. 173; 98 L.J.Ch. 410; 141 L.T. 447; Digest Supp.
(6) *Re Ray's Will Trusts, Re Ray's Estate, Public Trustee* v. *Barry*, [1936] 2 All E.R. 93; [1936] Ch. 520; 105 L.J.Ch. 257; 155 L.T. 405; 80 Sol. Jo. 406; Digest Supp.
F (7) *Farley* v. *Westminster Bank, Ltd. Re Ashton's Estate, Westminster Bank, Ltd.* v. *Farley*, [1939] 3 All E.R. 491; [1939] A.C. 430; 108 L.J.Ch. 307; 161 L.T. 103; 55 T.L.R. 943. H.L.; Digest Supp.
(8) *Re Norman, Andrew* v. *Vine*, [1947] 1 All E.R. 400; [1947] 1 Ch. 349; [1947] L.J.R. 780; 177 L.T. 125.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of the testatrix, a residuary bequest "to His Eminence the Archbishop G of Westminster Cathedral London for the time being . . . to be used by him for such purposes as he shall in his absolute discretion think fit" was a gift to the person who at the date of the testatrix's death answered that description, beneficially or on trust, and, if on, trust, whether on a valid charitable trust for ecclesiastical purposes.

Hewins for the Public Trustee.
H *R. R. A. Walker* for His Eminence the Archbishop of Westminster Cathedral.
Stranders for next-of-kin, Miss B. Harty.
Raymond H. Walton for other next-of-kin.

JENKINS, J.: This summons raises a question of the validity or otherwise of a residuary gift contained in the will of the testatrix, Kathleen Agnes Flinn, who died on July 11, 1946. The will is dated Apr. 27, 1946, and was proved by the Public Trustee on Nov. 19 in that year. The testatrix appointed the Public Trustee to be her executor and trustee, and gave personal legacies to certain individuals, and then continued;

> I give to the parish priest (for the time being) of St. Joseph's Catholic Church Charlton near Folkestone £500 free of duty to be spent on the church as he thinks fit. I give to the parish priest (for the time being) of the Catholic Church of Our Lady of the Assumption and St. Gregory Warrick Street near Regent Street London £500 free of duty to spend on the church.

Then comes the gift which has given rise to the question :

> To His Eminence the Archbishop of Westminster Cathedral London for the time being I bequeath all the rest residue and remainder of my property of every nature and kind subject to the payment of my funeral and testamentary expenses and debts to be used by him for such purposes as he shall in his absolute discretion think fit.

The questions which arise in connection with that gift are of this nature. First, is it a gift to the person who at the date of the testatrix's death answers the description of " His Eminence the Archbishop of Westminster Cathedral London " beneficially, or is it a gift on trust. If it is a gift beneficially, then no further question arises, but, if it is a gift on trust, the further question arises whether the trust is a valid charitable trust or a trust which is void for uncertainty. Having regard to the words " for such purposes as he shall in his absolute discretion think fit," which are the most general words which can be imagined, it is clear that the trust, if trust it be, must necessarily be void for uncertainty unless the purposes to which the archbishop can apply the fund are limited to charitable purposes in the legal sense of that expression.

To deal with the first of these questions, is it a gift to the archbishop beneficially or is it a gift to him on trust ? I have been referred to a number of authorities, and, having considered them, I feel no doubt that the gift here is a gift to the archbishop, not as an individual, but by virtue of his office. It follows that it is not a gift to him beneficially. The first of the authorities cited to me to which I need refer is *Thornber* v. *Wilson* (1) where the gift was for the term of 7 years " to the then minister of the Roman Catholic chapel at Kendal " whom the testator also made his residuary legatee. KINDERSLEY, V.-C., in his judgment said (4 Drew. 351) :

> After referring to the will, I cannot entertain any doubt that the intention was to benefit the minister as such, that is, the chapel. The question whether there is a charitable gift does not depend on the fact that there is a gift to an individual describing him as minister ; but on this, whether the testator designates the individual as such, or as being the person who happens to fill the office. A gift to a minister as such, is a charitable bequest. I think here the intention was clearly to benefit the minister and chapel ; it was not a personal bequest, with a description of the person to be benefited. A gift to the person *now* minister would have been different ; the testator might be unacquainted with his name, and so only be capable of describing him by his office.

That seems to me to be clear authority for the proposition that a gift, for example, to the minister for the time being of a particular Roman Catholic chapel or to the person who at some future time shall be such minister are to be construed as gifts, not to the individual, but to the holder of the office by virtue of his office. To the same effect is *Re Delany* (2), where the gifts were to women who held certain offices in a religious order or their successors. The question was whether the persons named took beneficially or by virtue of their office. A question of construction arose as to the effect of the use of the word " successors." FARWELL, J., dealt with that ([1902] 2 Ch. 646), and the effect of his observations can best be summarised by saying that he came to the conclusion that a gift to X and her successors was a gift to X as holder of the particular office, or, in other words, it was the same in effect as a gift to the holder for the time being of the particular office. The learned judge went on to state with approval what was said in the case of *Thornber* v. *Wilson* (1).

In *Re Garrard* (3) there was a gift to the vicar and churchwardens for the time being of a certain parish " to be applied by them in such manner as they shall in their sole discretion think fit," and it was held " that the bequest was a good charitable gift for ecclesiastical purposes in the parish." JOYCE, J., said ([1907] 1 Ch. 384) :

> The matter with regard to which I reserved judgment in this case was a legacy of £400 to the vicar and churchwardens for the time being of Kington to be applied by them in such manner as they shall in their sole discretion think fit. Having regard to the decision of KINDERSLEY, V.-C., in *Thornber* v. *Wilson* (1), and see *Re Delany* (2),

it is clear that a legacy to the vicar for the time being of a parish is a charitable gift for the benefit of the parish for ecclesiastical purposes. The churchwardens are the officers of the parish in ecclesiastical matters, so that a mere gift or legacy to the vicar and churchwardens for the time being of a parish, without more, is a gift or charitable legacy to them for ecclesiastical purposes in the parish. It was suggested that the words in the latter part of the gift were inconsistent with its being a charitable gift, and that they implied that the vicar and churchwardens were to take beneficially. In my opinion there is no contradiction or inconsistency in the will whatever. The words " to be applied by them in such manner as they shall in their sole discretion think fit," to my mind merely direct that the particular mode of application within the charitable purposes of the legacy is to be settled by those individuals, or rather that there is power given to them to do it, subject always, of course, to the jurisdiction of the court. Therefore I declare this to be a good charitable legacy for the benefit of the parish of Kington for ecclesiastical purposes.

I was also referred to *Re Davidson* (4) the headnote of which states ([1909] 1 Ch. 567) :

> A residuary bequest in trust for the Roman Catholic Archbishop of Westminster for the time being, to be distributed by him between such charitable, religious, or other societies, institutions, persons, or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit :—HELD : not a good charitable bequest, but void for uncertainty.

This case bears really on the second point with which I have to deal, because it was not disputed, or, at all events, was not seriously disputed, that the archbishop took as a trustee and not beneficially. The point for which the case was cited to me was that the Court of Appeal declined to accept the proposition that the meaning of the words of the trust should be governed by the office held by the trustee so that the words :

> . . . to be distributed and given by him at his absolute discretion between such charitable religious or other societies, institutions, persons or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit

should be construed as limited to such purposes within the scope of the words in question as were legally charitable purposes. The Court of Appeal held that the character of the trustees could not have that effect on the trust, and, examining the possible means of distribution within the ambit of the expressed purposes, they came to the conclusion that some of the purposes within it might not be charitable in the legal sense. In *Re Barclay* (5) (the Farm Street Chapel case), the gift was :

> To the superior of the Jesuit Church of the Immaculate Conception, Farm Street, London, to the superior of that church at the moment of the legacy falling due and failing him to any other representative father of the Order of the Society of Jesus . . .

In that case TOMLIN, J., held that the gift was a valid gift to the superior at the moment pointed out by the will. That decision was reversed on appeal, and it was held " that the gift was to the superior, upon trust for the benefit of the Church at Farm Street as he might in his discretion think fit," and that this was a valid gift. TOMLIN, J., expressed his view ([1929] 2 Ch. 182) :

> In my opinion the gift to a person described as the Superior does not *per se* make him a trustee, even though he may not be personally known to the testatrix, nor do I think he can be fixed with a trust, because by vow or otherwise, he is under some obligation of conscience carrying no legal sanction to deal with what he receives in a particular way.

In the Court of Appeal LAWRENCE, L.J., stated the contrary view very clearly where he said (*ibid.*, 191) :

> TOMLIN, J., held that the residue was bequeathed to Father Steuart for his own use and benefit. I am unable to agree with this view. The indications contained in the will that the gift was in respect of the office held by the legatee and that the office was not merely mentioned in order to describe the legatee, who was to take for his personal use, are in my opinion too strong to admit of the construction placed upon it by the learned judge.

He goes on to point out : " Not only is the legatee described by his office without mentioning his name, which of itself might not be sufficient . . .", but, a matter which has no counterpart here, there was a direction to the Society of Jesus and not to the superior to pay certain legacies. RUSSELL, L.J., said (*ibid.*, 195) :

> The gift is to a person to be ascertained in a particular way, who may, and in all probability will, be quite unknown to and unconnected with the testatrix. This fact, though it renders unlikely an unfettered beneficial gift to the donee, would be insufficient without further context, to establish a trust. In this will there are to be found three important features. First, the testatrix explains the reason of the gift—namely, gratitude to the Society of Jesus for her receipt of the grace of the true faith. Secondly, the gift is to a person holding an official or representative character . . .

Then he refers to the direction that the society shall pay certain gifts, which is the same point as had been taken by LAWRENCE, L.J.

In *Re Ray's Will Trusts* (6) there was a gift to a person who at the time of the testatrix's death should be or should act as abbess of the convent in which the testatrix was a nun. That was held by CLAUSON, J., on grounds similar to those in the other cases, to be a gift to the legatee *virtute officii* and not beneficially. I was also referred, really on the second question, to *Farley* v. *Westminister Bank, Ltd.* (7). That was a case of the bequest of the residue of the testator's estate " in equal shares to two charities and to the respective vicars and churchwardens of two named churches ' for parish work '." It was held ([1939] A.C. 430) :

> . . . that, as the words " for parish work " would in their ordinary meaning include objects which were not charitable in the legal sense, those gifts were not charitable and consequently failed.

In the recent decision of VAISEY, J., *Re Norman* (8) ([1947] 1 Ch. 350), a testatrix by her will provided : " I request that the residue of my moneys be bequeathed to the editors of the missionary periodical called ' Echoes of Service ' to be applied by them or him (*sic*) for such objects as they may think fit." She was a member of " The Brethren," having for over fifty years been one of their missionaries. On a summons to determine, *inter alia*, whether the bequest constituted a valid gift to the editors beneficially or for charitable purposes, the evidence was that the editors were trustees and treasurers of the churches of " The Brethren " so far as regarded the missionary activities of " The Brethren," and that " Echoes of Service " was the title of a magazine and the accepted designation of a charity recognised by the Inland Revenue authorities. It is to be observed that the gift there was to the " editors of the missionary periodical . . . for such objects as they may think fit." There is only one passage which I need read in VAISEY, J.'s judgment, and that is where he said (*ibid.*, 355) :

> The audited account for 1945 shows that substantially the whole of the funds collected were expended on missionaries and missionary efforts in various parts of the world. In my judgment, the case falls within the principle of *Re Garrard* (3), where JOYCE, J., held that a bequest to a vicar and churchwardens of a named parish to be applied by them in such manner as they should in their sole discretion think fit was a good charitable gift for ecclesiastical purposes in the parish, and I see no reason why I should in this case draw a distinction between two expressions so similar as " for such objects," and " in such manner." If I am wrong, it may be that the reference to objects, etc., is merely an indication of absolute ownership, with the result that the defendant editors take beneficially, and, were I so to hold, it would make no practical difference, since they offer to undertake to apply the funds for the purposes of their trust. But, in my view, that is not what the testatrix meant nor is it what she has said.

As I have said, on the first question I entertain no doubt but that this gift, on its true construction, is a gift to His Eminence the Archbishop of Westminster Cathedral, London, for the time being, *virtute officii* and not beneficially.

As to the second question, I think it should be answered in this way. It seems to me that, on the principle stated in *Thornber* v. *Wilson* (1), *Re Delany* (2), and in *Re Garrard* (3), and recognised in *Farley* v. *Westminster Bank, Ltd.* (7), a gift " to His Eminence the Archbishop of Westminster Cathedral London for the time being," without more, would be a good charitable gift to the archbishop for the time being *virtute officii* for ecclesiastical purposes. In this case, therefore, one starts with a gift which, if it stood alone, would be a valid charitable gift for ecclesiastical purposes. That being so, do the superadded words " to be used by him for such purposes as he shall in his absolute discretion think fit " destroy the charitable character of the preceding gift ? The words : " for such purposes as he shall in his absolute discretion think fit " are, taken literally and at their face value, all embracing. They would enable the donee to put the money in his pocket or do anything else with it he might choose. Obviously, that wholly unrestricted meaning cannot be attached to the words consistently with the conclusion already reached that the gift is to the archbishop by virtue of his office and not beneficially. What force, then, is to be attributed to the words in question? In my judgment, they should not be given the effect of enlarging the ambit of the purposes to which the archbishop can properly apply this gift *virtute officii* beyond the scope of A legal charity. I see no necessity for doing that. There is nothing here in the nature of a definition of the purposes so framed as to include purposes of a kind not necessarily charitable, and cases such as *Re Davidson* (4) are distinguishable on this ground. In my judgment, the only effect that can be properly attributed to the words is the effect attributed to the very similar words in *Re Garrard* (3): "to be applied by them in such manner as they shall in their sole discretion think fit," which, in the view of JOYCE, J., merely directed that B the particular mode of application within the charitable purposes of the legacy was to be settled by the vicar and churchwardens. So, here, it seems to me that the words "to be used by him for such purposes as he shall in his sole discretion think fit" merely direct that the particular mode of application within the charitable purposes of the gift is to be settled by "His Eminence the Archbishop of Westminster Cathedral London for the time being."

It was suggested in argument that *Re Garrard* (3) is of doubtful authority C and should not be followed. I cannot agree, because it has been followed in many cases, and as recently as last year it was followed by VAISEY, J., in *Re Norman* (8). It seems to me that the present case is just as much, if not more, within the principle of *Re Garrard* (3) as *Re Norman* (8) was. I can see no more reason why I should draw a distinction between two expressions so similar as "for such purposes" and "in such manner," than VAISEY, J., saw for D drawing a distinction between "for such objects" and "in such manner." It seems to me also that, so far as those who are attacking the gift are concerned, the same sort of dilemma as was noticed by VAISEY, J., in *Re Norman* (8) might well arise, because, if my construction of the words "for such purposes as he shall in his absolute discretion think fit" were wrong, if "for such purposes" must, in truth, be given a wholly and utterly unrestricted meaning, then the result might well be that the conclusion reached in the first instance E to the effect that the gift to the archbishop for the time being was a gift *virtute officii* and not beneficially might be cancelled out, and that, looking at the whole of the gift, one would be constrained to conclude that, peculiar though it might be, what the testatrix had done was to make a beneficial gift to the person for the time being holding the office of Archbishop of Westminster Cathedral. That, as appears from what I have already said, would not, in my judgment, be the right conclusion, but it seems to me that it might well F be the right one if the conclusion that I have actually reached were wrong. The result contended for by the next-of-kin can only be reached, first, by denying the words "for such purposes as he shall in his absolute discretion think fit," their full and literal meaning on the ground that the gift is to the archbishop in trust and not beneficially, and then assigning to them a particular construction short of their full and literal meaning which will serve the purpose G of invalidating the trust. It seems to me that the choice lies between absolute gift and valid trust and that valid trust is the correct solution.

I will, therefore, declare that, on the true construction of the will, the gift is a gift to the defendant as a trustee and not beneficially, and, in answer to the second question, that the defendant holds the residuary estate on a valid charitable trust for ecclesiastical purposes. The costs of all parties as between solicitor and client, will come out of the estate.

H *Declaration accordingly.*

Solicitors: *Farrer & Co.* (for the Public Trustee and other next-of-kin); *Witham & Co.* (for His Eminence the Archbishop of Westminster Cathedral); *Shaen, Roscoe & Co.* (for next-of-kin, Miss B. Harty).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

ACME FLOORING AND PAVING CO. (1904) LTD. *v.* INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Tucker, Somervell and Cohen, L.JJ.), March 2, 3, 1948.]

Revenue—Excess profits tax—Capital computation—" Money not required for purposes of the business "—Reserves for purchasing timber stocks—Timber control—Restriction of supplies—Finance (*No.* 2) *Act,* 1939 (*c.* 109), *sched.* VII, *pt.* II, *para.* 3.

The Finance (No. 2) Act, 1939, sched. VII, pt. II, under which is computed the capital employed in trade for the purpose of the assessment of excess profits tax, provides: " 3. . . . any moneys not required for the purposes of the trade or business, shall be left out of account . . ."

A company carrying on business as manufacturers of wooden blocks for flooring and street paving was accustomed to have large cash balances on deposit with its bankers for the purchase of wood when market conditions were favourable. In 1939, at the outbreak of war, the company came under the Timber Control and thereafter was directed from time to time to sell timber from its stocks for national requirements and was only allowed to purchase such timber as was wanted for its immediate purposes. In the result, its stocks were greatly depleted, but, owing to its inability to make full replacements, its cash balances increased. In the periods under review, *i.e.*, those ending Jan. 31, 1940, and Jan. 31, 1942, the lowest cash balances amounted to £140,000 and £127,000 respectively, while the lowest cash balance in the standard year was £82,500. It was estimated that the cost of replacing timber stocks to the 1939 level would be not less than £300,000. On Jan. 31, 1940, the company's cash at bank and in hand stood at £206,000, and at Jan. 31, 1942, £235,000. The company had provided, against maintenance contracts, a reserve amounting on Jan. 31, 1942, to £23,800, which was agreed to be in excess of requirements, and also a reserve against war risks amounting on Jan. 31, 1940, and Jan. 31, 1942, to £86,000. The company contended that the whole of its available cash was required for re-stocking.

Held: in applying para. 3, the test was whether a reasonable business man would in all the circumstances have kept the money idle for re-stocking, and, as there was no prospect of replacing stocks during the relevant chargeable accounting periods nor within a reasonable time thereafter, the amount of the difference between the minimum cash balance in the standard year and that in each of the relevant periods was " moneys not required for the purposes of the . . . business " within the paragraph.

Thomas Roberts (*Westminster*), *Ltd.* v. *Inland Revenue Comrs.*, (1946) (E.P.T. Leaflet No. 42), *applied.*

Inland Revenue Comrs. v. *Terence Byron, Ltd.*, ([1945] 1 All E.R. 636), *distinguished.*

[For the Finance (No. 2) Act, 1939, sched. VII, pt. II, para. 3, see HALSBURY'S STATUTES, Vol. 32, p. 1222.]

Cases referred to:

(1) *Thomas Roberts* (*Westminster*), *Ltd.* v. *Inland Revenue Comrs.*, (1946), E.P.T. Leaflet No. 42.

(2) *Inland Revenue Comrs.* v. *Terence Byron, Ltd.*, [1945] 1 All E.R. 636; 114 L.J.K.B. 345; 172 L.T. 389; 2nd Digest Supp.; *affg.*, [1944] 1 All E.R. 608.

Appeal by a company from a decision of Atkinson, J., affirming a decision of the Special Commissioners of Income Tax by which they disallowed certain sums as capital for the purposes of excess profits tax in the accounting periods ending Jan. 31, 1940, and Jan. 31, 1942, respectively. The Court of Appeal now affirmed the decision of Atkinson, J. The facts appear in the judgment of Cohen, L.J.

Millard Tucker, K.C., and *J. W. P. Clements* for the company.
Donovan, K.C., and *R. P. Hills* for the Crown.

TUCKER, L.J.: I will ask Cohen, L.J., to deliver the first judgment.

COHEN, L.J.: The Finance (No. 2) Act, 1939, s. 12 (1) provides:

> Where the profits arising in any chargeable accounting period from any trade or business to which this section applies exceed the standard profits, there shall, subject

> to the provisions of this part of this Act, be charged on the excess a tax (to be called the excess profits tax) . . .

At first the tax was equal to three-fifths of the excess. It was afterwards increased to 100 per cent. Section 13 (3) provides:

> (1) If the trade or business was commenced on or before July 1, 1936, the standard profits for a full year shall be ascertained by reference to the profits of the standard period as hereinafter defined and, subject as hereinafter provided, shall be, where the standard period is one year, the amount of those profits and, where the standard period is two years, half the amount of those profits: Provided that if the average amount of the capital employed in the trade or business in any chargeable accounting period is greater or less than the average amount of the capital employed therein in the standard period, the standard profits for a full year shall, in relation to that chargeable accounting period, be increased, or, as the case may be, decreased, by the statutory percentage of the increase or decrease in the average amount of the capital employed in the trade or business.

Sub-section (9) of that section fixes the statutory percentage. Section 14 contains provisions as to the computation of profits and capital. Sub-section (2) provides:

> The average amount of the capital employed in a trade or business in the standard period or any chargeable accounting period shall be computed in accordance with pt. II of sched. VII to this Act.

Schedule VII, pt. I, para. 6 (1) provides:

> Income received from investments shall be included in the profits in the cases and to the extent provided in sub-para. (2) of this paragraph and not otherwise.

The company in question in this case does not carry on a business of any of the classes specified in sub-para. (2), and, therefore, the income received from investments would not be included in the profits for the purposes of excess profits tax. Part II of the schedule contains provisions for computing capital. Paragraph 1 provides how the amounts of the capital employed in the trade or business are to be ascertained. Sub-paragraph (2) thereof authorises certain deductions, and para. 2 provides that any borrowed money and debts shall be deducted. Paragraph 3, which is the paragraph under which the question now in issue arises, provides:

> Any investments the income from which is by virtue of the provisions of part I of this schedule not to be taken into account in computing the profits of the trade or business, and any moneys not required for the purposes of the trade or business, shall be left out of account . . .

The question at issue in this case is whether certain moneys are "moneys not required for the purposes of the trade or business."

The company carried on a long-established business in the manufacture and laying of wooden blocks for street paving and parquet flooring. In the ordinary course of its business, the company was accustomed to purchase and to hold considerable stocks of timber. The drying and seasoning of new stocks takes about three years. Before the outbreak of war it was the policy of the company to increase its stocks of hard and soft woods so far as it was possible, and to have large cash balances on deposit with its bankers for the purchase of wood when market conditions were favourable. At the outbreak of war, the company came under the Timber Control and was directed from time to time to sell its timber for national requirements. Since the outbreak of war all foreign timber has been imported under government control and the company has been allowed to purchase only such timber as has been required for its immediate purposes. The result, of course, has been that the stocks of timber have been very greatly reduced. ATKINSON, J., in his judgment, points out that whereas on Jan. 31, 1939, the stocks were just under £156,000, on Jan. 4, 1940, they were just under £150,000, representing about £100,000 worth at pre-war prices. By Jan. 31, 1942, they had fallen to some £50,000, representing about £10,000 worth of timber at pre-war prices. The commissioners find that the cost of replacing timber stocks on the 1939 level without allowing anything for expansion of trade is estimated to be no less than £300,000. I think that figure represents the price at the date of the hearing before the commissioners and not the price at the date which is perhaps more material, namely, the conclusion of the accounting periods in question. The Case goes on to state:

> The importation of timber was still subject to government control at the date of the hearing of the appeal by us and it had not then been possible for the company

to undertake replacement. As a result of the sale and diminution of its timber stocks the company's cash deposits have increased.

It then goes on to point out that the lowest cash balances in the following accounting periods were as follows: Apr. 1, 1939, to Jan. 31, 1940, they were £140,000 in round figures; in the year ending Jan. 31, 1941, £116,000; and in the year ending Jan. 31, 1942, £127,000—these figures notwithstanding that in the year ending Jan. 31, 1941, the company subscribed for £85,000 in government securities. At Jan. 31, 1940, the company's cash at bank and in hand stood at £206,000, and at Jan. 31, 1942, at £235,000. I should add that the lowest cash balance for the standard year calculated on the basis of the average of two years was £82,500. The Case mentions other features in the company's business. In para. 4 it refers to the fact that the company "entered into contracts for the laying of wood paving blocks," which includes maintenance contracts, and provided reserves against those contracts; that no claim had arisen for nine years; and that it was agreed that the amount of the reserves, in view of the experience of the company, was in excess of requirements. The Case then refers to the company's ownership of premises and plant situated on the banks of the Thames, which were in a vulnerable area, and, until the passing of the War Damage Act, 1941, were not insurable against war risks. In respect of those risks the company created a reserve which at the material dates stood at £86,000.

On those facts the company contended that to re-establish its 1939 stock position, it would have to lay out no less than £300,000 in cash, and that the whole of its available cash was required to restore its stock position, and, therefore, required for the purposes of its business. The Crown contend that, having regard to the difficulties of replacing stock and of rebuilding in the event of damage to premises at the relevant times, the company had, in each of the chargeable accounting periods in question, moneys which fell to be left out of account in arriving at the computation of its capital for the purposes of the assessments in question, and they proceed to set out the method which they suggest should be adopted in arriving at moneys so to be left out of account. As stated in the Case, this method seems very confusing and to some extent misleading, but I think it was agreed that the Crown's argument may be taken to be that the company found a minimum cash balance of £82,500 sufficient for its purposes in the standard period, and that, in view of the fact that the company had no prospect at the end of either of the accounting periods in question or within a reasonable time thereafter of being able to replenish their stocks, the company could not require a larger cash balance than that which sufficed for its purposes during the standard period. Therefore, it is said, the excess over £82,500 of its cash on deposit in the bank was necessarily cash not required for the purposes of its business. With those contentions before them, the commissioners who heard the appeal were of opinion that there was no prospect of replacing stocks during the relevant chargeable accounting periods or within a reasonable time thereafter and that the company had ample reserves to meet every contingency. They, therefore, held that the cash on deposit at the company's bankers was not required for the purposes of the company's trade and should be excluded under para. 3 of pt. II of sched. VII to the extent contended for by the Crown, *i.e.*, to the extent in each of the two accounting periods in question of the difference between the minimum cash balance in fact existing in that year and the sum of £82,500.

The company, being dissatisfied with the decision, appealed to Atkinson, J., who took the same view as the commissioners. The matter was without authority when it came before the commissioners, but before it came before Atkinson, J., he was assisted by his own decision in *Thomas Roberts (Westminster), Ltd.* v. *Inland Revenue Comrs.* (1) which was decided on May 31, 1946. In that case Atkinson, J., laid down certain principles which, in his view, should be followed by the commissioners in dealing with cases of this kind. In summarising the arguments before the commissioners in that case he said (E.P.T. Leaflet No. 42, p. 3):

> The inspector and the commissioners . . . say: That is all very well. Of course a trader is very anxious to keep money lying in the bank in that way, because he is going to be allowed 8 per cent. . . . which pays him much better than investing it in any safe investment. We have to draw a line somewhere and we have to draw

the line as fairly as we can between the Revenue and the trader.

That passage indicates the advantage which would accrue to the taxpayer if his argument prevailed, and it has to be borne in mind that investments and moneys not required for the purposes of the trade or business are dealt with alike in the paragraph we have to consider. In the present case, citing a passage from his judgment in the earlier case (*ibid.*), ATKINSON, J., said (E.P.T. Leaflet No. 64, p. 3):

> It is quite clear that the line must be drawn somewhere. A man could not be allowed to retain very, very large sums of money where the possibilities of their being required were so unlikely or so remote that no reasonable man would retain the money lying idle in order to meet such vague possibilities. I imagine [the Special Commissioners] have to ask themselves this question: "What would a reasonable business man regard as sufficient money to retain lying idle to meet his future commitments—certainly the commitments in the near future?" The commissioners say: "We accept that." I think they have said: "We go beyond that, but we do not think that he ought to be allowed to look too far ahead." To my mind, where the line is to be drawn is obviously a question of fact. I cannot interfere merely because I think I would have drawn the line somewhere more favourable to the trader. It is for the commissioners to say. That was the principle which I thought they ought to apply and which they had applied in that case. Applying that principle here, the question would be: Would a reasonable business man have kept this money idle for the purpose of replacing his stocks if in fact there was no chance of that money being spent in the accounting year, or within any reasonable period thereafter, for that purpose? I think that is the test . . . To my mind . . . the Special Commissioners were answering the proper question. Although my decision was after they had dealt with this case, it seems to me that they have put to themselves precisely the question which I thought was the right one.

Counsel for the company has criticised these observations in one respect. He says that the learned judge erred in considering the question whether money was idle or not. He says that a company may keep money idle, and yet, looking ahead, it may be required for the purposes of its business. I think in that part of his argument he has misunderstood the learned judge's meaning. One must consider his words in relation to the contentions which had been advanced before him, and, looking at the contentions in the Case, which, so far as we know, were the same as the contentions which were advanced before him, there is nothing to suggest that the moneys were required for any purpose other than for the replenishment of stocks. I think that all that the learned judge is saying when he uses the phrase "money lying idle" is that, since the only suggestion is that the moneys were required for the purpose of re-stocking, the commissioners applied the proper test in asking whether a reasonable man would have kept money for that purpose. If not, it must be money not required for the purposes of the business, since no other purpose was suggested. Apart, however, from his criticism of ATKINSON J.'s judgment, counsel suggested three grounds on which we ought to reverse his decision and that of the commissioners. First, he said that the commissioners had misdirected themselves in that they had regard not to the position at the time, *i.e.*, at the end of each of the two accounting periods in question, but to the position as they knew it five years later, and he bases that argument on the inclusion in the Case of the sentence:

> The importation of timber was still subject to government control at the date of the hearing of the appeal by us and it had not then been possible for the company to undertake replacement.

I do not think that, when that sentence is read in its context and with the finding of the commissioners, it appears they were reasoning *ex post facto*. They say that they were of opinion that there was no prospect of replacing stocks during the relevant chargeable accounting periods or within a reasonable time thereafter. That phrase seems to me to show clearly that they were directing their minds to the position as it was at the end of each of the accounting periods in question.

Counsel for the company next argued that, even if the commissioners had not misdirected themselves in that respect, there was no evidence on which they could find that the money was not required for the purposes of the business within a reasonable tract of time. It seems to me plain that, having regard to the existence of control and the probability that control would continue for a number of years, the great doubt whether there would be any prospect of replenishing stocks and the probability that for many years to come people would have to live from hand to mouth, there was evidence on which the commissioners could come to the conclusion which they reached, and I see no ground on which we could properly reverse them on that point, which, I agree with Atkinson, J., was a question of fact. Finally, counsel for the company suggested that the commissioners had misdirected themselves in that they had erred in law in thinking that they had only to look at a reasonable tract of time after the conclusion of the years in the two accounting periods with which we are concerned. The only alternative he put forward was that, having regard to the facts of the particular case, they should have come to the conclusion that it was impossible to decide until the control was removed whether or not a reasonable time had expired, and that, therefore, they ought to have said that, so long as controls were in force, it was reasonable to retain the whole of those sums. That seems to me to be a wrong approach to the question. I think the commissioners were bound to estimate for themselves the probability of the control being removed, and I think it is implicit in their argument that they held that there was no probability of the control being removed within a reasonable time after the conclusion of the two accounting periods in question. There is only one other point to which I need refer. Counsel for the company referred us to the decision of this court and of the House of Lords in *Inland Revenue Comrs.* v. *Terence Byron, Ltd.* (2) as to the meaning of capital employed in the business within s. 13 (3), and he pointed out that in that case—and here I quote from the judgment of Viscount Simon, L.C., in the House of Lords ([1945] 1 All E.R., p. 640):

> The fact that the Hull building has been so much damaged that it cannot at present be used as a theatre does not seem to me in itself to establish that the freehold site and what is upon it is not still "employed in the trade or business."

Counsel seeks to apply that case here by saying that the fact that the capital could not at the end of the accounting period be employed in purchasing stock was no reason for assuming that it could not be employed in the business. I think it is sufficient to say that there seems to me to be no analogy between the cases. There there was a concrete asset, the site without building with a possibility of the building being rebuilt. Here there is money and nothing else, and the question is whether that money was required for the purposes of the business. The only purpose suggested for which it could be required was the replenishment of stock. I have already given my reasons for thinking that there was evidence on which the commissioners could find that the sums now in question were not required for that purpose. For those reasons I think the appeal fails, and should be dismissed.

TUCKER, L.J.: I am in complete agreement with the judgment of Cohen, L.J., and also with the judgment of Atkinson, J., in the court below. I think Atkinson, J., laid down the right test to be applied in these cases in *Thomas Roberts (Westminster), Ltd.* v. *Inland Revenue Comrs.* (1). I think also the commissioners in the present case applied that test, although that case had not then been decided. The matter is a pure question of fact, and there was ample evidence to support the findings at which the commissioners arrived.

SOMERVELL, L.J.: I agree. The phrase which was criticised by counsel for the company in Atkinson, J.'s judgment is "money lying idle." It seems to me that, in view of its context, the learned judge plainly meant money kept in the bank, whether on current account or on deposit, or in the till. I do not think there is any reason for thinking that the learned judge was in any way misconstruing the section in using that term. Another way of putting it with regard to its context would be to say "to retain money uninvested." For the reasons given by Atkinson, J., and the commissioners I think this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Geo. & Wm. Webb* (for the company); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

R. *v.* CUMMINGS.

[Court of Criminal Appeal (Lord Goddard, C.J., Humphreys and Singleton, JJ.), March 8, 1948.]

Criminal Law—Rape—Evidence—Complaint—Whether complaint made as soon as could be expected—Question for judge.

The prosecutrix alleged that she was raped by C. It appeared that after the incident C. took her back in his motor van to the land workers' camp where for a week she had been living. She did not complain to the camp warden although she saw him, nor to girls sharing her hut, but the following day she went to an older woman whom she knew, living two miles from the camp, and to her made a complaint which led to C.'s arrest. At the trial evidence of this complaint was admitted. C. was convicted, but, on appeal, it was argued that the complaint had not been made immediately, and, therefore, evidence of it was inadmissible.

Held: it was for the judge who tried the case to decide whether the complaint was made as speedily as could reasonably be expected, and, as the judge had applied the right principle, *i.e.*, that there must be an early complaint, the Court of Criminal Appeal could not interfere with the exercise of his discretion as to the admissibility of the evidence.

[As to Complaint, see HALSBURY, Hailsham Edn., Vol. 9, pp. 201-203, para. 290; and for Cases, see DIGEST, Vol. 14, pp. 398-401, Nos. *4182-4211.*]

Case referred to:

(1) *R.* v. *Lillyman,* [1896] 2 Q.B. 167; 65 L.J.M.C. 195; 74 L.T. 730; 60 J.P. 536; 40 Sol. Jo. 584; 18 Cox, C.C. 346; 14 Digest 399, *4194.*

Appeal against conviction.

The appellant was convicted on Dec. 9, 1947, before Hallett, J., at Leeds Assizes of rape and was sentenced to 4 years' penal servitude. The Court of Criminal Appeal dismissed the appeal.

Durand for the appellant.
D. H. Robson for the Crown.

LORD GODDARD, C.J. delivered the following judgment of the court. This appeal is based mainly on the contention that evidence of complaint was wrongly admitted. The circumstances of the case were these. In the first place, it was a matter of considerable importance that the prosecutrix was a virgin. That must, I think, have had considerable weight with the jury when one comes to regard the story that was told, not only by the prosecutrix, but also by the appellant. She was at work on the land and living in a camp or hostel for land girls, and on the evening when the assault was alleged to have taken place the appellant, who was a seller of ice cream, arrived at the camp in his van somewhat late and took the prosecutrix for a drive to see if they could get some pears at neighbouring farms. They went to some farms, but they did not get any pears. When they reached a lonely road quite late at night, according to the prosecutrix, he got her out of the van in which they were riding, took her into a field, assaulted her, and raped her. There is no question that he did have connection with her that night, but he said the girl was a consenting party. After the alleged assault, the girl got back into the van. That, of course, was a matter on which comment could properly be made to the jury, but, on the other hand, it was said: "How otherwise could she get back to camp that night?" However he had treated her, she could not allow herself to be left in a lonely part of the country. When they did get back into the van, she pointed out that her macintosh had been torn in what she described as the struggle, though he did not admit there was a struggle, and there is no doubt he offered to pay the girl for the macintosh and she accepted money from him.

The main point that is taken here is, as I have said, with regard to the evidence of a complaint by the girl. The fact that the prosecutrix in a case of rape has made an early complaint has always been regarded as one of the most important matters in a case of that description. The fact that the prosecutrix has made a complaint supports her case because it shows consistency of conduct on her part. In the present case the prosecutrix was brought back by the appellant in his van. She stated that he told her it would be no use her complaining to the warden of the camp because the warden was a friend of his. However that may be, the fact was that the prosecutrix had only been at the camp a week. When she got back on the night in question, she did see the warden of the camp—he was up and about—but she did not speak to him. There is nothing to show that the woman welfare officer, who was known to the prosecutrix, was about that night, though, in fact, she had not gone to bed. The prosecutrix did not make any complaint to the warden, and one has to balance against that the fact that she had always been a modest and well-behaved girl, and, therefore, it is not necessarily to be taken against her that she did not make a complaint to a man she hardly knew. Nor did she complain to the girls who were living in the same hut. That, again, is a matter which has to be taken into account, but next day, as early as she could, she went from the camp to a much older woman, a Mrs. Watson, who lived two miles away, whom she knew and to whom she did make a complaint which led to the arrest of the appellant.

It is objected that she did not make a complaint immediately, and, therefore, that evidence of the fact that she made a complaint ought not to have been admitted. The law on the subject was laid down once and for all in *R.* v. *Lillyman* (1) which reviewed all the authorities. HAWKINS, J., in delivering the judgment of the Court of Crown Cases Reserved, in that case, said ([1896] 2 Q.B. 171).

> It is too late, therefore, now to make serious objection to the admissibility of evidence of the fact that a complaint was made, provided it was made as speedily after the acts complained of as could reasonably be expected.

Who is to decide whether the complaint is made as speedily as could reasonably be expected? Surely it must be the judge who tries the case. There is no one else who can decide it. The evidence is tendered, and he has to give a decision there and then whether it is admissible or not. It must, therefore, be a matter for him to decide and a matter for his discretion if he applies the right principle. There is no question here that HALLETT, J., did apply the right principle. He had clearly in mind the fact that there must be an early complaint. Whether it was reasonable to expect the prosecutrix to complain the moment she got back to the camp to a man she hardly knew, or whether it was more reasonable that she should wait till the morning and complain to Mrs. Watson, her friend, were matters which the learned judge had to take into account. He did take them into account, and he came to the conclusion that in the circumstances the complaint next morning was in reasonable time. If a judge has such facts before him, applies the right principle, and directs his mind to the right question, which is whether or not the prosecutrix did what was reasonable, this court cannot interfere.

In the circumstances, we think that there was nothing which could oblige this court to say that the complaint was not made as speedily as could reasonably be expected. One might easily find an extreme case of a girl going back to her home where her mother was and not making a complaint until two or three days later. That might easily induce a judge to say: "This girl, immediately after the assault of which she complains, got home and saw her mother or father, a person to whom you would expect her to complain, and as she did not then complain, I shall not admit evidence of a later complaint." On the other hand, if one found that she had not a mother or a near relation or a friend at hand to whom she could make a complaint, but the next morning went some distance to find a woman who was in her confidence and was a person to whom you might expect she would be glad to make a complaint, then, we think, the learned judge could well come to the conclusion that the complaint was made as speedily as the circumstances of the case warranted. In these circumstances, the court does not find any fault with the conduct of this trial.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

THORY *v.* THORY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Jones, J.), February 11, 12, 13, 1948.]

Divorce — Desertion — Maintenance order — Non-cohabitation clause — Clause struck out on appeal—Date on which deletion operative.

On Feb. 2, 1939, the wife applied to justices for a maintenance order against the husband on the grounds (i) that he had deserted her, and (ii) that he had been guilty of wilful neglect to maintain her. The justices dismissed the summons alleging desertion, but found that the husband was guilty of wilful neglect to maintain the wife and made an order against him for 30*s*. a week, a non-cohabitation clause being inserted in the order. On Feb. 12, 1947, the husband presented a petition for divorce on the ground of his wife's desertion during the preceding three years. The existence of the non-cohabitation clause in the order of Feb. 2, 1939, having been brought to his notice, in April and May, 1947, he applied to the justices to delete the clause from the order, but his applications were dismissed. Leave to appeal out of time having been granted to him, he appealed to the Divisional Court who, on July 30, 1947, held that there was no ground for the inclusion of the clause in the order and directed it to be deleted, but they did not give a direction as to the date on which the deletion of the clause was to become operative :—

HELD : since the clause should never have been inserted in the order, the clause was never effective, and its deletion from the order should date from Feb. 2, 1939, when the order was made.

[AS TO NON-COHABITATION CLAUSE IN MAGISTRATE'S ORDER, see HALSBURY, Hailsham End., Vol. 10, p. 840, para. 1342, and p. 659, para. 969 ; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. *2978-2999*.]

Cases referred to :

(1) *Harriman* v. *Harriman*, [1909] P. 123 ; 78 L.J.P. 62 ; 100 L.T. 557 ; 73 J.P. 193 ; 27 Digest 321, *2995*.

(2) *Mackenzie* v. *Mackenzie*, [1940] 1 All E.R. 256 ; [1940] P. 81 ; 109 L.J.P. 9 ; 162 L.T. 228 ; 104 J.P. 126 ; 2nd Digest Supp.

(3) *Gatward* v. *Gatward*, [1942] 1 All E.R. 477 ; [1942] P. 97 ; 111 L.J.P. 54 ; 166 L.T. 223 ; 2nd Digest Supp.

(4) *Cohen* v. *Cohen*, [1947] 2 All E.R. 69 ; [1947] P. 147 ; [1947] L.J.R. 1360.

(5) *Cooper* v. *Cooper*, [1940] 3 All E.R. 579 ; [1940] P. 204 ; 110 L.J.P. 10 ; 164 L.T. 192 ; Digest Supp.

(6) *Green* v. *Green*, [1946] 1 All E.R. 308 ; [1946] P. 112 ; 174 L.T. 237 ; 2nd Digest Supp.

(7) *Woolfenden* (*otherwise Clegg*) v. *Woolfenden* (*otherwise Clegg*), [1947] 2 All E.R. 653 ; [1948] P. 27.

(8) *Robinson* v. *Robinson*, [1919] P. 352 ; 88 L.J.P. 126 ; 122 L.T. 222 ; 27 Digest 558, *6133*.

PETITION by the husband for divorce on the ground of the wife's desertion during the three years immediately preceding Feb. 12, 1947.

On Feb. 2, 1939, the wife obtained from justices a maintenance order against the husband, and in that order a non-cohabitation clause was inserted. In 1947, the husband appealed to a Divisional Court and obtained an order that the non-cohabitation clause be deleted from the justices' order, but no direction was given as to the date on which the order of the Divisional Court should become operative. JONES, J., was now asked to decide the preliminary point before hearing the evidence in the suit, and he held that the non-cohabitation clause should be deleted from the justices' order as from Feb. 2, 1939, the date of the order. The facts appear in the judgment.

Linton Thorp, K.C., and *I. H. Jacob* for the husband.
Karminski, K.C., and *Percy Lamb* for the wife.

JONES, J. : In this case the husband is the petitioner and he prays for dissolution of the marriage on the ground that his wife has deserted him. By her answer the wife denies that allegation.

The history of the marriage is as follows. It took place on Oct. 5, 1935, and there is no issue of it. The parties lived together from that date for approximately two years, but on Oct. 18, 1937, the wife left the husband and they have never lived together since then. On Dec. 28, 1937, the wife filed a petition praying for a decree of judicial separation on the ground of her husband's cruelty. In that suit the husband, by his answer, denied he had been guilty of cruelty. The suit was tried by Hodson, J., on Oct. 25, 1938, and was dismissed by him. On Feb. 2, 1939, two summonses, taken out by the wife in January, 1939, were heard by a court of summary jurisdiction at Ramsey. The wife asked for a maintenance order on two grounds: (i) that her husband had deserted her, and (ii) that he had been guilty of wilful neglect to maintain her. The justices appear to have made an attempt to persuade the parties to become reconciled, but that attempt was not successful and they then made their order. They dismissed the summons alleging desertion, but they found that the husband was guilty of wilful neglect to maintain the wife and they made an order against him for 30*s*. a week. In that order there was inserted what is known as a "non-cohabitation clause." From 1939 to 1947 nothing appears to have happened, the husband, presumably, making the payments under the maintenance order regularly, but on Feb. 12, 1947, the petition in the present suit was presented. In the petition as originally drafted reference was made to the proceedings in the justices' court at Ramsey on Feb. 2, 1939, and to the order then made that the husband should pay 30*s*. a week to the wife for her maintenance, but nothing was said about the non-cohabitation clause which had been included in that order. When the answer was filed, it was alleged in it that the non-cohabitation clause had been included in the justices' order. The next step which was taken was an application by the husband to the justices at Ramsey to delete the non-cohabitation clause from their original order. That application, which was made on April 9, 1947, was opposed by the wife and was dismissed. A similar application on May 7, 1947, was also opposed by the wife and was also dismissed. On May 23, 1947, the husband entered an appeal to the Divisional Court against the original order of the justices asking that the non-cohabitation clause be deleted from it. He was obviously very much out of time, but leave to appeal out of time was given to him, and he also entered appeals against each refusal of the justices to delete the clause from the order. These three appeals came before a Divisional Court on July 30, 1947. They were heard by Wallington and Willmer, JJ., who allowed the appeal against the original order and directed that the non-cohabitation clause should be deleted from it. There was some discussion as to the other two appeals, which appear to have been dismissed.

When these proceedings began before me I was asked by counsel to decide a preliminary point before hearing the evidence as a decision on that point might make it unnecessary for evidence to be called. In effect, the preliminary question to be decided was the date when, under the order allowing the appeal against the justices' order of Feb. 2, 1939, the non-cohabitation clause was deleted from the justices' order. Did the decision of the Divisional Court remove the clause from the justices' order only as from July 30, 1947, when the judgment of the Divisional Court was delivered, with the result that the clause was in operation up to July 30, 1947, or was the effect of the judgment of the Divisional Court to remove the clause from the order as from Feb. 2, 1939, the date of the original order, with the result that at no time was the clause effective? I have been referred by counsel to a number of reports including *Harriman* v. *Harriman* (1), *Mackenzie* v. *Mackenzie* (2), *Gatward* v. *Gatward* (3), and *Cohen* v. *Cohen* (4). The effect of those decisions appears to be that if before the presentation of a petition the wife has obtained from the justices a maintenance order which includes a non-cohabitation clause, no decree based on desertion can be granted to a spouse so long as the clause remains in the order. If, however, the clause was inserted in the order by mistake and did not form part of the justices' decision and has been deleted by order of the justices on that ground, the revocation of the clause would operate from the date of the original order, as the clause must be regarded as never having been in the order. In the present case the Divisional Court have held that there was no ground for the exercise by the justices of their discretion to include the clause in their order and that it should be deleted from the order. Wallington, J., said:

> The conclusion which I reach in this case is that there was jurisdiction to make the order, that on the facts of the case there was no ground for the exercise by the magistrates of their discretion to make the order—indeed, the relevant facts pointed all the other way—and that, therefore, this appeal ought to be allowed and the

non-cohabitation clause should be deleted from the order made by the magistrates. WILLMER, J., said:

> . . . I can see no evidence which was before the magistrates such as would justify the conclusion at which they arrived, namely, that the non-cohabitation clause was necessary in order to protect the health of the complainant . . . I can see no evidence on which the magistrates could act to show that her health was ever at the material time in danger.

The court ordered the clause to be deleted on those grounds. This appears to me to be a decision that the clause ought never to have been inserted in the order. WALLINGTON, J., said:

> You want us to say it was a nullity and never existed. If we come to that conclusion, quite clearly our decree would date from 1939. However, we have said the order was made within the power of the magistrates but, as we think, in the wrong exercise of their discretion.

Counsel for the husband said: "In other words, it ought never to have been made." WALLINGTON, J., said:

> It ought never to have been made, but it has been in force in fact for 8 years, and do parties acquire rights under an order which is allowed to run for 8 years?

Counsel for the husband said: "This matter, I think, was referred to in *Mackenzie's* case (2)." Counsel for the wife said that that was not so, and WALLINGTON, J., does not appear to have said any more. The Divisional Court did not give a direction as to the date on which their order that the clause be struck out should become operative, and counsel for the husband told me that he had to be content to take the order without any decision as to the date on which it became operative, or as to its precise effect.

It appears to me that, as it has been held that the clause ought never to have been inserted in the justices' order, the clause never was effective and that its deletion from the order should date from Feb. 2, 1939, the date of the order. I, therefore, decided the preliminary point in favour of the husband and proceeded with the hearing of the suit, but I did not deal with the possibility referred to by WALLINGTON, J., that parties might acquire rights under an order which is allowed to run for eight years.

[HIS LORDSHIP then dealt with the evidence in the suit and held that, although the wife had deserted the husband in 1937, the husband had refused to take her back in 1939, when she had offered to return to him, that he was not justified in rejecting her offer to return, and, consequently, that she had not deserted him since 1939.]

Petition dismissed with costs.

Solicitors: *C. Hampton Vick*, agent for *Sidney J. Peters*, Cambridge (for the husband); *Vizard, Oldham, Crowder & Cash*, agents for *Wild & Hewitson*, Cambridge (for the wife).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* WESLEYAN AND GENERAL ASSURANCE SOCIETY.

[HOUSE OF LORDS (Viscount Simon, Lord Porter, Lord Uthwatt, Lord du Parcq and Lord Oaksey), January 29, 30, March 19, 1948.]

Income Tax—Deduction—Life assurance—Loans to assured—Recovery out of amount payable at death—Payments not in nature of annuities—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 21.

An assurance society issued to H. a life assurance policy, whereby, in consideration of a premium of £500, the society covenanted to pay, on H.'s death, a sum equal to the aggregate of £4 14*s.* 8*d.* for each month between the date of the receipt of the premium and the date of H.'s death, less the amounts of any loans made by the society to H. under the provisions of the policy. The policy provided that H. might request the society to make him monthly loans free of interest on the security of the policy, subject to the condition that the aggregate of the loans outstanding at any date should not exceed the amount which would have been payable by the society if H. had died on that date. The loans were not recoverable by the society otherwise than on H.'s death and out of the sums then payable. H. called on the society to make loans to him free of interest to the maximum extent and on the earliest date permitted by the policy unless and until this request was cancelled, and in accordance with the option thus exercised the society paid H. £4 14*s*. 8*d*. during eight successive months until the end of the fiscal year ended Apr. 5, 1945 :—

Held : on a true construction of the policy the sums paid by the society were loans and not monthly instalments of an annuity, and, consequently, were not subject to income tax under the Income Tax Act, 1918, All Schedules Rules, r. 21.

Decision of the Court of Appeal ([1946] 2 All E.R. 749; 176 L.T. 84), *affirmed.*

[As to Annuities and Other Annual Payments, see HALSBURY, Hailsham Edn., Vol. 17, pp. 180-183, paras. 377-380 ; and for Cases, see DIGEST, Vol. 28, pp. 62-64, Nos. *316-323.*]

Case referred to :

(1) *Inland Revenue Comrs.* v. *Westminster* (*Duke*), [1936] A.C. 1 ; 104 L.J.K.B. 383 ; 153 L.T. 223 ; *sub nom. Westminster* (*Duke*) v. *Inland Revenue Comrs.*, 19 Tax Cas. 490 ; Digest Supp.

Appeal by the Crown from an order of the Court of Appeal (Lord Greene, M.R., Cohen and Asquith, L.JJ.), dated Nov. 19, 1946, and reported [1946] 2 All E.R. 749, allowing an appeal from Macnaghten, J., who had reversed a finding of the Special Commissioners of Income Tax that monthly payments made by an assurance company to the holder of a policy during his life were loans and not instalments of an annuity liable to income tax under r. 21 of the All Schedules Rules under the Income Tax Act, 1918. The House of Lords upheld the decision of the Court of Appeal and dismissed the Crown's appeal.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. H. Stamp* and *R. P. Hills* for the Crown.

Donovan, K.C., and *Graham-Dixon* for the society.

The House took time for consideration.

Mar. 19. **VISCOUNT SIMON :** My Lords, this appeal comes before the House in the following circumstances. The respondent society appealed to the Commissioners for the Special Purposes of the Income Tax Acts against an assessment to income tax in the sum of £42 18*s*. made upon it for the year ended Apr. 5, 1945. The assessment purported to be made under the provisions of r. 21 of the General Rules applicable to all schedules to the Income Tax Act, 1918, on the ground that this sum was " payment of interest of money, annuity, or other annual payment charged with tax under sched. D " from which the society was bound to deduct tax and was thus rightly assessed against the society, who paid the amount to a Mr. Hart without deduction in pursuance of a transaction between Mr. Hart and the society. The society denied that the sum which it paid to Mr. Hart was a payment from which tax had to be deducted and contended that it was money lent to him. The commissioners decided in favour of the society, but stated a Case for the opinion of the High Court. Macnaghten, J., reversed the commissioners' decision, holding that the payment in question was not a loan, but was an annuity or other annual payment. On appeal to the Court of Appeal, that court (Lord Greene, M.R., Cohen and Asquith, L.JJ.) reversed the decision of Macnaghten, J., and restored the conclusion of the commissioners. The Crown now comes to this House and argues that the decision of the Court of Appeal is wrong.

The whole matter depends on the terms of the transaction entered into between Mr. Hart and the society, and this transaction is contained in three documents—a proposal form " for annuity and life assurance," dated May 24, 1944 ; a policy dated May 25, 1944, which is described as a bond and in which Mr. Hart is called the purchaser ; and a letter dated May 26, 1944, from Mr. Hart to the society exercising an option under the terms of the bond. The bond, which recites that the proposal is agreed to be the basis of the contract, provides, in return for the sum of £500 paid by the purchaser to the society, for the payment of a sum at Mr. Hart's death equal to the aggregate of £4 14*s*. 8*d*. for each month between May 25, 1944, and the date of death, less the amounts of any loans made by the society to Mr. Hart under the provisions of the bond. The bond also provides that he may borrow from the society on the security of the bond on the twenty-fifth day of each month "such sum or sums as the purchaser may request, provided that the aggregate of the amounts of such loans at any date shall not exceed the amount which would have been payable by the society, if the annuitant had died on that date. Such loans shall be free of interest and shall not be recoverable by the society otherwise than on the death of the annuitant and out of the sum then payable." By his letter of May 26, 1944, Mr. Hart called on the society to make loans to him free of interest to the maximum extent and on the earliest date permitted by the bond unless and until this request was cancelled. In accordance with the option thus exercised, the society paid to Mr. Hart £4 14*s.* 8*d.* in eight successive months until the end of the fiscal year, amounting to £37 17*s.* 4*d.* in all, and the question is whether such payments are in the nature of annuities or are, as the society contends, loans. The balance of £5 0*s.* 8*d.* making up the £42 18*s.* is admittedly an annuity.

It may be well to repeat two propositions which are well established in the application of the law relating to income tax. First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it. Secondly, a transaction which, on its true construction, is of a kind that would escape tax is not taxable on the ground that the same result could be brought about by a transaction in another form which would attract tax. As LORD GREENE, M.R., said in the present case ([1946] 2 All E.R. 751; 176 L.T. 85):

> In dealing with income tax questions it frequently happens that there are two methods at least of achieving a particular financial result. If one of those methods is adopted, tax will be payable. If the other method is adopted, tax will not be payable . . . The net result, from the financial point of view, is precisely the same in each case, but one method of achieving it attracts tax and the other method does not. There have been cases in the past where what has been called "the substance of the transaction" has been thought to enable the court to construe a document in such a way as to attract tax. That particular doctrine of substance, as distinct from form, was, I hope, finally exploded by the decision of the House of Lords in the *Duke of Westminster* v. *Inland Revenue Comrs.* (1).

Applying these principles, I reach the same conclusion as that arrived at by the Court of Appeal and expressed by the MASTER OF THE ROLLS in a manner which I find quite conclusive. The obligation of the society is to provide a sum at death; the right of Mr. Hart is to borrow such sums as he thinks fit month by month, subject to the limitation above set out, against the sum so to be paid at death. He is not to pay interest on such advances, and there is no obligation to repay them, save out of the sum payable at death. Though he is not bound to repay them in his lifetime, it seems to me that on the true construction of the documents he would be entitled to do so if he chose—though, as the loan carries no interest, this would not seem to be a very likely choice for him to make. The legal relationship created by the transaction between the parties to it is that of lender and borrower, and there seems no reason for denying that this is their real relationship on the ground that, if Mr. Hart exercises his right of borrowing up to the full amount permitted, his executors will find that the net sum to be payable at his death has been reduced to nothing. While it is true that Mr. Hart's letter of request of May 26, 1944, if it remained uncancelled, would reduce the sum payable at death to zero, there was nothing to compel Mr. Hart to go on borrowing these monthly sums. If he cancelled his request, then there would be a sum payable at death arrived at by deducting the loans which had been paid out of what would otherwise be the total sum. The primary obligation of the society is to pay the sum payable at death and, however much or however little is borrowed in the meantime, the loans are repaid by setting them against what is a primary capital obligation. The Special Commissioners were right in deciding that these payments were loans, and I move that the appeal be dismissed with costs.

LORD PORTER: My Lords, I agree with the reasoning and conclusion reached by the noble Lord on the Woolsack and have nothing to add.

LORD UTHWATT : My Lords, it is conceded by the Commissioners of Inland Revenue that the whole transaction between the society and Mr. Hart is to be found in the bond of May 25, 1944, and the letter of May 26, 1944, and that the transaction so disclosed is to be taken at its face value. It follows that the task before your Lordships is to ascertain what, on the true construction of the deed, are the legal rights of the parties, and in light of that construction to determine whether the sums paid to Mr. Hart in accordance with the direction given in his letter fall within the description "annuities and other annual profits or gains."

There is no exceptional rule of construction applicable to the case. Here, as in all other cases of construction, mere nomenclature descriptive of an operation provided for by the bond may be disregarded as of no weight if it mis-describes the operation, but under cover of that rule it is not right to attribute to words appearing in the bond a sense they do not naturally bear by reason of the odd legal or practical position that results. The argument for the commissioners appears to me to have embodied this error. In my opinion, the construction of the bond is clear. Mr. Hart's executor was to be entitled at Mr. Hart's death to receive payment of a sum (I will call it the gross sum) ascertained by multiplying £4 14*s*. 8*d*. by the number of calendar months he might live after May 25, 1944. He was to be entitled on the twenty-fifth day of each month to borrow money from the society, but so that the aggregate of the amounts of the loans at any date should not exceed the amount payable by the society if he died on that date. Interest was not to be charged on any loan and the society could not sue to recover any loan. When Mr. Hart died the aggregate of the loans was to be deducted from the gross sum. It will be observed that, if Mr. Hart chose to exercise his right of borrowing to the full and at the earliest date open to him, he would receive £4 14*s*. 8*d*. every month and his executor would receive nothing. Financially it would pay him so to exercise his right. The transaction has the same commercial result as an agreement to pay a monthly annuity of £4 14*s*. 8*d*., coupled with a stipulation that Mr. Hart was to be entitled to leave in the hands of the society any instalment of the annuity which he did not wish to receive when it became due and was to be entitled to demand payment at a later date. There was no automatic set off between sums borrowed and the gross sum. One other matter has to be added. Mr. Hart was entitled, in my opinion, as a matter of construction of the bond at any time to repay the moneys borrowed. If he wished to exercise that right, he would, I apprehend, be bound, unless the society otherwise agreed, to repay all. Commercially that right might be worth little or nothing, but it existed.

Those are my views as to the construction of the bond. What is the legal transaction embedded in it ? My Lords, in my opinion, the transaction, both in substance and in form, is an obligation to pay on Mr. Hart's death a sum quantified in the manner I have stated above with a right on Mr. Hart's part to borrow on the security of that sum without subjecting himself to personal liability, Mr. Hart being at liberty to make repayment. There is a coincidence between the payer of the gross sum and the lender of the money. In my view, that coincidence does not alter the transaction. Indeed, for the purpose in hand I do not regard the case as differing in legal effect from a case where the obligation to make the loan rested on a third party, whether a subsidiary of the society or not. Taking this view of the construction of the contract and the transaction, the sums received by Mr. Hart do not fall within the description "annuities and other annual profits and gains." A man may live by borrowing, but that habit of life does not attract income tax. I would dismiss the appeal.

LORD DU PARCQ : My Lords, I concur.

LORD UTHWATT : My Lords, my noble and learned friend **LORD OAKSEY,** who is unable to be present today, asks me to say that he has had the advantage of reading my opinion and he agrees with it.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the Crown) ; *Field, Roscoe & Co.* (for the society).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

PEGLER *v.* RAILWAY EXECUTIVE.

[HOUSE OF LORDS (Lord Thankerton, Lord Porter, Lord Uthwatt, Lord du Parcq and Lord Oaksey), February 17, 19, March 19, 1948.]

Railway—Amalgamation—Employee's position worsened—Compensation from amalgamated company—Claim—Limitation—Date from which time runs—Railways Act, 1921 (*c.* 55), *sched.* III, *paras.* (3) (4)—*Limitation Act,* 1939 (*c.* 21), *s.* 27 (6).

The Railways Act, 1921, which provided by s. 1 that the railway system of Great Britain should be formed into groups, the principal railway companies in each group being amalgamated and other companies absorbed, enacted in sched. III: "(1) Every existing officer and servant shall, as from the date of amalgamation or absorption, become an officer or servant of the amalgamated company; . . . (3) No existing officer or servant so transferred shall . . . be by reason of such transfer in any worse position in respect to the conditions of his service as a whole . . . as compared with the conditions of service formerly obtaining with respect to him; (4) If any question arises as to whether the provisions of the last foregoing paragraph have been complied with, the question shall be referred to a standing arbitrator or board of arbitration . . . and, if the arbitrator or board consider that those provisions have not been complied with, and that the officer or servant has thereby suffered loss or injury, they shall award him such sum to be paid by the amalgamated company as they think sufficient to compensate him . . ."

On Oct. 24, 1913, the appellant entered the employment of the T. railway, and worked in the locomotive running department. On Apr. 14, 1919, he was appointed a fireman. On July 1, 1923, the T. railway was absorbed into the western group under the Railways (Western Group) Amalgamation Scheme, 1923, pursuant to the Act of 1921, and the appellant was transferred to the service of the G. railway, which became the amalgamated company. Under the practice of the T. railway seniority for the purposes of promotion from fireman to driver was calculated from the date of entry into the company's locomotive running department, but the practice of the G. railway at the date of the transfer (July 1, 1923) was to calculate such seniority from the date of the employee's engagement as a cleaner, or, if he had not been a cleaner, then from the date when he became a fireman. As the appellant had never been a cleaner, his seniority under the G. railway's system dated only from April, 1919, as compared with October, 1913, under the practice of the T. railway. On May 14, 1924, the practice of the G. railway was changed so that the appellant became entitled to be treated for the purpose of seniority as if he had become a fireman 3 years after entry into the locomotive running department. As a result of this loss of seniority the appellant's promotion did not take place until Mar. 9, 1934, whereas a man junior to him under the practice of the G. railway was promoted on Apr. 3, 1933. The appellant claimed that as a result he was in a worse position in respect to his conditions of service by reason of the absorption of the T. railway under the Act of 1921, and on Mar. 2, 1942, he claimed to be entitled to compensation under sched. III, para. 4, to that Act, as incorporated in the scheme of 1923. The claim was referred to a standing arbitrator pursuant to para. 4, and he held it to be barred by the Limitation Act, 1939.

HELD: (i) although in s. 27 of the Act of 1939 (sub-s. 6 of which applies the Act to a statutory arbitration) the phrase "the cause of arbitration" (corresponding to "the cause of action" in litigation) nowhere appeared, just as in the case of an action the claim was not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so a claim was not to be brought before the arbitrator after the expiration of 6 years from the date when the claim accrued.

(ii) the change of practice made on May 14, 1924, constituted a change in the appellant's conditions of service by reason of transfer within para. 3 of sched. III; that was the date when the claim accrued; and, in consequence, the claim was barred by s. 2 of the Act of 1939.

Decision of Court of Appeal ([1947] 1 All E.R. 355), *affirmed.*

[As to When Time Begins to Run, see HALSBURY, Hailsham Edn., Vol. 20, pp. 649-650, paras. 826, 827; and for Cases, see DIGEST, Vol. 32, pp. 327-328, Nos. *134-141.*]

Appeal from a decision of the Court of Appeal, dated Feb. 14, 1947, and reported *sub nom. Pegler* v. *Great Western Railway Co.* ([1947] 1 All E.R. 355), affirming an order of Atkinson, J., by which he confirmed an award of a standing arbitrator in favour of the Great Western Railway Co., to the effect that the claim for compensation made by one, Pegler, under the Railways (Western Group) Amalgamation Scheme, 1923, was barred by the Limitation Act, 1939, s. 2. The House of Lords dismissed the appeal. The facts appear in the opinion of Lord Uthwatt.

Beney, K.C., and *M. R. Nicholas* for the appellant.

Cartwright Sharp, K.C., Fox-Andrews, K.C., and *B. J. M. Mackenna* for the respondents.

The House took time for consideration.

Mar. 19. **LORD THANKERTON :** My Lords, I have had the advantage of considering the opinion about to be delivered by my noble and learned friend, **LORD UTHWATT,** and I desire to express my concurrence both in his reasoning and in the conclusion at which he arrives.

LORD PORTER : My Lords, I have had the same advantage, and I also concur.

LORD UTHWATT : My Lords, the question at issue in this appeal is whether a claim for compensation preferred by the appellant against the Great Western Railway Co. under the provisions of the Railways (Western Group) Amalgamation Scheme, 1923 (S.R. & O., 1923, No. 817), made under the Railways Act, 1921, is barred by the Limitation Act, 1939. As the result of the Transport Act, 1947, the Great Western Railway Co. is not now interested in the matter, and by virtue of that Act and the Scheme of Delegation of Functions made by the British Transport Commission, the Railway Executive has replaced the railway company as respondent in this appeal. That change of interest and parties has not in any respect altered the rights of the appellant.

Before stating the facts, it is convenient to recall the relevant provisions of the Railways Act, 1921. Section 1 provided that the railway system of Great Britain should be formed into groups and that the principal railway companies in each group should be amalgamated and other companies absorbed. Section 3 (1) (*b*) provided that an amalgamation scheme should incorporate the provisions contained in sched. III to the Act. Except in the case of the western group, to which the Great Western Railway Co. and the Taff Vale Railway Co. belonged, the amalgamation schemes were to provide for the incorporation of a new company which was to be the amalgamated company. In the case of the western group, the amalgamation scheme was to provide that the Great Western Railway Co. should be the amalgamated company. By s. 7 (3) it was provided that the schemes should be binding on all persons and have effect as if enacted by the Act. The only provisions of sched. III which are relevant to this case are paras. 1, 3 and 4. They provide :

> (1) Every existing officer and servant shall, as from the date of amalgamation or absorption become an officer or servant of the amalgamated company . . . (3) No existing officer or servant so transferred shall, without his consent, be by reason of such transfer in any worse position in respect to the conditions of his service as a whole (including tenure of office, remuneration, gratuities, pension, superannuation, sick fund or any benefits or allowances whether obtaining legally or by customary practice of the constituent or subsidiary company) as compared with the conditions of service formerly obtaining with respect to him; (4) If any question arises as to whether the provisions of the last foregoing paragraph have been complied with, the question shall be referred to a standing arbitrator or board of arbitration appointed by the Lord Chancellor, and, if the arbitrator or board consider that those provisions have not been complied with, and that the officer or servant has thereby suffered loss or injury, they shall award him such sum to be paid by the amalgamated company as they think sufficient to compensate him for such loss or injury.

The Great Western Railway Co. was constituted the amalgamated company of the western group on July 1, 1923, and the Scheme of Amalgamation duly incorporated the provisions of sched. III to the Act. The appellant, who was a locomotive driver employed by the company, made a claim for compensation based on paras. 3 and 4 of sched. III and that claim was duly referred to the standing arbitrator. The material facts found by the standing arbitrator may now be stated.

On Oct. 24, 1913, the appellant entered the service of the Taff Vale Railway Co. and was employed in that company's locomotive running department as a labourer. On Apr. 14, 1919, the Taff Vale Railway Co. appointed the appellant to the grade of fireman. From July 28, 1920, to July 1, 1923, when the Taff Vale Railway Co. was amalgamated with the Great Western Railway Co., it was the practice of the Taff Vale Railway Co. to rank firemen for promotion to drivers in the order of the dates when they respectively entered the company's locomotive running department. In the appellant's case that date was Oct. 24, 1913. On the date of the amalgamation, the appellant was transferred to the service of the Great Western Railway Co. At that date it was the practice of that company to rank firemen for promotion to drivers in the order of the dates when they became cleaners, or, if they had never become cleaners, of the dates when they had become firemen. The appellant had never been employed as a cleaner, and according to this practice his seniority for promotion to driver was calculated from Apr. 14, 1919, when he had become a fireman. At this stage the appellant's loss of seniority was some five and a half years. On May 14, 1924, the Great Western Railway Co., giving effect to a decision of the Sectional Railway Council (No. 2) set up for the company's system under the Railways Act, 1921, altered their practice regulating the promotion of firemen to drivers. Under the altered practice, a former employee of the Taff Vale Railway Co., who had been appointed fireman before Aug. 18, 1919, was deemed for purposes of seniority to have been made a fireman three years after he had entered the locomotive running department of the Taff Vale Railway Co. As the appellant had entered the locomotive running department on Oct. 24, 1913, his date for the purpose of seniority thus became Oct. 24, 1916. His loss of seniority was thus reduced from five and a half years to three years. On Apr. 3, 1933, the Great Western Railway Co. appointed as driver a man who had formerly been in the employment of the Taff Vale Railway Co. This man was junior to the appellant under the Taff Vale Railway Co.'s practice, but senior to the appellant under the practice of the Great Western Railway Co. On Mar. 9, 1936, the Great Western Railway Co. appointed the appellant driver. On May 8, 1937, the appellant reached the maximum rate of pay applicable to drivers, and thereafter received the same wages as if he had been appointed driver on Apr. 3, 1933. On Mar. 2, 1942, the appellant made a claim for compensation under sched. III. On May 7, 1942, the Great Western Railway Co. rejected this claim. It was common ground between the parties before the standing arbitrator that the conditions of the appellant's service were not, save as regards loss of seniority, altered by his transfer from the service of the Taff Vale Railway Co. to the service of the Great Western Railway Co. On these facts the standing arbitrator held that the date of the commencement of the arbitration was Mar. 2, 1942, and that the appellant's claim was barred by the Limitation Act, 1939. This question of law was referred by the standing arbitrator to the High Court. Atkinson, J., was of the opinion that the arbitrator was right in his conclusion of law and the Court of Appeal affirmed his decision.

Two matters have, in light of the arguments of the appellant, to be dealt with—first, the application of the Limitation Act, 1939, to statutory arbitrations, and, second, the construction of paras. 3 and 4 of sched. III. The Limitation Act, 1939, is an amending and consolidating statute. It made an important change as to the effect of the lapse of time in relation to arbitration proceedings. The Arbitration Act, 1934, had enacted that statutes of limitation should apply to arbitrations as they apply to proceedings in the High Court, but that provision did not apply to statutory arbitrations. In the Act of 1939 statutory arbitrations are placed on the same footing as other arbitrations, with the result that the provisions as to limitation are applicable to both : see

s. 27 (6). The Act came into force on Jan. 1, 1940. The questions which arise on the Limitation Act itself may be shortly disposed of. Before ATKINSON, J., and the Court of Appeal it was argued that the provisions of this Act subjecting statutory arbitrations to the rules as to limitation did not apply when the time limit had run out before the Act was passed. That point was not taken before your Lordships. There is, indeed, nothing in it. The matter argued was that in the application of the Act to a statutory arbitration the phrase, "the cause of arbitration"—the matter corresponding to "the cause of action" in litigation—is nowhere to be found. This is true, but it appears to me, as it appeared to ATKINSON, J., that, just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so, in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued. With the Court of Appeal I regard the reasoning of ATKINSON, J., on this matter as unanswerable. I do not propose to repeat that reasoning, but only his conclusion, which I accept to the full. In ATKINSON, J.'s view—I quote him (62 T.L.R. 477):

> the proper interpretation of s. 27 is to apply the Limitation Act, treating a cause of arbitration in the same way as a cause of action would be treated if the proceedings were in a court of law.

On the footing that the Limitation Act, 1939, so applies, it is common ground that the period of limitation is 6 years from the date when "the cause of arbitration" arose: see s. 2 of the Limitation Act, 1939. That date depends on the fair construction of paras. 3 and 4 of sched. III.

On this, the appellant contended, first, that the cause of arbitration arose on the date when the "question" was raised by the appellant—as distinguished from the date when the appellant was entitled to raise the question. Secondly, in the alternative, the appellant contended that the earliest date was Apr. 3, 1933, when the loss resulting from postponement of seniority became an established fact, and that he continued to suffer loss until May 8, 1937. Success in the first contention would have the consequence that his rights were not barred at all by the Limitation Act, 1939. Success in the second contention would have the consequence that recovery of the loss he sustained between Mar. 2, 1936 and May 8, 1937, was not barred by that Act. The first contention was based on the theory that para. 3 of itself did nothing except establish a principle on which an arbitrator was to act if and when a question was referred to him under para. 4. The substantive right was, according to this contention, to be found embedded in para. 4 which gives a right to submit a question to the arbitrator. I am unable to accept this construction of these paragraphs. The terms of para. 3, when incorporated in an amalgamation scheme, have statutory effect, and, in my view, created rights in the existing officers and servants. If those rights were invaded, the officers and servants were entitled to a remedy to be obtained in arbitration proceedings. The substantive provision is in para. 3 and the remedial provision is in para. 4. The second contention demands a closer consideration of the language of para. 3. The keynote to para. 3 lies, in my opinion, in the words "by reason of such transfer." The matter provided is that no existing officer or servant is by reason of the transfer to be in any worse position as respects the conditions of his service. His post-amalgamation conditions resulting from the transfer are to be compared with his pre-amalgamation conditions, both sets of conditions being viewed as a whole. The relevant conditions of his old service are those obtaining at the date of transfer, and are, therefore, then known. The conditions of his new service as a whole resulting from the transfer may well not be ascertained at the date of the transfer. Teething troubles may be expected even where, as here, the amalgamated company is an existing company, but once the amalgamated company has settled the conditions of service under it the opportunity for the comparison envisaged by the paragraph arises. The effect of the transfer has been ascertained and each transferred officer and servant then knows where he stands by reason of the transfer. Subsequent variations of conditions are irrelevant under the terms of para. 3. If attention is paid to them the go-by is given to the words "by reason of the transfer" and the giving of such attention is, therefore, repelled by the wording of the provision. This conclusion does not raise any insuperable difficulty and the obstacles in the way of fixing the exact date at which a comparison is to be made are easily exaggerated. The date when the conditions of service in the new company of any transferred officer or servant had been considered and settled is a matter to be determined by evidence.

In the present case it is, I think, a fair inference from the facts stated by A the arbitrator that the change of practice in seniority made on May 14, 1924, was a change by reason of the transfer, and there is nothing to suggest that a later date for comparison should, as respects the appellant, be adopted. The date was obviously some comparatively early date in the history of the company, and the exact date is obviously not here in issue, but, consistently with what I have said and giving due weight to the fact that the Great Western Railway Co. was itself the amalgamated company, I am unable to B agree with the Court of Appeal that the date of transfer of the amalgamated company—July 1, 1923—is the critical date. I prefer the view expressed by ATKINSON, J.—May 14, 1924. On this footing the cause of arbitration arose on May 14, 1924, unless there is anything in the provisions of para. 4 which postpones the date until losses are exactly quantified by actual happenings. The appellant urged there was. For the statement of his point and the C answer to it, I cannot do better than adopt the language of ATKINSON, J. (62 T.L.R. 477):

> There is also the point that no cause of claim arises until the claimant has sustained a loss or injury, or until he can prove that he is out of pocket and has actually lost money. Again I cannot accept that point of view because the cause of action or arbitration is something which arises out of a comparison of two sets of conditions: Is the second set of conditions less favourable than the first? If it is less favourable, then the cause arises, and irrespective of whether as a matter of fact it has as yet affected D the man's pocket. The question arises then, and it is then that the man has to make up his mind: "Do I, or do I not, consent?" If he thinks that the conditions are less favourable, his right, and his only right, is to litigate or claim an arbitration to have his position not made worse; and, if it is made worse, then it is for the arbitrator to say what sum of money will compensate the claimant for the worsened position. Each man has a right to have his own position considered. The arbitrator may very often have a very difficult task, but he has to do the best he can. I think that that is E what the scheme means, and that a man cannot wait until, it may be, years later.

It follows that the cause of arbitration accrued more than six years before the commencement of the arbitration and that the Limitation Act, 1939, is a bar to the claim. I would dismiss the appeal.

LORD DU PARCQ: My Lords, I entirely agree with the opinion which has just been delivered by my noble and learned friend LORD UTHWATT F and I have nothing to add to it.

LORD UTHWATT: My Lords, my noble and learned friend **LORD OAKSEY,** who is unable to be present today, asks me to say that he agrees that the appeal should be dismissed for the reasons given in my opinion, but that he does not think it is necessary to decide whether July 1, 1923, or May 14, 1924, is the critical date.

G *Appeal dismissed.*

Solicitors: *Pattinson & Brewer* (for the appellant); *M. H. B. Gilmour* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

THE EMPIRE GULF.

[Probate, Divorce and Admiralty Division (Willmer, J.), March 1, 1948.]

Shipping—Salvage—Award—Apportionment among crew—Basis—Basic pay—Exclusion of war bonus.

The owners, master and crew of a ship were awarded £11,000 for salvage services, of which sum £1,400 was to be paid to the crew who were in receipt of a war bonus which was paid at a flat rate regardless of rank or status :—

Held : the proper method of apportioning the crew's proportion of the award was on the basis of their basic pay, consideration of the war bonus being excluded.

[As to Apportionment of Salvage Award to Crew, see HALSBURY, Hailsham Edn., Vol. 30, p. 908, para. 1229 ; and for Cases, see DIGEST, Vol. 41, pp. 888-890, Nos. *7750-7792*.]

Motion by the crew for apportionment of £1,400, being the proportion allotted to them out of £11,000 awarded to the owners, master and crew of the ship for salvage services.

Boyes for the applicants.

WILLMER, J. : In my judgment, the correct method of apportioning the crew's proportion of this salvage award in the circumstances of this case is on the basis of their basic pay. It appears that this is a matter on which there is no authority. The reason why I have come to my conclusion is that stated by me during the course of the argument, *viz.*, that the basic pay seems to me to be the best guide in ascertaining the status of the various persons entitled to share in the fund. If one adds on the war bonus, which is paid at a flat rate regardless of rank or status (except in the case of cabin-boys), it seems to me that one gets a distorted view of the relative status of the respective parties, and, if one proceeded to base a salvage award on that, the award resulting would be unfairly weighted in favour of the lower paid ratings and against the higher paid officers. Only by excluding the war bonus and by restricting one's consideration to the basic pay, does one come, in my judgment, to a fair assessment of the relative merits and the relative rights of the various members of the crew. For these reasons I come to the conclusion that this award should be apportioned in accordance with the basic rates of pay.

Order accordingly. By consent no order as to costs.

Solicitors : *Middleton, Lewis & Clarke*, agents for *Middleton & Co.*, Sunderland (for the appellants).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

WILKINSON *v.* BARKING CORPORATION.

[Court of Appeal (Scott, Bucknill and Asquith, L.JJ.), February 25, 26, March 15, 1948.]

Local Government—Superannuation of officers—Right to annual superannuation allowance on ceasing to be employed—Question to be decided by Minister – Claim after cessation of employment—" Employee "—Local Government Superannuation Act, 1937 (*c.* 68), *s.* 35.

Practice—Appearance—Unconditional appearance—Defendant's right to plead that plaintiff has no cause of action—R.S.C., Ord. 25, *r.* 2.

W., who was employed by a local authority and was entitled, as an employee, to participate in the benefits of a superannuation fund, resigned his post on Dec. 17, 1945, but on Mar. 27, 1946, the local authority purported to dismiss him and decided that he was not entitled to an annual superannuation allowance under the Local Government Superannuation Act, 1937, s. 8 (1) (*a*). In an action by W., begun on July 31, 1946, claiming a declaration that he was so entitled, unconditional appearance to the writ was entered by the local authority, but it was pleaded by para. 6 of the defence that W. had no cause of action because, under s. 35 of the Act (which provides that any question concerning the rights of an employee of a local authority under the Act shall be decided, in the first instance, by the authority concerned, and, if the employee is dissatisfied with the authority's decision, by the Minister whose decision shall be final), the question whether or not he was entitled to an allowance was to be determined only by the Minister of Health. The master ordered that the issue raised by para. 6 of the defence should be disposed of before the trial under R.S.C., Ord. 25, r. 2. At the hearing W. contended (i) that, since A the authority had entered an unconditional appearance, the plea in para. 6 of the defence was bad since it denied the jurisdiction of the court; (ii) that s. 35 of the Act of 1937 did not apply to his claim because, at the material time (*i.e.*, when the question of his rights was raised), he had ceased to be an "employee.":—

HELD: (i) the court had jurisdiction to decide whether or not it could deal with the matter; by entering an unconditional appearance the B defendants had submitted to that jurisdiction; but they were not thereby precluded from challenging the jurisdiction of the court to deal with the claim.

Pasmore v. *Oswaldtwistle Urban Council,* ([1898] A.C. 387; 78 L.T. 569), *applied.*

(ii) although W. had ceased to be employed by the local authority before the question of his rights was raised, s. 35 of the Act of 1937 applied to C him and he had no cause of action.

Decision of MORRIS, J. ([1947] 2 All E.R. 24), *affirmed.*

[AS TO PRELIMINARY POINT OF LAW, see HALSBURY, Hailsham Edn., Vol. 25, p. 251, para. 416, and Vol. 26, p. 68, para. 110; and FOR CASES, see DIGEST, Pleading, pp. 49, 50, Nos. *394-398.*

FOR THE LOCAL GOVERNMENT SUPERANNUATION ACT, 1937, see HALSBURY'S D STATUTES, Vol. 30, p. 385.]

Cases referred to:

(1) *Pasmore* v. *Oswaldtwistle Urban Council,* [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 16 Digest 302, *1150.*

(2) *Re Boaler,* [1915] 1 K.B. 21; 83 L.J.K.B. 1629; 111 L.T. 497; 78 J.P. Jo. 280; 42 Digest 605, *55.*

(3) *Chester* v. *Bateson,* [1920] 1 K.B. 829; 89 L.J.K.B. 387; 122 L.T. 684; 84 J.P. E 65; Digest Supp.

(4) *Re A Decision of a District Auditor, Dickson's Appeal,* [1947] 2 All E.R. 47; *sub nom. Dickson* v. *Hurle-Hobbs* (*District Auditor*), [1947] K.B. 879; 177 L.T. 105.

APPEAL by the plaintiff from a judgment of MORRIS, J., dated May 5, 1947, and reported [1947] 2 All E.R. 24, on a preliminary issue of law, under R.S.C., Ord. 25, r. 2, in an action by the plaintiff for a declaration that he was entitled F to receive an annual superannuation allowance under the Local Government Superannuation Act, 1937, s. 8 (1) (*a*). The defendants (the local authority) entered unconditional appearance to the writ, but they pleaded in their defence that the plaintiff had no cause of action because, under s. 35 of the Act, his only remedy against a decision of the local authority was by way of appeal to the Minister of Health. MORRIS, J., gave judgment for the defendants G and the Court of Appeal now upheld his decision. The facts appear in the judgment of ASQUITH, L.J.

Malone, K.C., and *Winn* for the plaintiff.
Harold Williams, K.C., for the defendants.

Cur. adv. vult.

Mar. 15. The following judgments were read.

H **ASQUITH, L.J.:** I am authorised by **BUCKNILL, L.J.,** to say that he concurs in this judgment.

This is an appeal by the plaintiff from a judgment of MORRIS, J., refusing him a declaration of certain rights under the Local Government Superannuation Act, 1937, against the defendant corporation. Section 8 (1) of that Act reads as follows:

> (1) Subject to the provisions of this Act, a contributory employee of an employing authority shall be entitled, on ceasing to be employed by them, to receive an annual superannuation allowance if he . . . (*a*) has completed 10 years' service and is incapable

of discharging efficiently the duties of his employment by reason of permanent ill-health or infirmity of mind or body . . .

The plaintiff entered the service of the defendants in 1934 as a park superintendent. On Dec. 17, 1945—over ten years later—he purported to resign on the ground of ill-health. On Jan. 15, 1946, the medical officer of health for Barking certified that the plaintiff was "incapable of discharging efficiently the duties of his employment by reason of permanent ill-health or infirmity of mind or body"—the formula employed in s. 8 (1) (*a*) of the Act. Meanwhile, the district auditor had investigated the plaintiff's accounts and on Mar. 6 surcharged him in respect of sums totalling £6 15*s*. 5*d*. on the ground that they had improperly not been brought into account. On Mar. 27, 1946, the defendants, ignoring the plaintiff's notice of resignation, through the town clerk wrote him a letter, the substance of which was that, after considering the accounts in the light of the audit, it had decided that he was to take one month's notice and to receive no more than a refund of his superannuation contributions without interest, instead of the full benefits to which, if s. 8 (1) (*a*) had applied without qualification, he would have been entitled. On July 31, 1946, the plaintiff issued a writ and on the same day a statement of claim claiming the following relief:

> The plaintiff claims a declaration as against the defendants that on his ceasing to be employed by the defendants on Dec. 17, 1945, and having completed 10 years' service with the defendants and being at all material times incapable of discharging efficiently the duties of his employment by reason of permanent ill-health he is entitled to receive from the defendants an annual superannuation allowance under the provisions of s. 8 (1) (*a*) of the Local Government Superannuation Act, 1937.

In the statement of claim the plaintiff claimed to have resigned on Dec. 17, 1945, and to have complied with the conditions prescribed by s. 8 (1) (*a*) as regards length of service, ill-health, etc. In the defence the defendants alleged that the plaintiff had not so resigned, but had been dismissed at a month's notice running from Mar. 27, 1946, "in consequence of an offence of a fraudulent character or of grave misconduct," and had thereby, under s. 24 of the Act, forfeited all right to an annual superannuation allowance under pt. I of the Act, of which s. 8 forms part.

This issue of fraud or no fraud has no direct bearing on the present appeal and is only relevant indirectly in its possible bearing on the date as at which the plaintiff must be taken to have ceased to be an "employee" of the defendants, whether Dec. 17, 1945, or Apr. 27, 1946, a factor which on one limb of the plaintiff's argument, is material, but, on the view I take of the case, is immaterial. The only paragraph of the defence which, in my view, requires to be considered is para. 6 which reads as follows:

> The defendants will rely on s. 35 of the Local Government Superannuation Act, 1937, and will contend that by virtue of the said section any question as to the plaintiff's right to an annual superannuation allowance under pt. I of the said Act is required to be determined by the Minister of Health and that the plaintiff has no cause of action.

Section 35 of the Act is as follows:

> Any question concerning the rights or liabilities of an employee of a local authority, or of a person claiming to be treated as such an employee, under any of the provisions of pt. I . . . of this Act, or any regulations made under this Act, shall be decided in the first instance by the authority concerned, and if the employee is dissatisfied with any such decision or with the authority's failure to come to a decision, shall be determined by the Minister, and the Minister's determination shall be final . . .

It was obvious that, if the defendants could establish para. 6 of their defence, there was an end of the plaintiff's case. It is not, therefore, surprising that on Feb. 21, 1947, an order was made by the master in chambers by consent of both parties that the issue raised in para. 6 of the defence in this action be set down for hearing and disposed of before the trial pursuant to R.S.C., Ord. 25, r. 2. The preliminary issue, accordingly, which Morris, J., had to determine was in the nature of a demurrer. He had to decide whether, if all the facts alleged in the statement of claim were proved, s. 35 would, nevertheless, apply to the claim and defeat it. The learned judge answered this question in the affirmative. The argument for the plaintiff before him, as before this court, fell into two limbs. The plaintiff contended (i) that, since the defendants had submitted to the jurisdiction of the court by entering an unconditional appearance, it was not open to them to contend that by reason of s. 35 Parliament had withdrawn claims such as the plaintiff's from the jurisdiction of the ordinary law courts by providing, as the sole means for their settlement, the machinery prescribed in s. 35—the defendants, it was argued, should have moved to set aside the writ with a conditional appearance, or, under R.S.C., Ord. 12, r. 30, without it; (ii) alternatively, that the plaintiff's claim in the present case did not fall within s. 35 because at the material time he was, not an "employee" within the opening words of the section, but an ex-employee. The learned judge pronounced against both of these contentions and I think he was right. The first can be dealt with shortly. It is, undoubtedly, good law that, where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to this remedy or this tribunal and not to others. As the House of Lords ruled in *Pasmore* v. *Oswaldtwistle Urban Council* (1), per EARL OF HALSBURY, L.C. ([1898] A.C. 394):

> The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.

Before this court the principle laid down in this passage was not seriously challenged. What was said for the plaintiff was that, even though s. 35 of the Act of 1937 deprives the ordinary law courts of jurisdiction in the case of claims or questions covered by the section, yet the defendants, by entering an unconditional appearance to the writ, had submitted to the jurisdiction of those courts and could not be heard to challenge it. One corollary of this argument, if it were sound, would be that the House of Lords decided *Pasmore* v. *Oswaldtwistle Urban Council* (1) wrongly, since there is no suggestion that an unconditional appearance was not entered in that case or that any steps were taken to set aside the writ, yet the House had no hesitation in saying to the plaintiff-appellants: "You have no remedy in the courts of law. Your only remedy is to make a complaint to the local government board." The real answer to the plaintiff's contention under this head can be put in several ways. No act of the parties can create in the courts a jurisdiction which Parliament has said shall vest, not in the courts, but exclusively in some other body, and a party cannot submit to, so as to make effective, a jurisdiction which does not exist—which is, perhaps, another way of saying the same thing. The argument we are here rejecting seems to be based on a confusion between two distinct kinds of jurisdiction. The Supreme Court may by statute lack jurisdiction to deal with a particular matter—in this case, matters including superannuation claims under s. 8 of the Act of 1937. It has, however, jurisdiction to decide whether or not it has jurisdiction to deal with such matters, and by entering an unconditional appearance, a litigant submits to the former jurisdiction (which exists), but not to the latter (which does not). We are not here concerned with irregularity in the service or issue of the writ. That raises other considerations which are here quite out of place. I think the argument for the plaintiff under this head quite impossible to sustain, and leading counsel for the plaintiff, when fairly confronted with the difficulties in his way, did not press it.

There remains the contention that the plaintiff was not at the material time an "employee" within s. 35 of the Act of 1937. An "employee" it is said, is a person who *is* employed, not a person who *was* employed, but whose employment had ceased. The material time, with reference to which "is" and "was" in the argument must be construed, must be, we were told, the time when the question of the claimant's rights is raised. Counsel for the plaintiff, in an interesting argument, urged that, if a subject was to be deprived of his normal right of access to the King's courts by statute, this could only be done by plain words and any ambiguity should be resolved in favour of a construction which left the courts open to him. He cited in support of his argument well-known passages from the judgment of SCRUTTON, J. ([1915] 1 K.B. 36) in *Re Boaler* (2) and of AVORY, J. ([1920] 1 K.B. 836) in *Chester* v. *Bateson* (3). Counsel for the plaintiff argued, indeed, that "employee" in its ordinary plain meaning was unambiguous and meant a person who is employed, not a person who *was,* but if, contrary to his contention, it were ambiguous, his client should have the benefit of such ambiguity. He pointed out that, whereas the term used in s. 8 of the Act of 1937 was " contributory employee " that in s. 35 is " employee " *simpliciter,* and that the two are separately defined, the first in s. 3, the second in s. 40. He conceded that, according to the definition of the term contained in s. 3, a person can remain a " contributory employee " after he has ceased to be actually employed—a necessary concession because, according to s. 8 (1), a " contributory employee " only becomes entitled to receive a superannuation allowance " on ceasing to be employed " by the employing authority, but he said that the same did not apply to " employee " as used in s. 35, and this for several reasons. He pointed to the use of the present tense in the definition of employee in s. 40, which is as follows :

> " employee " means an employee whether permanent or temporary, but does not include a person whose employment is of a casual nature.

He relied on the undoubted fact that pt. I of the Act confers " rights " on many persons other than " contributory employees," and argued that " employee " in s. 35 must be taken to refer to such a person only. He put in an analysis in a tabular form of all the other passages in which the term " employee " was used in the Act, in only two of which (if in any) it could, he suggested, mean an ex-employee.

These arguments, though most attractively presented, have not convinced me. I think, in the first place, that there is nothing in the separate definitions of " employee " and " contributory employee " to repel the natural assumption that the first class is a *genus* comprising the second as a species. Nor do I think that, if a " contributory employee " can continue to retain his character as such after actual employment has terminated, an " employee " cannot do the same. To hold the contrary would be to limit the operation of the machinery of s. 35 quite arbitrarily to questions concerning the rights of persons under pt. I other than those claiming superannuation allowances, which last claimants are, perhaps, the most important body of persons asserting rights under that part of the Act. Again, the result of the construction contended for would be that, if a person's employment terminated, *e.g.*, on the tenth of a month, and a question concerning his rights under pt. I of the Act arose on the ninth, when he was still in employment, he would as regards the settlement of his claim be " cribbed, cabined and confined " by the machinery of s. 35, whereas, if the question arose on the eleventh or twelfth, he would be free as air to resort to the ordinary courts of law. This seems on the face of it a senseless form of discrimination, particularly as persons claiming superannuation allowances do not generally begin to raise questions about their rights until they have been superannuated. If I do not deal in detail with the other contentions advanced under this head, it is not because they have not been carefully weighed. I am clearly of opinion that they are invalid. This is one of the increasing number of Acts in which an interested party—first the local authority, and then, on appeal, the Minister—is made judge in his own cause. It is none the less the duty of the court to construe and administer its provisions, and I feel little doubt as to its true construction. The appeal must, in my view, be dismissed.

SCOTT, L.J. : I agree with my Brethren that the appeal must be dismissed because of the provisions of s. 35 of the Act of 1937, but I feel bound for myself to draw attention to certain legal consequences of that section which become apparent on its correct interpretation, but may, as it seems to me, have escaped the attention of Parliament when passing that clause. Under it the employing local authority is made the court of first instance to decide the issue whether it is itself guilty of a breach of the claimant's right to the superannuation benefit, claimed by him under s. 8. As the Act both creates the right and confers the remedy, it follows on ordinary principles of statute interpretation that no independent right of action is created, but the remedy conferred makes it almost a contradiction in terms to call it a remedy for the breach of a right. Except for the opening words, " Subject to the provisions of this Act . . ." s. 8 purports to create an absolute right in the employee and to impose on the employing authority a duty, correlative to that right, of an equally unqualified and absolute nature to pay the superannuation allowance. The issue on a disputed claim is, therefore, one of right, not one of discretion. Section 35 is, no doubt, a "provision" within s. 8, qualifying that right, and its first provision is to subject the question of the duty to pay to the jurisdiction, not of a court, not of a lay tribunal, not even of an impartial third party, but of the debtor himself! That is barely consistent with s. 8 and almost converts its right into a mere discretionary privilege. At any rate, the local authority is made, purely and simply, "a judge in its own cause." It is true that a so-called appeal is allowed to the aggrieved employee from the decision of that far from impartial judge, but to what court? To the Minister! And the section contains no provision as to how, when or where the Minister is to decide. He would be acting with perfect legality if, on receiving from the appellant employee a notice of appeal, he asked the two parties for their written statements of their respective cases, and if, after receiving them and perhaps reading them, he wrote to each of them a letter dismissing the appeal without stating any reasons. Even if *certiorari* would lie to bring up his decision on the ground, *e.g.*, that he had not read the papers, the section provides no means by which the aggrieved applicant could interrogate the Minister on that head, or otherwise seek to find out if he had read them. It is true that [under s. 35] the Minister is given power, and may be ordered by the High Court, to state a Case, but only on a "question of law arising in those proceedings." The only issue, however, may well be, and in most cases will be, one of fact, *e.g.*, under s. 24 which was cited to us and is in these terms:

> A contributory employee who is dismissed or resigns, or otherwise ceases to hold his employment, in consequence of an offence of a fraudulent character or of grave misconduct shall forfeit all claim to any rights under this part of this Act in respect of his previous service.

Such an issue involves a question of character on which a wrong decision may ruin a man for life. On any issue of fact, *e.g.*, whether the local authority has a good defence under s. 24, there is no appeal even by Case Stated. This state of affairs is not consonant with British justice or the rule of law on which British democracy depends for its very existence.

These comments on the statute itself have a rather lurid light thrown on them by the pleadings. The action was brought for a declaration only, indorsed on the writ and repeated in the statement of claim. The only facts relevant to that claim were those sufficient to bring it within s. 8 (1) (*a*) quoted in the judgment of my Brethren. They are two:—(i) more than ten years' service from July, 1934: (ii) incapacity, as there defined, at the time when, after the expiration of the ten years, the employee's ability to do his work is thereby brought to an end. The *cessation* of capacity is the material fact. No condition is imposed by the section about notice of resignation to, or its acceptance by, the local authority. The pleadings, unfortunately, have confused the true issue. The statement of claim, para. 3, alleges a tender of resignation—a harmless but irrelevant allegation which was not "a material fact" for the purpose of R.S.C., Ord. 19, r. 4. Paragraph 4 is worse. It would have been relevant in an action for damages for wrongful dismissal, but had no place in this action. It merely confuses the issue. The defence quite properly admits the plaintiff's absence from duty from Sept. 26, 1945, onwards by reason of neurosis, but then introduces an allegation that he was dismissed on Mar. 27, 1946, as a result of a report to the district auditor for "an offence of a fraudulent character and grave misconduct" which deprived him of his right to any superannuation allowance under pt. I of the Act. The plea that the plaintiff had been surcharged by the district auditor of the Ministry of Health obviously meant that the surcharge was in connection with the alleged fraud within s. 24. This court had occasion recently in *Re A Decision of a District Auditor, Dickson's Appeal* (4) to consider certain aspects of the procedure before a district auditor in regard to a surcharge under the Local Government Act, 1933, s. 228. It does not give a surcharged person anything like the protection of an accused person in a criminal court or of a defendant in a civil court. None the less, the probability is obvious that the Minister of Health would tend to act on his district auditor's surcharge without further inquiry, especially as the superannuation claimant has no right of appearance or representation before him under s. 35 of the Local Government Superannuation Act, 1937. Almost the only really material plea in the defence is para. 6, which raises the question of demurrer—and even that fails to attribute to the Minister his proper jurisdiction under s. 35, namely that only of an appellate tribunal. But the erroneous and irrelevant pleadings in this action serve to illustrate the great danger to the real freedom before the law of all local government servants which is created by s. 35 of the Act of 1937. Wherever a charge of fraud or other "grave misconduct" is made under s. 24 against one by his employing authority, however unjustified the charge may be, the only vindication of his good name open to him is such investigation as the Minister may make, or, after he has been deprived of his superannuation allowance *on that ground*, an action in the courts for damages for wrongful dismissal, and there, presumably, the local authority could plead *res judicata* against him. I have felt bound to call attention to these aspects of the existing legislation for consideration by the appropriate authority, because they only become apparent on a critical examination of the section. In spite of these grave considerations, s. 35, I agree, compels the court to dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Hatten, Asplin, Jewers & Glenny*, Barking (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *E. R. Farr*, Town Clerk, Barking (for the defendants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

R. *v.* ROWLEY.

[Court of Criminal Appeal (Lord Goddard, C.J., Humphreys and Singleton, JJ.), March 8, 1948.]

Criminal Law—Accessory after the fact—Plea of Guilty—Principal offenders subsequently acquitted.

Where a defendant is charged with the offence of being an accessory after the fact, which involves knowledge on his part that the person he has received, comforted, etc., has committed a felony, it is improper to accept his plea of Guilty until the guilt of the alleged principal felon has been established.

[As to Accessory after the Fact, see HALSBURY, Hailsham Edn., Vol. 9, pp. 36-40, paras. 35-39; and for Cases, see DIGEST, Vol. 14, pp. 99, 100, Nos. *714-728.*]

Appeal against conviction.

The appellant, Eli Rowley, pleaded Guilty before the assistant recorder at Birmingham Quarter Sessions to a charge of assisting and comforting two other men, well knowing that they had committed the felony of receiving stolen goods, and was sentenced to 9 months' imprisonment. Subsequently, the two other men were put on their trial for receiving and were acquitted. The Court of Criminal Appeal now quashed the appellant's conviction.

Hillard for the appellant.
R. H. Blundell for the Crown.

HUMPHREYS, J., delivered the following judgment of the court. The indictment in this case shows that three persons—the appellant, George Stanley, and William Gall—were charged together at Birmingham Quarter Sessions with various offences. In the first count they were all three charged with breaking and entering the warehouse of Marvelle Ltd. and stealing 93 dresses and other things. They pleaded Not Guilty to that. The second count charged them all with receiving that property knowing it to have been stolen. They all pleaded Not Guilty to that. The fourth count charged the appellant with an offence which is stated in these terms, that he, Eli Rowley:

> . . . well knowing that George Stanley and William Gall on Dec. 6, 1947, in the city of Birmingham, had received 93 dresses, 4 blouses and 1 lady's sports suit, the property of Marvelle Ltd. knowing the same to have been stolen, did on the same day and other days afterwards receive, comfort, harbour, assist and maintain the said George Stanley and William Gall.

To that charge the appellant pleaded Guilty. The jury were then sworn to try Stanley and Gall and acquitted both of them on all the counts of the indictment. As a result, there is error on the record which cannot be cured by amendment. Writs of error are abolished and have been abolished since 1908 by the Criminal Appeal Act, 1907, but this court has the power which the Court of King's Bench used to exercise in dealing with error on the record. Where there are no means of amending the record so as to make it consonant A with the proved facts of the case and where it is inconsistent with itself, as the record is here, the only course this court can take is to quash the conviction, and that must be done in this case.

Two mistakes were made at the trial. It should be stated in all fairness to the learned assistant recorder of Birmingham that he was no party to those mistakes except in the sense that, having said what he thought was the proper course to adopt, he allowed himself to be over-reasoned by counsel for the B prosecution and counsel for the appellant and agreed to a different course. The first mistake that was made was this. It being a matter that had to be decided by the jury whether Stanley and Gall were or were not guilty of felony, it was quite wrong to allow the appellant to plead Guilty to having done something in the shape of assisting and comforting those two persons, well knowing that they had committed a felony. If the appellant had not C pleaded Guilty and the other two men had been acquitted as they were, the prosecution would have been bound to offer no evidence on this indictment against the appellant because it would be absurd to say that a man had assisted and comforted persons, knowing that they had committed a felony, when they had not committed a felony. The assistant recorder said more than once: "Had I not better wait for the prisoner to be dealt with?", and he also pointed out, and this court agrees with him, that on the statement D made to him of what were the facts it appeared that the appellant had not assisted or comforted either of the other men at all. Therefore, even if they were guilty of the felony charged, his offence, while it might have been a different offence, certainly was not that of being an accessory after the fact. All that was said, and it was said by himself, was: "Those stolen goods were, I agree, found in my van, and when they were found by the police they asked me for an explanation and I lied to them. I said my van had been stolen and E the stolen property must have been put in the van by whoever the people were who stole it. That was untrue, and I afterwards admitted it was untrue, and, in fact, I had lent my van to Stanley and Gall." The proper course would have been for the three defendants to have been tried on the indictment, together if necessary, if there was any evidence to support that course on the charge of warehousebreaking, and, in any event, tried on the count for receiving where there was ample evidence against all three.

F The next mistake was that, at the instance of counsel for the prosecution, the learned assistant recorder passed sentence then and there on the appellant without waiting for the jury to try the alleged two principal felons. The result was that the appellant was deprived of the opportunity he would have had through his counsel of asking the assistant recorder to allow him to amend his plea, to retract his plea of Guilty and to plead Not Guilty, in which case, as G I have said, the prosecution would have been bound to offer no evidence against him. He could not do that because he had been sentenced, and the assistant recorder took the view—we need not discuss whether he was right or wrong—that he had no power to deal with the matter any more. He, however, granted a certificate enabling the appellant to appeal to this court.

It is clear that the appellant's plea of Guilty was wrongly accepted, and he has been in custody in respect of an offence which he never committed and H could not have committed. Where a man is charged with the offence of being an accessory after the fact, which involves knowledge on his part that the person he has received and comforted has committed a felony, it is always improper to accept his plea of Guilty until the fact has been tried by a jury whether the other persons are felons or not, unless, of course, they also plead guilty to the felony. While they are awaiting trial and stoutly protesting their innocence, it is wrong to accept a plea of Guilty from a person who is indicted for an offence which involves his knowledge of their guilt. The same observation would in truth and in law apply to a case of conspiracy, but this was a case of accessory after the fact. The result, therefore, is that this conviction must be quashed and the appellant released.

Conviction quashed.

Solicitors: *Philip Baker & Co.*, Birmingham (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

HUXLEY *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., LTD.

[House of Lords (Lord Thankerton, Lord Porter, Lord Uthwatt, Lord du Parcq and Lord Oaksey), February 10, 12, 16, March 19, 1948.]

Workmen's Compensation—Industrial disease—Widow's claim on workman's death—Certificate by medical referee negativing scheduled disease—Conclusiveness against dependants—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 43 (1) (*f*).

In September, 1944, a workman who was employed by a colliery company in work which exposed him to contact with tar and its by-products obtained a certificate from the examining surgeon, under s. 43 (1) (i) of the Workmen's Compensation Act, 1925, that he was suffering from a disease specified in sched. III to the Act (as amended by the Workmen's Compensation Industrial Diseases (Consolidation) Order, 1929), *viz.*, epitheliomatous cancer or ulceration of the skin due to tar or its by-products. Under s. 43 (1) (*f*), on Oct. 3, 1944, the employers appealed to the medical referee who certified that, at the time of his examination by the examining surgeon, the workman was not suffering from epitheliomatous cancer due to tar or any by-product thereof, that the workman was suffering from epithelioma of the scrotum, but that he (the medical referee) was unable to obtain evidence that the condition had been caused through the workman's occupation, and that, in his opinion, it was not due to the conditions of his work. On Oct. 2, 1945, the workman died and his widow claimed compensation, as a dependant, under s. 43 (1) (iii) of the Act of 1925, on the ground that the workman had died of a scheduled disease. The employers contended that she was not entitled to compensation because, under s. 43 (1) (*f*) of the Act, the medical referee's certificate was final and conclusive that on Oct. 3, 1944, the workman was not suffering from a scheduled disease and (it was agreed) he had not acquired the disease after that date. Section 43 (1) (*f*) provides: "If an employer or a workman is aggrieved by the action of [an examining] surgeon in giving or refusing to give a certificate of disablement . . . the matter shall . . . be referred to a medical referee, whose decision shall be final, and the medical referee when deciding the matter shall also certify as to the condition of the workman at the time when he is examined by him, and such certificate by the medical referee shall be conclusive." By s. 43 (2): " . . . the date of disablement shall be such date as [the examining] surgeon certifies as the date on which the disablement commenced . . . Provided that . . . (*b*) Where a workman dies without having obtained a certificate of disablement . . . it shall be the date of death."

Held: (i) the provision in s. 43 (1) (*f*) that the medical referee's decision was to be "final" and his certificate "conclusive" applied only to proceedings between the workman and the employers and the medical referee's certificate was not binding on the dependants, and, therefore, the widow could proceed with her claim without the aid of a certificate.

Decision of the Court of Appeal (1946) (175 L.T. 446) *reversed.*

[As to Certificate of Examining Surgeon or Medical Referee, see HALSBURY, Hailsham Edn., Vol. 34, pp. 975-977, para. 1333, and p. 979, para. 1335; and for Cases, see DIGEST, Vol. 34, pp. 465-469, Nos. *3812-3834*, and Supplements.]

Cases referred to :

(1) *Blatchford* v. *Staddon and Founds,* (1927), 43 T.L.R. 424 ; 34 Digest 465, *3810.*
(2) *Dean* v. *Rubian Art Pottery, Ltd.,* [1914] 2 K.B. 213 ; 83 L.J.K.B. 799 ; 110 L.T. 594 ; 7 B.W.C.C. 209 ; 34 Digest 465, *3807.*
(3) *M'Ginn* v. *Udston Coal Co., Ltd.,* 1912 S.C. 668 ; 34 Digest 467, *g.*
(4) *Young* v. *Keeble, Ltd.,* (1928), 21 B.W.C.C. 294 ; Digest Supp.
(5) *Bedford* v. *Cowtan & Sons, Ltd.,* [1916] 1 K.B. 980 ; 85 L.J.K.B. 1066 ; 114 L.T. 861 ; 9 B.W.C.C. 208 ; 34 Digest 467, *3820.*
A (6) *Rollings* v. *Thompson,* [1922] 1 K.B. 329 ; 91 L.J.K.B. 301 ; 126 L.T. 313 ; 14 B.W.C.C. 190 ; 34 Digest 466, *3816.*
(7) *Cauldon Potteries, Ltd.* v. *Johnson,* (1926), 20 B.W.C.C. 42 ; Digest Supp.
(8) *Haylett* v. *Vigor & Co.,* [1908] 2 K.B. 837 ; 77 L.J.K.B. 1132 ; 99 L.T. 674 ; 1 B.W.C.C. 282 ; 34 Digest 464, *3802.*
(9) *Whitaker* v. *National Smelting Co., Ltd.,* (1940), 33 B.W.C.C. 161 ; 2nd Digest Supp.
(10) *Jobson* v. *Cory (W.) & Sons, Ltd.,* (1911), 4 B.W.C.C. 284 ; 34 Digest 245, *2094.*
B (11) *Manton* v. *Cantwell,* [1920] A.C. 781 ; 89 L.J.P.C. 73 ; 123 L.T. 433 ; 13 B.W.C.C. 55 ; 34 Digest 257, *2199.*
(12) *Williams* v. *Tredegar Iron & Coal Co., Ltd.,* [1948] 1 All E.R. 236.

APPEAL by the widow of a deceased workman from a decision of the Court of Appeal (TUCKER and ASQUITH, L.JJ., SCOTT, L.J., *dissenting*), dated July 31, 1946, dismissing her appeal from an award of His Honour JUDGE C ESSENHIGH, at Barnsley County Court.

The widow claimed as a dependant compensation under the Workmen's Compensation Act, 1925, on the ground that the workman's death was caused by one of the diseases specified in sched. III to the Act (as amended by the Workmen's Compensation Industrial Diseases (Consolidation) Order, 1929). The county court judge held himself bound, as a matter of law, by a medical referee's certificate that the workman was not suffering from the disease in question and D gave his award in favour of the employers, but he stated that, had he not been so bound, he would have accepted evidence which was before him and awarded in favour of the widow. The Court of Appeal upheld the award, but the House of Lords now held that a medical referee's certificate was not binding on a deceased workman's dependants. The facts appear in the opinions of LORD THANKERTON and LORD PORTER.

E *Beney, K.C.,* and *Withers Payne* for the widow.
Fenwick, K.C., and *Stanley-Price* for the employers.

The House took time for consideration.

Mar. 19. The following opinions were delivered.

LORD THANKERTON : My Lords, the appellant is the widow, and F the only dependant, of Llewellyn Thomas Huxley, who died on Oct. 2, 1945, and she claims compensation under the Workmen's Compensation Acts from the respondents, in whose employment he had been for certain periods, on the ground that his death was caused by one of the scheduled diseases. The appeal raises an important question as to the proper construction of s. 43 of the Act of 1925, and, in particular, of para. (*f*) of the modifications set out in sub-s. (1) of that section, and as to the finality or conclusiveness in regard G to a claim by a dependant of the refusal of a medical referee to give to the deceased workman a certificate of disablement and his certificate as to the condition of the workman at the time of his examination. The county court judge held that the decision and certificate were binding on the appellant, and made an award in favour of the present respondents, and, on an appeal by Stated Case, his award was affirmed by a majority of the Court of Appeal, and the appellant's appeal was dismissed.

H The scheduled disease referred to is : " Epitheliomatous cancer or ulceration of the skin due to tar, pitch, bitumen, mineral oil or paraffin, or any compound, product or residue of any of these substances." It is not disputed that the deceased workman suffered from epitheliomatous cancer or ulceration of the skin and that his death was caused thereby. The following facts also do not appear to be in dispute. The workman was employed during the years 1917 to 1932 by the respondents as a dauber in their by-products plant. He was not on the list of those employed on the tar plant, who underwent voluntary medical inspection, but the county court judge has found that he was exposed during this period to tar or pitch or any compound, product or residue of these substances. In 1932 the respondents' plant was closed down, and after a short period of unemployment, the workman was employed as a labourer at glass works from 1932 to 1940. In December, 1940, he returned to his previous employment as a dauber with the respondents and continued therein until the end of July, 1944, when he developed a boil on the scrotum and came under medical treatment. His condition having improved, he returned to his work with the respondents in January, 1945, but, after three weeks, he gave it up and took light work, at which he collapsed in April, 1945. He was not able to resume work, and died on Oct. 2, 1945. On Mar. 8, 1946, the appellant initiated the present arbitration proceedings, claiming, as a dependant, £400 compensation under the Workmen's Compensation Acts. On Sept. 11, 1944, the workman had obtained from the examining surgeon a certificate of disablement that he was suffering from the scheduled disease mentioned and was thereby disabled, in terms of s. 43 (1) (i) of the Act of 1925. The respondents appealed to the medical referee, who, on Oct. 3, 1944, refused to give a certificate of disablement in terms to which I will refer later. The county court judge has found that the workman was in contact with tar or pitch or any compound or residue thereof during his employment with the respondents during 1940 to 1944 and in January, 1945, but, as stated by him, it was conceded by the present appellant that death was not caused by any exposure to such substances after Oct. 3, 1944, the date of the medical referee's certificate. In these circumstances, the county court judge held himself bound, as matter of law, by the medical referee's certificate as final and conclusive, but stated that, if not so bound, he would have held, on the evidence, that the workman was exposed to the substance in question during 1917 to 1932, and that the scheduled disease was caused during that period.

The only question in the appeal is whether the medical referee's certificate is so binding, and its decision turns on the proper construction of s. 43 of the Act of 1925, and, in particular, of modification (*f*) of sub-s. (1). It will be convenient to quote s. 43 (1) and (2), which provide as follows:

43. (1) Where (i) the [examining] surgeon* appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in sched. III to this Act and is thereby disabled from earning full wages at the work at which he was employed; or (ii) a workman is, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, suspended from his usual employment on account of having contracted any such disease; or (iii) the death of a workman is caused by any such disease; and the disease is due to the nature of any employment in which the workman was employed at any time within the 12 months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—(*a*) The disablement or suspension shall be treated as the happening of the accident; (*b*) If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable; (*c*) The compensation shall be recoverable from the employer who last employed the workman during the said 12 months in the employment to the nature of which the disease was due: Provided that—(i) the workman or his dependants if so required shall furnish that employer with such information as to the names and addresses of all the other employers who employed him in the employment during the said 12 months as he or they may possess, and, if such information is not furnished, or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer upon proving that the disease was not contracted whilst the workman was in his employment shall not be liable to pay compensation; and (ii) if that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer, and not whilst in his employment, he may join such other employer as a party to the arbitration, and if the allegation is proved that other employer shall be the employer from whom the compensation is to be recoverable; and (iii) if the disease

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*In the Act of 1925 the words "certifying surgeon" are used, but by s. 126 (9) of the Factories Act, 1937, references in the Act of 1925 to a "certifying surgeon" are to be construed as "references to an examining surgeon appointed under this section."

> is of such a nature as to be contracted by a gradual process, any other employers who during the said 12 months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation, or, if the amount of compensation is not in dispute, as may be determined by arbitration under this Act. (*d*) The amount of the compensation shall be calculated with reference to the earnings of the workman under the employer from whom the compensation is recoverable ; (*e*) The employer to whom notice of the death, disablement or suspension is to be given shall be the employer who last employed the workman during the said 12 months in the employment to the nature of which the disease was due, and the notice may be given notwithstanding that the workman has voluntarily left his employment ; (*f*) If an employer or a workman is aggrieved by the action of [an examining] or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final, and the medical referee when deciding the matter shall also certify as to the condition of the workman at the time when he is examined by him, and such certificate by the medical referee shall be conclusive. (2) For the purposes of this section the date of disablement shall be such date as the [examining] surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given : Provided that—(*a*) Where the medical referee allows an appeal against a refusal by [an examining] surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine : (*b*) Where a workman dies without having obtained a certificate of disablement, or is at the time of death not in receipt of a weekly payment on account of disablement, it shall be the date of death.

My Lords, before proceeding to a close examination of these provisions, certain preliminary observations may be made. In the first place, it was conceded on behalf of the respondents—rightly, in my opinion—that the provisions of s. 48 (3) whereby, in the case of a dead workman, any reference to a workman shall include a reference *inter alia* to his dependants, does not apply to this section. Secondly, it is necessary to note the distinction between the phrase "the disease is due to the nature of any employment" and the phrase "the disease was in fact contracted whilst the workman was in the employment" of an employer : see *Blatchford* v. *Staddon and Founds* (1) *per* Viscount Sumner ([1927] A.C. 470-472). In refusing to accept the view expressed in *Dean* v. *Rubian Art Pottery, Ltd.* (2) Viscount Sumner said (*ibid.*, 471, 472), with reference to s. 8 of the Act of 1906 :

> The crucial error in the judgments in *Dean's* case (2) may be found in the view, that the nature of the employment mentioned in sub-s. (2) [now s. 44 (1) of the Act of 1925] means the nature of the particular employment with the respondents, and that proof that the disease was not in any degree due to the nature of the employment under the respondent, means not caused or produced in his employment.

Thirdly, it is important to observe the particular subjects of inquiry by the examining surgeon and the medical referee for the purposes of sub-s. (1) of s. 43, and the independent subject-matter of sub-s. (2). Lastly, I do not propose to consider the case of suspension under s. 43 (1) (ii), as the special rules or regulations made under the Factory and Workshop Act, 1901, are referred to for the method and grounds of suspension, and neither a certificate nor its subject-matter is expressly prescribed under s. 43 (1) (ii), which distinguishes it from the certificate of disablement under s. 43 (1) (i), with which we are here concerned.

Turning to s. 43 (1), it is at once obvious that the conditions precedent to the right of compensation thereby conferred are, in the first instance, quite different in the case of the workman and in the case of his dependants. In the case of the workman, he cannot proceed until he has obtained a certificate of disablement ; on the other hand, the dependants have no such proceeding available to them, but must prove that the workman's death was caused by a scheduled disease. It necessarily follows—as was conceded by the respondents—that the procedure of appeal under modification (*f*) is equally unavailable either to or against the dependants. The remaining condition precedent clearly requires proof alike in the case of the workman or the dependants that the disease was :

> . . . due to the nature of any employment in which the workman was employed at any time within the 12 months previous to the date of the disablement . . .

In the case of the dependants, this essential condition precedent is in addition to proof that the workman's death was caused by the scheduled disease. A consideration of the statutory subject-matter of a certificate of disablement by the examining surgeon or by the medical referee will show that this additional condition precedent is not covered by them, and must equally be established by the workman as a fact. As regards the examining surgeon, he is to certify that the workman is suffering from a scheduled disease and is thereby disabled, which clearly does not include any certificate that the disease was due to the nature of his employment. This certificate relates to the state of matters at the time of the certificate. The subject-matter of the medical referee's certificate is the same, with an express addition prescribed in modification (*f*). He is also to certify as to the condition of the workman at the time when he is examined by him. This clearly relates to an objective examination of the workman and a certificate of his condition as derived from such examination. It equally does not include a certificate as to whether the disease was due to the nature of his employment.

Coming to the modifications, the first five, (*a*) to (*e*), clearly relate to claims either by the workman or his dependants, and afford no assistance in the construction of (*f*), with which we are immediately concerned. In the present case the examining surgeon gave a certificate of disablement, and, on appeal, the medical referee allowed the appeal against the action of the examining surgeon, and certified as to the then condition of the workman in the following terms :

> I find that the said Llewellyn Thomas Huxley was not, at the time of his examination by the certifying surgeon, suffering from epitheliomatous cancer or ulceration of the skin due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound, product or residue of any of these substances. And I hereby certify that the present condition of the workman as ascertained by my examination is as follows : The said Llewellyn Thomas Huxley is suffering from an epithelioma of the scrotum, but after most careful investigation and consideration I am unable to obtain evidence that the condition has been caused through his occupation, and am of the opinion that the epithelioma is not in any respect due to the conditions of his work. Dated Oct. 3, 1944. (sgd.) Harold F. Horne, Medical Referee.

The certificate as to the condition of the workman appears, in its latter part, to certify that it was not due to the nature of the work in which he was employed, and, to this extent, I am of opinion that the medical referee exceeded the subject-matter of the reference prescribed by the statute, and should be disregarded. But we are concerned with the proposition that the medical referee's findings are binding on the dependants.

Authority is not required to establish that the right of dependants to compensation under the Workmen's Compensation Acts is an independent right and is in no way derived from the workman. As already mentioned, it was conceded, rightly, that the dependants could not be parties to any proceedings under modification (*f*). This must be so, for these proceedings contemplate the examination of a live workman, and the right of compensation is given to those who are dependants at the time of his death. Nevertheless, it is maintained that the dependants, who are admittedly not mentioned, are bound by these proceedings. No authority in favour of this contention has been produced and it has to be derived from the terms of modification (*f*) itself, which I will now consider. This modification falls into two parts, the first part dealing with the medical referee's decision to give or refuse a certificate, which is declared to be final. In my opinion, this merely provides that there is to be no further appeal, and such further appeal could only have been taken by the parties to the proceedings, namely, the employer or the workman. It can have no reference to the dependants. The second part relates to the then condition of the workman, which is to be conclusive. I can only read this as referring to the same parties. I am quite unable, in the absence of express provision, to read it as applying to the quite separate proceedings by the dependants, based on an independent right. I will add these further observations :—First, that the present provision is in contrast to the provisions of s. 19, under sub-s. (3) of which the medical referee's certificate as to the condition of the workman and his fitness for employment is to be " conclusive evidence as to the matters so certified," and under sub-s. (4) of which it is expressly provided that, on the question whether or to what extent the incapacity of the workman is due to the accident, the provisions of the section are to apply as if the question were a question as to the condition of the workman. There is no such statutory extension of the word "condition" in s. 43. In the second place, it was suggested that sub-s. (2) of s. 43 had some bearing on the present question. In my opinion, it has none. It deals with a separate matter, the date of disablement for the purpose of fixing the period of twelve months previous thereto, during which the workman has been employed in employment to the nature of which the disease is due. The certificate under sub-s. (2) fixes a statutory date, and is not a certificate under sub-s. (1). I will further add that the statutory presumption of fact provided by s. 44 (1), so far as it goes, negatives the suggestion that the certificates under s. 43 are final and conclusive as to whether the disease is due to the nature of the employment: see *M'Ginn* v. *Udston Coal Co., Ltd.* (3) *per* the LORD PRESIDENT (LORD DUNEDIN) (1912 S.C. 673) as to the corresponding provision under s. 8 (2) of the Act of 1906.

A number of cases were cited to us, which dealt with the finality or conclusiveness of certificates in questions between the workman and his employers. In my opinion, these cases are irrelevant to the question in this appeal, and I am not considering or expressing any opinion on them. There is a marked lack of authority on the present question, and I need only deal with two cases, which involved claims by dependants, the first being *Young* v. *Keeble, Ltd.* (4). The deceased workman had obtained a certificate of disablement from the medical referee, but the county court judge had evidence, which he accepted, that the workman's death was not due to the scheduled disease, and refused an award. On appeal, it was maintained for the dependants that the county court judge, in view of the conclusiveness of the medical referee's certificate, misdirected himself in taking the evidence into consideration. It was held that, while the certificate was conclusive as to the disablement at the time it was given, evidence as to the cause of the workman's death was relevant and was not inconsistent with the certificate, which related to an earlier date. It does not appear from the report that any argument was submitted that the certificate did not bind the dependants, and, on the facts, the result of the case would have been no different if such a contention had been made and accepted, but two of the judges expressly stated that the certificate was binding on the dependants, and the opinion of the third judge would also appear to involve that assumption. LORD HANWORTH, M.R., and SANKEY, L.J., both refer to the same four cases as authority for their opinion, but none of these cases gives support to their opinion. Three of them, *viz.*, *Bedford* v. *Cowtan & Sons, Ltd.* (5), *Rollings* v. *Thompson* (6) and *Cauldon Potteries, Ltd.* v. *Johnson* (7), raised questions between employer and workman, and they in no way touch on the present question. The fourth case, *Haylett* v. *Vigor & Co.* (8) related to a claim by dependants, but throughout the report I am unable to find any mention of a certificate or its conclusiveness. The other case to which I need to refer, *Whitaker* v. *National Smelting Co., Ltd.* (9) was a claim by dependants, and is the subject of a quotation from the opinion of SLESSER, L.J., made by TUCKER, L.J., in the present case. It is, perhaps, enough to say that the opinion of SLESSER, L.J., is quite inconsistent with the opinion I have already expressed, and I am unable to accept it as a correct statement.

My Lords, in view of the opinion I have expressed, I find myself in agreement with the dissenting opinion of SCOTT, L.J., on s. 43 (1), when he said (175 L.T. 447):

> . . . the Act does not in death cases make the certification machinery any part of the statutory "right of action," as we may metaphorically call the right of compensation; nor does it impose any condition about medical certificates on the dependants' right of compensation for death of the workman by a scheduled disease. Had Parliament intended to make the certificate, whether of the examining surgeon or the medical referee, a condition of the dependants' right to compensation, it would have been so easy to say so in s. 43 (1) (iii)—the appropriate place for it; but it is not there. As it is absent from the enactment which creates the right, I feel unable to imply it in the procedural parts of the section which follow.

With all respect to the learned judge, it appears that TUCKER, L.J., has failed to appreciate the difference between the subject-matter of sub-s. (2) and the subject-matter of the certificates under sub-s. (1), to which I have already referred. The latter relates to the existence of the scheduled disease at the time of examination; the former relates to the date of commencement of the disease. This confusion of the learned judge would seem to be the explanation of his statement (175 L.T. 448):

> Where . . . there is in existence a certificate of a medical referee, proviso (*b*) to s. 43 (2) has no application, and, in my view, the employer is entitled to rely on the certificate as conclusive of the non-existence of the industrial disease as at the date specified therein.

It surely is clear that proviso (*b*) to s. 43 (2) comes into operation unless there is a certificate of disablement either by the examining surgeon, there being no appeal or the appeal having been refused, or by the medical referee reversing a refusal by the examining surgeon and giving a certificate of disablement. There is no reference to the case where the medical referee reverses the examining surgeon's grant of a certificate and declines to give a certificate, as in the present case. It follows that proviso (*b*) to s. 43 (2) operates. Asquith, L.J., falls into the same error. He says (*ibid.*):

> For instance, if in such a case a valid certificate by the examining surgeon exists, it is undoubtedly relevant and conclusive as to the date of disablement. I cannot see why it should be less so as to the nature of the disease, or, indeed, why a medical referee's certificate negativing a scheduled disease should be less conclusive than one affirming such a disease.

The reason why, as I have endeavoured to point out, is that s. 43 (2) omits any reference to such a case, except in so far as proviso (*b*) expressly contemplates the case where the workman has failed to obtain a certificate from the medical referee.

I am of opinion, accordingly, that the appeal should be allowed, that the order of the Court of Appeal should be reversed and that the appellant should have an award of compensation for the agreed amount of £400. The respondents should pay the appellant's costs here and below.

LORD PORTER: My Lords, this appeal is brought by the widow of Llewellyn Thomas Huxley for compensation under the Workmen's Compensation Acts. She claims as a dependant, as admittedly she is. Her husband had been employed by the respondents as a dauber during 1917 to 1932. This work, as the county court judge found, exposed him to contact with tar and its by-products. Between 1932 and 1940 he was employed elsewhere, but in the latter year he returned to his former occupation with the respondents and continued in that employment until July, 1944, when on medical advice he ceased work and received hospital treatment. On Sept. 11, 1944, the authorised examining surgeon, in pursuance of s. 43 (1) of the Workmen's Compensation Act, 1925, certified that he was suffering from "epitheliomatous cancer . . . due to tar . . . or" a product thereof and on Sept. 18 verbal notice of disablement was given by him to the respondents. On Sept. 21 the respondents applied for the matter to be referred to the medical referee and on Sept. 21 the medical referee decided that Mr. Huxley was not at the time of his examination by the certifying surgeon suffering from "epitheliomatous cancer . . . due to tar . . . or any" by-product thereof, and went on to certify that his present condition was as follows:

> The said L. T. Huxley is suffering from an epithelioma of the scrotum, but after most careful investigation and consideration I am unable to obtain evidence that the condition has been caused through his occupation, and am of opinion that the epithelioma is not in any respect due to the conditions of his work.

After this decision had been given, the workman's condition improved and in January, 1945, he returned to work as a dauber for three weeks, but his illness then recurred and, though he undertook light work between January and April, he ultimately died on Oct. 2, 1945. No compensation under the Workmen's Compensation Acts had been paid to him by the respondents, prior to his death, in respect of the industrial disease alleged.

After his death the appellant filed a request for arbitration, alleging that her husband's death was caused by the disease certified by the certifying surgeon and the arbitration was heard on Apr. 12, 1946. In that arbitration the appellant alleged that her husband's death was caused by the certifiable disease alleged, that it was due to the nature of his employment as a by-product plant-worker, that he was last so employed in such employment within twelve months previous to his death by the respondents and gave as particulars :

(3) that the disease was due to his employment as by-product plant worker,
(4) that the disease was epitheliomatous cancer . . . due to tar . . . or a compound product or residue thereof,
(5) that the death took place on Oct. 2, 1945.

The respondents denied that Mr. Huxley's death was so caused and denied the particulars set out above. Before your Lordships it was not denied that he had worked as a by-product plant-worker or that the death took place on Oct. 2, 1945. The county court judge had found both facts in favour of the appellant. On those and the other matters in dispute, evidence was called at the arbitration and the judge in his judgment said that on the evidence he would have found that the deceased man was exposed to tar or pitch or any compound, etc., of these substances during the period he worked for the respondents from 1917 to 1932 but that the medical referee's certificate was final and conclusive and as a matter of law he was bound by it. He further found that the workman was in contact with tar or its by-products during his work for the respondents from 1940 to 1944 and in January, 1945, but that the workman's death was not caused by any exposure to these materials since the date of the medical referee's decision.

In these circumstances it was common ground that the sole question for your Lordships' determination was whether the medical referee's decision and certificate was final and conclusive or whether the appellant was entitled to take advantage of the county court judge's view that Mr. Huxley died of a certifiable disease. The answer to this question depends on the true construction of s. 43 of the Workmen's Compensation Act, 1925, and the material portions of that section have already been set out.

My Lords, I should myself *prima facie*, at any rate, read the first sub-section as indicating three separate circumstances in which compensation is recoverable in respect of a disease specified in sched. III to the Act. These circumstances are : (i) where the workman gets and holds a certificate ; (ii) where he is suspended under the provisions of rules or regulations made under the Factory and Workshops Act ; and (iii) where he dies of the disease. The disease in respect of which the claim is made must also be due to the nature of the employment in which the workman was employed at any time within twelve months of the disablement. At the outset consideration of two of these matters may be ruled out. No question of suspension or the grounds on which a workman may be suspended come in question and it is conceded and, indeed, has been determined in your Lordships' House in *Blatchford* v. *Staddon and Founds* (1) that the disease need not have occurred by reason of any exposure during the twelve months preceding the disability. It is enough that the nature of the work on which he was engaged during that period exposed him to infection, even though the disease was actually acquired at an earlier date.

There remains the question whether a decision and certificate of the medical referee that a workman was not suffering from a specified disease at a given date coupled with the admission that, though exposed to it, he did not acquire the disease afterwards, is final and conclusive against the workman himself and against his dependants. My Lords, in my view, the question whether such a certificate is conclusive against the workman himself does not come in issue in this case and I desire to reserve my decision of that point until it directly arises inasmuch as, in my opinion, the dependants are not bound by the finding.

So far as concerns an accident in the ordinary sense of that expression, the matter is concluded by authority. An early example of this principle is to be found in *Jobson* v. *W. Cory & Sons, Ltd.* (10), a decision of the Court of Appeal, but, so far as I am aware, this decision, which was approved in this House in *Manton* v. *Cantwell* (11), is not now disputed and it was accepted in argument in this case. It is said, however, that this principle has no application in the case of an industrial disease. That incident, it is contended, is governed by a special scheme which is embodied in ss. 43 and 44 of the Act which alone prescribe the right of recovery. My Lords, let me accept the assertion and deal with the circumstances on that basis, prefacing what I have to say, however, by pointing out that it is admitted by the respondents and is indisputable, having regard to s. 43 (2) (*b*), that, if no certificate has been obtained by the workman, his dependants can recover, though in that case the date of disablement shall be the date of death. The appellant relies on this fact and alleges that in this case her husband had died without obtaining a certificate, inasmuch as the medical referee's finding by reversing the examining surgeon's certificate had made it of no effect and caused it to be a nullity. If this be so, of course, the respondents' defence is at an end, but the respondents answer that the effect of the medical referee's decision is not merely to destroy the efficacy of the original certificate but to substitute for it a negative finding which is still a decision and certificate and, as such, final and conclusive of the appellant's claim, because it is binding not only on the workman but upon his dependants also.

No doubt, a living workman cannot recover without producing a certificate of disability or suspension, and has no claim unless he does so, however manifest it is that he is suffering from the scheduled disease. But this result follows only because in the case of an industrial disease the Act, in s. 43 (1) (i), gives a right of recovery in the three circumstances mentioned and in no others. While the workman is alive, therefore, one of the two specified certificates must be produced, but in case of death no such condition precedent is required. It is said, however, that the whole of the paras. (*a*) to (*f*) [of the modifications to s. 43 (1)] are *in pari materia*, that paras. (*a*) to (*e*) apply whether the workman be living or dead and para. (*f*) must do so, too. My Lords, no doubt para. (*a*) does apply to both cases since any right of recovery by anyone in respect of an industrial disease depends upon its provisions. No doubt, also, where in the other paragraphs the word "compensation" is found it must be applied to all compensation whether payable to workman or dependants, but those provisions deal only with *quantum*, not with liability. The other provisions contained in paras. (*a*) to (*e*) are directed to the rights of employers *inter se* and to the giving of notices and it is instructive to observe that in the first proviso to para. (*c*), where a duty is imposed on dependants, they are specifically mentioned by name. It is true that by s. 48 (3) it is enacted that any reference to a workman who has been injured shall, where the workman is dead, include a reference to "his dependants," but this provision is preceded by the qualification that this result is reached only "unless the context otherwise requires." Where, therefore, s. 43 (1) (*f*) begins with the words: "If an employer or a workman is aggrieved by the action" of an examining surgeon, the context does otherwise require, since it is the workman only, not his dependants, who can be aggrieved—they have no right of reference to the medical referee, nor have they then or at any time any claim or opportunity to take part in the proceedings before the surgeon or referee. Indeed, their constitution is not and cannot be known before the workman's death. Having regard to the recognised principles on which matters are held to be *res judicata*, it would be odd if in a matter totally outside their interference they should be held to be conclusively bound.

Similarly, it was contended that s. 43 (2) applied to workman and dependants alike and was an indication that the whole section applied to both. It is true, of course, that sub-s. (2) may play a part in a case where the workman has subsequently died, but its purpose is a limited one, *viz.*, to determine the date at which the disablement took place. It in no way widens the scope or effect of sub-s. (1) (*f*).

With all respect to the contrary view, to me the provisions of the section are plain. A certificate is required provided the workman has not died: it is part of his necessary proof whilst he is alive. But once he is dead examination of his physical state of health, which is prescribed by the Act as a necessary prelude to the issue of a certificate, is impossible. In that case no certificate is required, and the requisite proof can be furnished *aliunde* by dependants whose rights are separate and independent of his.

I should allow the appeal.

LORD UTHWATT: My Lords, the question at issue in this case is whether, as is contended by the respondents, dependants of a workman, suing for compensation under s. 43 of the Workmen's Compensation Act, 1925, are bound by a decision and certificate of a medical referee given in proceedings between the workman and his employer, which negatived the fact that at a particular date the workman was suffering from a scheduled disease. The Court of Appeal by a majority held that dependants were so bound. I find myself unable to agree with the reasoning by which this conclusion was reached. That reasoning hinges on the necessity of the dependants in many cases resorting to the certificate of an examining surgeon or the decision of a medical referee for fixing the date of disablement.

The date of disablement plays an important part in s. 43 of the Workmen's Compensation Act, 1925. Cases of suspension apart, the date of disablement enters into every claim for compensation under that section, and it is not surprising that the term "date of disablement" is used in that section as a A term of art. It is precisely defined in sub-s. (2). Under that sub-section the relevant date of disablement for the purpose of any claim can be found only in some certificate of an examining surgeon, decision of a medical referee, or the date of death. Such a certificate can be obtained only in proceedings taken under sub-s. (1) (i) of s. 43 and such a decision can be obtained only under the procedure laid down in para. (*f*) of the modifications to s. 43 (1). A fact B certified in proceedings between the employer and workman is by sub-s. (2) alone given statutory effect for all purposes as part of the machinery of the section. Sub-section (2), be it observed, gives to a certificate of an examining surgeon (except of course when displaced by the decision of a medical referee) exactly the same consequence in fixing a date of disablement as a decision of the medical referee. Nothing for the purposes of this sub-section turns on the circumstance that para. (*f*) in sub-s. (1) makes the decision of a medical referee C final and his certificate conclusive. Lastly, there is nothing in sub-s. (2) to bring into operation, or to give statutory effect to, the certificate or decision as regards other matters therein dealt with, and obviously there is nothing in the sub-section which gives any statutory effect to a certificate or decision negativing the fact of disablement. I fail to see in these circumstances how the necessity of relying in certain cases on a certificate or decision for establishing a date of disablement can affect the construction of para. (*f*) of sub-s. (1).

D Turning now to that proviso, certain matters relevant in construing it are beyond dispute and may conveniently be catalogued. (i) The claim of the dependants, though based on the conduct and sufferings of the workman, is not a claim made under the workman. Dependants claim in their own right directly under the statute. (ii) Dependants as such cannot be interested in any part of the compensation payable to a workman during his lifetime. E (iii) Dependants cannot be ascertained until the death of the workman. (iv) A matter can come before a medical referee only where either "an employer or a workman is aggrieved by the action" of an examining surgeon in a matter falling within sub-s. (1) (i) or (ii) of s. 43.

It follows from this that dependants of a workman, though comprehended normally within the meaning of the word "workman" (see s. 48 (3)), cannot fall within the description "a workman . . . aggrieved by the action" of F an examining surgeon appearing in the opening part of para. (*f*) of s. 43 (1) and that the dispute before the medical referee is never anything else but a dispute between the employer and his workman on a matter with which they alone are then concerned. The medical referee's decision on the matter before him, so far as that decision relates to matters falling within his province: see *Williams* v. *Tredegar Iron and Coal Co., Ltd.* (12); is final and his certificate as to the condition of the workman at the time of his examination is conclusive. G It is clear to my mind that the words "final" and "conclusive" cannot go further than meaning "final" and "conclusive" between the employer and the workman. Finality and conclusiveness on the matters to which the medical referee's decision and certificate properly relate obtain in the particular dispute then in issue and, it may be—I have not formed any opinion one way or another on the point—in other disputes between the employer and the workman. But H it is not necessary for the scheme of the section to attribute finality and conclusiveness on those matters as respects dependants, and it would be against all sound principles of construction to extend the ambit of the words "final" and "conclusive" so that an unascertained class should be bound by a decision or certificate given in a dispute in which their rights are not in issue, in which they are not and cannot be represented, and in the result of which they have no financial concern. I would allow the appeal.

LORD DU PARCQ : My Lords, I concur in the opinions of those of your Lordships who have preceded me. My noble and learned friend, LORD OAKSEY, who is unable to be present today, has prepared an opinion which I will now read and which concisely expresses my own views.

LORD OAKSEY [read by Lord du Parcq]: My Lords, I agree. The only question to be decided in this appeal is whether the dependants of a deceased workman are bound by the certificate of a medical referee under s. 43 (1) (*f*) of the Workmen's Compensation Act, 1925, certifying that the workman was not at the time of the certificate suffering from a disease mentioned in sched. III to the Act. In my opinion, such a certificate is not binding on the dependants whose rights only come into existence by virtue of s. 4 of the Act on the death of the workman and who can have, therefore, no *locus standi* before the medical referee or before the examining surgeon from whose decision the matter has been referred to the medical referee. The Act does not make it necessary for the dependants to procure any certificate before prosecuting their claim. Indeed, s. 43 (2) (*b*) makes it clear that, where no certificate of disablement has been obtained, the date of disablement is the date of death, and, if the dependants can then prove that the death was caused by a disease mentioned in sched. III and was due to the nature of any employment in which the workman had been employed during twelve months before the death, the claim is complete against the workman's last employer, subject to s. 43 (1) (*b*), without any certificate. I cannot agree with Tucker, L.J., when he says (175 L.T. 448) that where, as here, there is in existence a certificate of a medical referee, s. 43 (2) (*b*) has no application. In my opinion, it is clear that the certificate in the present case was not a certificate of disablement within the meaning of s. 43 (2) (*b*) which sub-section, therefore, applied and Tucker, L.J., agrees (*ibid.*) that, if s. 43 (2) (*b*) does apply, "the dependants can make good their claim without the aid of any certificate." I agree, therefore, with the motion proposed.

Appeal allowed with costs here and in the court below.

Solicitors: *Corbin, Greener & Cook,* agents for *Raley & Sons,* Barnsley (for the widow); *Johnson, Weatherall & Sturt,* agents for *Parker Rhodes, Cockburn & Co.,* Rotherham (for the employers).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Approved. Williams *v.* Sharpe. [1949] 2 All E.R. 102.

Re BLANDY-JENKINS (*deceased*), BLANDY-JENKINS *v.* PUBLIC TRUSTEE.

[Chancery Division (Jenkins, J.), February 12, 13, March 3, 1948.]

Coal Mine—Compensation—Disposal as between beneficial interests under settlement—Will directing accumulation of rents and royalties—Coal Act, 1938 (c. 52), *sched.* III, *pt.* IV, *para.* 21 (2), (6).

A testator, who died on Nov. 4, 1915, by his will gave his residuary real and personal estate to the Public Trustee on trusts of the usual character for sale and conversion and to hold the net residue on trust to pay certain annuities and subject thereto: (i) to pay the income to his widow during widowhood; (ii) thereafter to divide the corpus into three equal shares, one of which was to be appropriated to each of the testator's three daughters and held on trust to pay the income to that daughter for life and after her death on trust for the issue of such daughter as she should by deed or will appoint and in default of such appointment on trust for the children or child of such daughter who being male should attain the age of 21 years or being female attain that age or marry, with a provision for accruer to the shares of the other daughters in the event of the failure of these trusts. The will further provided that the trustees should have power to postpone the sale and to manage unsold hereditaments, and: "20. During the period of 20 years after my death all surface rents and fixed or minimum rents payable under any mining lease or agreement for mining lease granted before or after my death shall be applicable as income but with this exception. All rents (including wayleave rents) and royalties payable under any such lease or agreement shall be treated and applicable as capital moneys and after the expiration of such period of 20 years all rent within the meaning of the Settled Land Act, 1882, s. 11, shall be treated and applicable in the manner directed by that section in cases where the tenant for life is impeachable for waste. 21. Subject as hereinbefore expressly provided all the net rents profits and income arising from my estate real or personal until the sale calling in and conversion thereof . . . shall for all the purposes of this my will . . . be applied as if the same were income arising from the proceeds of such sale calling in or conversion . . . no part thereof being liable to be retained as capital . . ." The provision in cl. 20 with regard to the Settled Land Act, 1882, s. 11 (now replaced by s. 47 of the Settled Land Act, 1925) was tantamount to a direction that after the expiration of 20 years from the death of the testator, three fourths of all rent received under mining leases was to be set aside as capital money. The validity of this provision in respect of any period after the expiration of 21 years from the date of the testator's death was assumed. After the expiration of 20 years from the death the question arose as to the disposal of (*a*) the sum of £229,714 received under the Coal Act, 1938, as compensation for the compulsory acquisition of certain freehold interests in coal which formed part of the residuary estate, and (*b*) the income of such compensation, including £6,025 received under s. 7 (8) of the Act for interest thereon from the vesting date (July 1, 1942) until payment.

HELD : (i) the compulsory character of the acquisition under the Act of 1938 did not alter the fact that the compensation was capital and the income of it was income for the purposes of the trusts of the will, save in so far as such capital and income might be impressed with some different character by virtue of the Act.

(ii) paragraph 21 (2) of pt. IV of sched. III to the Act, which was the only provision of the Act which could bestow such a different character, could not be relied on as the result contended for (*i.e.*, the setting aside of income of the compensation as capital on the strength of cl. 20 of the will) would then be achieved only by virtue of para. 21 (2), which was the very thing that proviso (ii) to that sub-paragraph prohibited, and, similarly, the provisions in para. 21 (2) as to accumulation and as to giving the beneficiaries "the like benefit" were of no avail to those interested in the capital for those provisions also were subject to proviso (ii).

(iii) paragraph 21 (6) of pt. IV of the schedule, which was designed merely to deal with cases not specifically dealt with in the preceding provisions of para. 21, was expressly made subject, *inter alia*, to para. 21 (2).

(iv) in the application of para. 21 (2) to cl. 20 of the will, therefore, the effect attributable to cl. 20 must not involve the setting aside of any part of the income of the compensation as capital, but must be limited to the "capital supplement" (if any) in each year.

(v) effect should be given to the Settled Land Act, 1925, s. 47, as incorporated (in substitution for the Settled Land Act, 1882, s. 11) in cl. 20 of the will and to the extent permitted by proviso (ii) to para. 21 (2) by setting aside as capital out of each year's "abated royalty equivalent" three fourths of such "abated royalty equivalent" or the amount of the "capital supplement" for that year, whichever was the less, the amount to be so set aside in years in which there was no "capital supplement" being nil.

Re Duke of Leeds' Will Trusts, Leeds (*Duke*) v. *Davenport* ([1947] 2 All E.R. 200 ; 177 L.T. 506), *applied and followed.*

Per cur. : Even if the relevant provision of cl. 20 of the will had been framed in terms in themselves apt to include the income of the compensation, the provision in question, having regard to the date of the testator's death, could have no valid application to such income, except by virtue of some statutory dispensation to be found, if anywhere, in para. 21 (2), from the ordinary restrictions on the accumulation of income imposed by the Law of Property Act, 1925, s. 164, so that any setting aside of income of the compensation as capital on the strength of the provision in question could only have been by virtue of para. 21 (2), and, therefore, prohibited by proviso (ii).

[AS TO METHOD OF DISTRIBUTION OF COMPENSATION ON COMPULSORY PURCHASE, see HALSBURY, Hailsham Edn., Vol. 6, pp. 153, 154, para. 174 ; and FOR CASES, see DIGEST, Vol. 11, pp. 247, 248, Nos. *1464-1503*.]

Case referred to:

(1) *Re Duke of Leeds' Will Trusts, Leeds (Duke)* v. *Davenport and Others,* [1947] 2 All E.R. 200; [1947] Ch. 525; [1947] L.J.R. 1141; 177 L.T. 506.

ADJOURNED SUMMONS to determine whether on the true construction of a will and of the Coal Act, 1938, sched. III, pt. IV, para. 21, the present tenant for life under the trusts of the will was entitled to the whole of the income of the compensation moneys received by the Public Trustee (who was the sole trustee under the will) under the provisions of the Act in respect of the trust estate of the testator. The court held that no part of the income of the compensation should be set aside as capital, and that, in conformity with the trusts of the will, three fourths of the "abated royalty equivalent" or the amount of the "capital supplement" for each year, whichever were the less, should be set aside as capital. The term "abated royalty equivalent" was applied by JENKINS, J., in *Re Duke of Leeds' Will Trust* ([1947] 2 All E.R. 200) to the amount arrived at by so abating the estimated royalty income in each year that the total capital and income of the compensation would exactly suffice to provide in each year the appropriate abated amount. The "capital supplement" was the excess, if any, of the abated royalty equivalent for any year over the income of the compensation for that year.

Sir Andrew Clark, K.C., and *T. A. C. Burgess* for the tenant for life.

Wilfrid M. Hunt for the Public Trustee.

J. H. Lazarus; Gerald Upjohn, K.C., and *J. V. Nesbitt* for beneficiaries under the will.

C. A. J. Bonner for the National Coal Board. *Cur. adv. vult.*

Mar. 3. **JENKINS, J.,** read the following judgment. This case concerns the disposal, as between the successive beneficial interests in the residuary trust estate of the testator, John Blandy-Jenkins deceased, of:—(i) the sum of £229,714 0*s.* 8*d.*, received under the provisions of the Coal Act, 1938, as compensation for the compulsory acquisition of certain freehold interests in coal which formed part of such residuary trust estate; and (ii) the income of such compensation, including a sum of £6,025 13*s.* 8*d.* received under s. 7 (8) of the Act for interest thereon or on the unpaid part thereof for the time being from the vesting date (July 1, 1942) until payment.

The testator died on Nov. 4, 1915, and his will, dated June 8, 1912, with two codicils thereto, dated respectively July 21, 1913, and Mar. 12, 1915, were duly proved on Apr. 7, 1916, by the defendant, the Public Trustee, the sole executor and trustee therein named, to whom in his capacity as sole trustee of the will the above-mentioned compensation and interest has been paid. The will contains a general residuary devise and bequest to the Public Trustee on trusts of the usual character for sale, calling in and conversion, payment of funeral and testamentary expenses, debts and duties, and investment of the net residue (which, with the investments from time to time representing the same, the testator terms his "trust estate"), and the Public Trustee is directed to hold the testator's trust estate on trusts under which (as modified by the first codicil and in the events which have happened) certain annuities are payable out of the income of the trust estate and subject thereto:—(i) the income of the trust estate is payable to the testator's widow, the plaintiff, Elizabeth Norah Blandy-Jenkins, during her widowhood; (ii) subject as aforesaid, the trust estate is divisible into three equal shares, one of which is to be appropriated to each of his three daughters, the defendants, Dame Alice Forestier Walker, Janet Blandy-Jenkins, and Ethel Storrar, and held on trust to pay the income thereof to such daughter for life without power of anticipation and after her death in trust for the issue of such daughter as she shall by deed or will appoint, and in default of such appointment in trust for all or any the children or child of such daughter living at the testator's death or born afterwards who being male attain the age of 21 years or being female attain that age or marry, and if more than one in equal shares, with a provision for accruer to the shares of the other daughters in the event of the failure of these trusts. All life interests are made subject to certain protective trusts, the details of which are not material for the present purpose.

The defendant, Dame Alice Forestier Walker, has had two children (daughters), each of whom has children, and has settled her interests under the testator's will. The defendant, Ethel Storrar, has had one child, namely, the defendant, Nancy Nicholl, who has no children and has been joined in these proceedings to represent the interests of all persons who are, or may hereafter become, interested in the capital of the testator's trust estate.

The will contains the following provisions to which special reference is necessary :

> 18. So long as my trustee deems proper he may (without being responsible for loss) postpone the sale calling in and conversion of all or any part of my estate and (by way of further postponement of but without further prejudice to the foregoing trusts for sale calling in and conversion) retain as if the same were an authorised investment hereunder any property I may die possessed of whether the same be in fact an authorised investment under this my will or not and he shall not sell any reversionary property unless he sees special reason therefor. 19. My trustee may manage and cultivate any hereditaments hereinbefore devised or bequeathed to him in trust for sale until the same shall be sold with all the powers in that behalf of an absolute owner and in particular with all the powers by sub-ss. (2) and (3) of s. 42 of the Conveyancing Act, 1881, conferred on trustees to whom those sub-sections apply and my trustee may make any outlay which he may consider proper for or in respect of any such hereditaments and may exercise over or in relation to any such hereditaments all such powers of leasing mortgaging and other powers of every description as are by the Settled Land Acts, 1882 to 1890, conferred on tenants for life of the same nature. 20. During the period of twenty years after my death all surface rents and fixed or minimum rents payable under any mining lease or agreement for mining lease granted before or after my death shall be applicable as income but with this exception All rents (including wayleave rents) and royalties payable under any such lease or agreement shall be treated and applicable as capital moneys and after the expiration of such period of twenty years all rent within the meaning of s. 11 of the Settled Land Act, 1882, shall be treated and applicable in the manner directed by that section in cases where the tenant for life is impeachable for waste. 21. Subject as hereinbefore expressly provided all the net rents profits and income arising from my estate real or personal until the sale calling in and conversion thereof in whatsoever condition or state of investment the same may be and whether consisting of investments of an authorised character or not (including leasehold or other property of a terminable or wearing out nature) shall for all the purposes of this my will and as between all persons interested hereunder and as well during the first year after my death as afterwards be applied as if the same were income arising from the proceeds of such sale calling in or conversion or the investments of such proceeds no part thereof being liable to be retained as capital but that no reversion or other property not actually producing income shall be treated as producing income for the purposes of this my will and that all annuities yearly rents and other periodical payments payable out of my estate not being annuities hereinbefore bequeathed or instalments of principal money shall be paid or satisfied out of the annual rents profits or income of my said residuary estate.

It will be observed that, as the testator died on Nov. 4, 1915, the period of 20 years from his death expired on Nov. 4, 1935, and the relevant part of cl. 20 of the will is, therefore, contained in the words :

> . . . and after the expiration of such period of 20 years all rent within the meaning of s. 11 of the Settled Land Act, 1882, shall be treated and applicable in the manner directed by that section in cases where the tenant for life is impeachable for waste.

Reference to the Settled Land Act, 1882, s. 11 (now replaced by s. 47 of the Settled Land Act, 1925), shows this provision to be tantamount to a direction that, after the expiration of 20 years from the death of the testator, three fourth parts of all rent received under mining leases are to be set aside as capital money. No question was raised or argued before me as to the validity of this provision in respect of any period subsequent to the expiration of 21 years from the death of the testator. Counsel on both sides tacitly assumed its validity and directed their arguments entirely to the effect to be attributed to it as a valid provision in applying the directions as to the disposal of the compensation and the income thereof contained in the Coal Act, 1938. I propose, for the purposes of the present judgment, to make the same assumption, but this is not to be taken as implying any decision as to the validity of the provision in question. If those interested to argue to the contrary are satisfied that its validity cannot be successfully disputed, then no decision on the point is necessary. If, on the other hand, they are not so satisfied, I am prepared, if desired, to hear further argument, with a view to a decision on it. I have only to add on this aspect of the case that, if the provision in question is valid, its validity would appear to depend on its being regarded, not as a provision for the partial accumulation of income beyond the period of 21 years from the death of the testator, but merely as a provision to counteract or mitigate the inroads on the capital value of the testator's trust estate resulting from the working of the mines.

I think the only provisions of the Coal Act, 1938, to which I need refer are those contained in sched. III, pt. IV, para. 21, to which I will refer as "section 21," which is headed "Disposal of compensation as between beneficial interests" and, so far as material for the present purpose, is in the following terms :

> 21. (1) The compensation for a holding when paid by the Commission to the person entitled to receive it from them, including any sum paid on account thereof under para. 19 or 20 of this schedule, and the income thereof, shall, in order to its being applied as compensation to the persons whose interests are comprised in the holding, be held and disposed of for the benefit of those persons, or their personal representatives or assigns, in accordance with the succeeding provisions of this paragraph. (2) In the case of a holding that consists of or comprises an estate or other interest subject to a settlement within the meaning of the Settled Land Act, 1925, or to a trust for sale the proceeds whereof are subject to a settlement by way of succession, the trustees of the settlement or any court having jurisdiction in relation to the execution of the trusts of the settlement, and in the case of the court on the application of any beneficiary under the settlement, may require and cause the compensation, or the part thereof attributable to that estate or other interest, as the case may be, to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the court, as the case may be, will give to the beneficiaries under the settlement the like benefit therefrom as they might lawfully have had from that estate or other interest, or as near thereto as may be, regard being had to the terms of the settlement and to all relevant circumstances affecting the premises in which the holding subsisted, including—(*a*) the terms of any subsisting coal-mining lease and the operation of any provision therein contained as to undergettings, short workings, and other like matters ; (*b*) the period within which coal being worked might have been expected to be worked out or coal not being worked might have been expected to come into working and to be worked out ; and (*c*) the extent to which, having regard to those circumstances, the premises ought to be regarded as property of a wasting character : Provided that—(i) where a payment on account of the compensation for the holding has been made under para. 19 of this schedule before the vesting date, the net income accruing to the trustees before the vesting date from the investment of the sum paid, up to an amount sufficient to make good to the capital of the settlement the interest on that sum brought into account under para. 19 of this schedule against the capital of the compensation, shall be set aside as capital of the settlement ; (ii) subject as aforesaid no part of the income of the compensation shall be required or caused by virtue of this sub-paragraph to be set aside as capital of the settlement . . . (6) Subject as aforesaid the compensation for a holding and the income thereof shall be held and disposed of in such manner as to confer on the existing owners whose interests are comprised in the holding, their personal representatives or assigns, the like benefits so far as may be, as they would have had from their respective interests in the premises in which the holding subsisted if those premises had not been acquired by the Commission.

In my judgment in *Re Duke of Leeds* (1) I dealt at some length with the effect of s. 21, and, apart from one outstanding question which did not there arise for decision, that judgment is accepted by the parties now before me as covering, so far as this court is concerned, all questions regarding the disposal of the compensation and the income thereof in the present case. The outstanding question now requiring decision concerns the effect to be attributed, in applying s. 21, to the express provision by reference to the Settled Land Act, 1882, s. 11 (now s. 47 of the Settled Land Act, 1925), contained in cl. 20 of the testator's will for the setting aside as capital of three fourth parts of all rents received under mining leases, which had no counterpart in the *Duke of Leeds'* case (1).

It is to be noted that, on the one hand, it is provided in the body of sub-para. (2) of s. 21 that :

> . . . the court . . . may require and cause the compensation . . . to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the . . . court . . . will give to the beneficiaries under the settlement the like benefit therefrom as they might lawfully have had . . . or as near thereto as may be, regard being had to the terms of the settlement and to all relevant circumstances affecting the premises in which the holding subsisted . . .

including the matters affecting those premises specifically enumerated in sub-cll. (*a*), (*b*) and (*c*), while, on the other hand, proviso (ii) to sub-para. (2) provides that "subject as aforesaid," (which I construe as meaning subject to the directions in proviso (i) as regards the setting aside as capital of income received before the vesting date from compensation paid before that date) "no part of the income of the compensation shall be required or caused by virtue of this sub-paragraph to be set aside as capital of the settlement." Consideration of the directions contained in sub-para. (2) of s. 21 without regard to the qualification introduced by proviso (ii) would appear *prima facie* to point to the conclusion that, as regard must be had to the terms of the settlement, and as cl. 20 of the will in the present case is one of those terms, three fourths of the "abated royalty equivalent" for each year, ascertained in the manner indicated in the *Duke of Leeds*' case (1) ([1947] 2 All E.R. 212), should be set aside as capital, inasmuch as, if the holdings had remained subject to the trusts of the will, three fourths of the rents received under the mining leases would have fallen to be so set aside under the relevant provision of cl. 20 of the will. The result of giving this effect to the provision in question in carrying out the directions contained in sub-para. (2) of s. 21 would, of course, be that part of the income of the compensation would have to be set aside as capital in every year other than years in which "the capital supplement (as defined in the *Duke of Leeds*' case (1) (*ibid.*)) was equal to, or exceeded, three fourths of 'the abated royalty equivalent.'" But on the directions pointing to the *prima facie* conclusion stated above is imposed the important qualification contained in proviso (ii), to the effect that, save as mentioned in proviso (i), "no part of the income of the compensation is to be set aside as capital by virtue of" sub-para. (2) of s. 21. It follows that, if the setting aside of part of the income of the compensation as capital involved in the attribution of the above-mentioned effect to the relevant provision of cl. 20 of the will would be a setting aside of such income as capital by virtue of sub-para. (2) of s. 21, then such setting aside of income is in terms prohibited by proviso (ii), and the effect attributable to the provision in question in working out the directions contained in sub-para. (2) of s. 21 must be modified accordingly.

Counsel for the plaintiff tenant for life contends that to set aside any part of the income of the compensation as capital on the strength of cl. 20 of the will would be to set it aside by virtue of sub-para. (2) of s. 21 and is, therefore, in terms prohibited by proviso (ii). Counsel for the defendant, Nancy Nicholl, as interested in capital, on the other hand, contend that such setting aside of income would be effected, not by virtue of sub-para. (2) of s. 21, but by virtue of cl. 20 of the will, or, at all events, would not be the setting aside of income by virtue of sub-para. (2) of s. 21 within the meaning of the prohibition which proviso (ii) imposes.

Before dealing with the arguments adduced in support of these contentions I should refer to certain passages in my judgment in the *Duke of Leeds*' case (1). As I have said, the question now before me did not there arise for decision, but it was necessary for me to consider the effect of proviso (ii) for two purposes. First, the question arose whether the income of the compensation in years in which the holding, if retained, would, according to the estimates, have produced no royalty income, or royalty income smaller in amount than the income produced by the compensation during the like period, should be wholly or partially accumulated (as the case might be) so as to increase the fund available to meet the demands of subsequent years. I answered this question in the negative in view of proviso (ii), and in the course of so doing I said (*ibid.*, 209):

> The last of the three particular matters that I have mentioned concerns the interest on the compensation moneys. It will be noted that, while para. 21 (2) provides that the compensation may be required or caused, *inter alia*, "to be accumulated," provisos (i) and (ii) are to the effect that, except as regards income accruing before the vesting date on a payment on account made before that vesting date: ". . . no part of the income of the compensation shall be required or caused by virtue of this sub-paragraph to be set aside as capital of the settlement." I take the effect of this to be that, while an accumulation may be directed of any income which, if it had been royalty income from the holding, would have fallen to be accumulated by virtue of an express or implied provision for accumulation in the settlement, the process of converting the successive beneficial interests formerly subsisting in the holding, under the settlement, into the like beneficial interests . . . in the compensation moneys is not to involve any capitalisation of income during a period in which the holding, according to the estimates, would, in fact, have produced no royalty income, or would have produced royalty income smaller in amount than the income produced by the compensation during the like period.

Then I went on to deal with the case of estimates showing a completely unproductive period for, say, 10 years from the vesting date, and I came to the conclusion that there was no warrant for the conclusion that the income should be accumulated so as to increase the fund available to provide as nearly as possible the equivalent of the royalty income which would have been received from the holding in subsequent years. Secondly, a question arose as to the effect to be attributed to the Settled Land Act, 1925, s. 47, in cases in which, if the holding had been retained, a proportion of the royalty income therefrom would have been required by that section to be set aside as capital. In dealing with that question I said (*ibid.*, 212):

> If a proportion of the royalty income derived from the holding in any year, had it remained subject to the settlement instead of being compulsorily acquired, would, in view of the Settled Land Act, 1925, s. 47, have been liable to be set aside as capital money arising under the settlement, the like proportion (in this case one-fourth) of the abated royalty equivalent for the same year must be similarly set aside, but, in view of the prohibition against the capitalisation of income contained in the proviso to para. 21 (2) (which I regard as exempting the income of the compensation from accumulation except in so far as there may be an obligation to accumulate by virtue of the actual limitations of the settlement itself in any particular case), not exceeding the amount, if any, of the capital supplement for that year.

Counsel for Nancy Nicholl place some reliance on the passage (*ibid.*, 209):

> I take the effect of this to be that, while an accumulation may be directed of any income which, if it had been royalty income from the holding, would have fallen to be accumulated by virtue of an express or implied provision for accumulation in the settlement, . . .

as supporting the conclusion for which they now contend. On the other hand, counsel for the plaintiff cited the passage where I said I regarded sub-para. (2) as:

> . . . exempting the income of the compensation from accumulation except in so far as there may be an obligation to accumulate by virtue of the actual limitations of the settlement itself in any particular case,

as tending rather to support his view of the matter. I cannot regard either of these passages as prejudging either way the question which I now have to decide. The first passage in its context should not, in my view, be taken as doing anything more than contrast accumulation by virtue of an express or implied provision for accumulation under the settlement, which, as it seemed to me, might be directed without any contravention of proviso (ii), with accumulation in the circumstances I was then engaged in considering, which, as it seemed to me, would involve a setting aside of income as capital by virtue of sub-para. (2) of s. 21 and was, therefore, prohibited by proviso (ii). The passage in question, considered in isolation, is, no doubt, capable of bearing the meaning counsel for Nancy Nicholl would have me attach to it if the words, "if it had been royalty income from the holding" are pressed, but, considered in its context, I cannot look on it as expressing anything like a decided opinion to the effect that in every case in which the settlement contains a provision under which, if the holding had remained subject to the settlement, the royalty income therefrom would have fallen to be wholly or partially accumulated or set aside as capital, the income of the compensation should be directed to be similarly dealt with notwithstanding proviso (ii), even though the provision in question is framed in terms which make it exclusively applicable to royalty income as such. The second passage, which is parenthetical, is, I think, really neutral in its effect, for the question whether the actual limitations or (as I should, perhaps, strictly have said) provisions of the will in the present case are to be regarded as imposing an obligation to accumulate the income of the compensation is the very question which I now have to decide. In any case, as the settlement in the *Duke of Leeds*' case (1) contained no express provision for the accumulation of income or setting aside of income as capital, whether confined in its terms to royalty income as such or of general application to all income arising under the settlement, any observations in the judgment bearing on the effect of provisions of that character were unnecessary to my decision, and, accordingly, I think I am entitled, and, indeed, bound, to disregard them as mere *obiter dicta* if, on the arguments addressed to me in the present case, I come to the conclusion that they should not be followed. I should, however, point out that the judgment in the

Duke of Leeds' case (1) did include an actual decision as to the effect to be attributed to the Settled Land Act, 1925, s. 47, and the implications of that decision are, I think, not without relevance to the point now in issue.

The arguments in the present case can, I think, fairly be summarised as follows. Counsel for the tenant for life submitted in effect, first, that, except in so far as the Coal Act, 1938, may be found to impress it with some different character, the compensation should be regarded simply as a capital sum representing the proceeds of sale of a capital asset, and the income which it produces simply as income of an invested capital sum. Secondly, that, independently of the Act, the relevant provision of cl. 20 of the will can have no application whatever to the income of an invested capital sum, since it is in terms confined to rents within the meaning of the Settled Land Act, 1882, s. 11 (now s. 47 of the Settled Land Act, 1925), that is, to rents under mining leases, in which connection it is material to observe that in the immediately succeeding cl. 21 the testator himself was at pains to emphasise this by directing that:

> Subject as hereinbefore expressly provided all the net rents profits and income arising from my estate real or personal until the sale calling in and conversion thereof in whatsoever condition or state of investment the same may be and whether consisting of investments of an authorised character or not (including leasehold or other property of a terminable or wearing out nature) shall for all the purposes of this my will and as between all persons interested hereunder and as well during the first year after my death as afterwards be applied as if the same were income.

Thirdly, that there can, therefore, be no question at all of setting aside any part of the income of the compensation as capital by virtue of cl. 20 of the will. Fourthly, that there is nothing in the Act to modify the foregoing submissions apart from sub-para. (2) of s. 21. Fifthly, that, having regard to the terms of sub-para. (2) of s. 21, other than proviso (ii), it would be, at all events, arguable (were it not for that proviso) that the court should direct the setting aside as capital of three fourths of the entire "abated royalty equivalent" for each year (whether provided out of capital or income) as corresponding to the proportion of the royalty income from the holdings which would have fallen to be set aside as capital under cl. 20 of the will if the holdings had been retained. Sixthly, that, in doing this, however, the court would be doing the very thing which proviso (ii) prohibits, namely, causing or requiring income of the compensation to be set aside as capital by virtue of sub-para. (2) of s. 21, since it is only by virtue of that sub-paragraph that cl. 20 of the will can have anything whatever to do with the compensation or the income thereof. Seventhly, that, accordingly, while the relevant provision of cl. 20 of the will should, no doubt, be taken into account in working out the directions contained in sub-para. (2), enjoining as they do regard to the terms of the will, and contemplating as they do accumulation where that course is appropriate, the effect to be accorded to the provision in question must relate exclusively to the "capital supplement" (if any) for each year. Eighthly, and finally, that there is nothing inequitable to those interested in capital in the result thus arrived at, for there is no reason why any part of the income of the compensation (being income in the true sense, produced without any inroad on capital) should be accumulated for their benefit, and it matters not for this purpose that the income received by the tenant for life exceeds the one fourth of the royalty income from the holdings to which (having regard to cl. 20 of the will) her receipts would have been confined if the holdings had been retained, since this extra benefit involves no diminution of capital, and, moreover, those interested in capital themselves benefit by the income to the extent that it is taken in or towards satisfaction of the "abated royalty equivalent" and thus reduces the calls on capital which would otherwise be required.

Counsel for the defendant, Nancy Nicholl, on the other hand, contended, in effect, first, that, while cl. 20 of the will would admittedly have had no application to the income of the proceeds of a sale of the holdings, the transaction here in question is not a sale but a compulsory acquisition, and the compensation (including whatever income it produces) is simply compensation for the compulsory acquisition, out of which payments corresponding as nearly as may be to the royalty income which would have been received if the holdings had been retained are to be provided. Secondly, that there is, therefore, no justification for excluding the income of the compensation from the effect to be attributed to the relevant provision of cl. 20 of the will in working out the directions contained in sub-para. (2) of s. 21. Thirdly, that the compensation (including any interest which it produces) is substituted for the coal, and the "abated royalty equivalent" is substituted for the royalty income which would have been derived from the working of the coal. Fourthly, that the relevant provision of cl. 20 of the will should, therefore, be applied to the whole of the "abated royalty equivalent," whether provided out of the sum received as compensation or out of the income which it produces, for the purpose of ascertaining the amount to be set aside as capital in any year. Fifthly, that, unless this is done, the direction in sub-para. (2) of s. 21 that the compensation is to be "laid out, invested, accumulated, and paid in such manner as . . . will give to the beneficiaries under the settlement the like benefit therefrom as they might lawfully have had" from the holding will not have been complied with, and that this contention is strongly supported by the express reference to accumulation in sub-para. (2). Sixthly, that proviso (ii) does not, on its true construction, prohibit the application to the "abated royalty equivalent" (whether derived from capital or income of the compensation) of an express provision in the settlement to precisely the same relative extent as it would have applied to the corresponding royalty income, but merely prohibits the setting aside of income as capital on account of the special circumstances affecting the holding in any particular case, as, for instance, accumulation of the income for any period during which, according to the estimates, the holding would have been unproductive. Seventhly, that the result contended for by the plaintiff is inconsistent with sub-para. (6) of s. 21. Eighthly, and finally, that the result contended for by the plaintiff is inequitable to those interested in capital, inasmuch as it means that the tenant for life will receive in the form of income of the compensation alone substantially more than, having regard to the relevant provision of cl. 20 of the will, she would have received as her proportion of the royalty income from the holdings if they had been retained.

In my judgment, the arguments advanced for beneficiaries interested in capital provide no sufficient answer to those adduced on behalf of the plaintiff as tenant for life, which, as it seems to me, are really conclusive. I do not think that the compulsory character of the acquisition alters the fact that the compensation is capital and the income of it is income for the purposes of the trusts and provisions of the will, save in so far as such capital and income may be impressed with some different character by virtue of the provisions of the Act. So far as I can see, the only provisions of the Act which can have any such effect are those contained in sub-para. (2) of s. 21, and no special character imposed on the compensation and the income thereof by those provisions can be relied on for the present purpose, as the result contended for (*i.e.*, the setting aside of income of the compensation as capital on the strength of cl. 20 of the will) would then be achieved only by virtue of sub-para. (2) of s. 21, which is the very thing proviso (ii) prohibits. Nor do I think the provisions as to accumulation and as to giving the beneficiaries "the like benefit" in sub-para. (2) are of any avail to those interested in capital, for, as provisions of sub-para. (2), they are themselves subject to the qualification imposed by proviso (ii). Sub-paragraph (6) of s. 21 seems to me to carry the matter no further. It is introduced by the words "subject as aforesaid" (that is subject *inter alia* to the provisions of sub-para. (2) dealing specially with holdings which, or the proceeds of sale of which, are settled) and I look on it as designed merely to sweep up cases not specifically dealt with in the preceding provisions of s. 21. A further point perhaps worth mentioning is that, even if the relevant provision of cl. 20 of the will had been framed in terms in themselves apt to include the income of the compensation, the provision in question, having regard to the date of the testator's death, could have had no valid application to such income, except by virtue of some statutory dispensation, to be found, if anywhere, in sub-para. (2) of s. 21, from the ordinary restrictions on the accumulation of income imposed by the Law of Property Act, 1925, s. 164, so that any setting aside of income of the compensation as capital on the strength of the provision in question could only have been by virtue of sub-para. (2) of s. 21, and, therefore, prohibited by proviso (ii). The case turns mainly on the construction of sub-para. (2) of s. 21, but, so far as the equity of the result is material, I regard the result contended for by the plaintiff as preferable also from that point of view, as it gives those interested in capital relatively at least equal protection against inroads on capital as they would have had by virtue of cl. 20 of the will if the holdings had been retained, and I fail to see why any extra benefit received by the tenant for life in the form of income should be regarded as affording them any legitimate ground for complaint, any more, for example, than the persons entitled in remainder to a settled fund could legitimately complain of the advantage gained by the tenant for life through an increase in the rate of interest earned by the investments representing it.

For these reasons I am of opinion that, in working out the directions contained in sub-para. (2) of s. 21 in the present case, the effect attributable to the relevant provision of cl. 20 of the will must be limited to the amount of the "capital supplement" (if any) for each year, and must not involve the setting aside of any part of the income of the compensation as capital. This accords with my decision in the *Duke of Leeds*' case (1) as to the effect to be attributed to s. 47 of the Settled Land Act, 1925, which, like cl. 20 of the will in the present case, can have no application to the income of the compensation otherwise than by virtue of sub-para. (2) of s. 21, and consequently, having regard to proviso (ii), is not to be applied to such income. Following my decision in the same case as to the mode of applying s. 47 of the Settled Land Act, 1925, to the extent permitted by proviso (ii), I hold that on the assumption I have throughout made as to the validity of the relevant provision of cl. 20 of the will, effect should be given to that provision by setting aside as capital out of each year's "abated royalty equivalent" three fourths of such "abated royalty equivalent" or the amount of the "capital supplement" for that year, whichever is the less, the amount to be so set aside in years in which there is no "capital supplement" being accordingly nil. Counsel for the plaintiff reserved the right (in case the matter goes further) to contend that the amount to be set aside as capital should be limited to three fourths of the "capital supplement" (if any) for each year, and that, of course, he is perfectly entitled to do. For my part, I think my proper course is to follow my own decision on this point in the *Duke of Leeds*' case (1), which moreover I still regard as right, on the ground that the alternative now suggested would involve departing from the positive directions contained in sub-para. (2) of s. 21 further than is necessary for the purpose of complying with the prohibition against the setting aside of income of the compensation as capital imposed by proviso (ii). I should, perhaps, add that nothing I have said in this judgment must be regarded as applicable to a valid provision for accumulation in a settlement or will in terms apt to include the income of invested capital moneys, or to the statutory provision for the accumulation of income during a minority. I find nothing in proviso (ii) to prohibit the accumulation of any income of the compensation simply as income which independently of anything contained in sub-para. (2) of s. 21 would fall to be accumulated by virtue of a provision of either of these descriptions. The order as to costs will follow the form settled in the *Duke of Leeds*' case (1), which is agreed to by counsel for the Coal Board in this case also. The special direction given in the *Duke of Leeds*' case (1) with regard to the costs of expert advice whether or not ultimately used will only be included, however, if it can be shown to be justified by the circumstances of the present case.

Declaration accordingly. Costs reasonably incurred by all parties other than the National Coal Board to be taxed and paid by the National Coal Board. Costs of any party other than the National Coal Board, so far as not included in the foregoing to be taxed as between solicitor and client and paid out of the compensation moneys.

Solicitors: *Butt & Bowyer*, agents for *Randall, Llewellyn & Verity*, Bridgend (for the plaintiff, the Public Trustee and other defendants); *Halsey, Lightly & Hemsley* (for the defendant, Nancy Nicholl); *Solicitor to the National Coal Board* (for the National Coal Board).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

HOFFMAN *v.* FINEBERG AND OTHERS.

[Chancery Division (Harman, J.), March 4, 5, 9, 1948.]

Lease—Forfeiture—Breach of covenant—Permitting premises to be used for the purpose of gaming—Notice of breach—Notice not containing requirement that breach should be remedied—Validity—Relief—Law of Property Act, 1925 (*c.* 20), *s.* 146 (1), (2).

The lease of premises, which were to be used as a working men's social club, contained a covenant by the tenants not to do or suffer to be done any act or thing which might be to the annoyance or damage of the landlord, but to conduct the club in a proper and orderly manner and comply with all legal and other necessary regulations, and there was a proviso for re-entry in the event of a breach of covenant. The tenants commited a breach of covenant by allowing the premises to be used for the purpose of gambling, on Feb. 21, 1947, their manager and other members of the staff being convicted under the Betting Act, 1853. The tenants then appointed a new manager, but he was one of the staff who had been convicted of assisting the former manager, and they continued to allow gambling on the premises, though on a smaller scale than before. On Mar. 20, 1947, the landlord served on the tenants a notice under the Law of Property Act, 1925, s. 146 (1), alleging the conviction of the tenants' manager and that the club had been carried on in breach of covenant, but the notice did not require the tenants to remedy the breach:—

Held: (i) even if the premises were no longer used for gambling, that could not alter the fact that the tenants had allowed the property to be used for an illegal purpose, and the landlord was entitled to be protected from the slur involved in being said to be the landlord of a gaming house, even though he had suffered no monetary damage, and, therefore, the breach was one which was not capable of remedy within the Law of Property Act, 1925, s. 146 (1) and the notice was a valid notice although it did not require the tenants to remedy the breach.

Rugby School v. *Tannahill* ([1935] 1 K.B. 87; 152 L.T. 198) and *Egerton* v. *Esplanade Hotels, London, Ltd.* ([1947] 2 All E.R. 88), *considered.*

(ii) in the circumstances of the case, the tenants were not entitled to relief against forfeiture under s. 146 (2) of the Act.

Hyman v. *Rose* ([1912] A.C. 623; 106 L.T. 907), *considered.*

[As to Notice of Breach, see HALSBURY, Hailsham Edn., Vol. 20, pp. 257-259, paras. 290, 291; and for Cases, see DIGEST, Vol. 31, pp. 483-486, Nos. *6322-6342*, and Supplement.

As to Relief against Forfeiture, see HALSBURY, Hailsham Edn., Vol. 20, pp. 260, 261, para. 293; and for Cases, see DIGEST, Vol. 31, pp. 487, 488, Nos. *6354-6356*.]

Cases referred to:

(1) *Horsey Estate, Ltd.* v. *Steiger*, [1899] 2 Q.B. 79; 68 L.J.Q.B. 743; 80 L.T. 857; 31 Digest 486, *6343*.

(2) *Lock* v. *Pearce*, [1893] 2 Ch. 271; 62 L.J.Ch. 582; 68 L.T. 569; 31 Digest 485, *6332*.

(3) *Piggott* v. *Middlesex County Council*, [1909] 1 Ch. 134; 77 L.J.Ch. 813; 99 L.T. 662; 72 J.P. 461; 31 Digest 485, *6337*.

(4) *Civil Service Co-operative Society* v. *McGrigor's Trustee*, [1923] 2 Ch. 347; 92 L.J.Ch. 616; 129 L.T. 788; 31 Digest 506, *6534*.

(5) *Rugby School* v. *Tannahill*, [1935] 1 K.B. 87; 104 L.J.K.B. 159; 152 L.T. 198; Digest Supp.; *affg.*, [1934] 1 K.B. 695.

(6) *Egerton* v. *Esplanade Hotels, London, Ltd.*, [1947] 2 All E.R. 88.

(7) *Hyman* v. *Rose*, [1912] A.C. 623; 81 L.J.K.B. 1062; 106 L.T. 907; *revsg. S.C. sub nom. Rose* v. *Spicer, Rose* v. *Hyman*, [1911] 2 K.B. 234; 31 Digest 488, *6356*.

Action for possession of premises on the ground of breach of covenant by the tenants in permitting the premises to be used for the purpose of gambling. The defence was that the notice served by the landlord before commencing the action failed to comply with the requirements of the Law of Property Act, 1925, s. 146 (1), in that it did not require the tenants to remedy the breach complained of. In a counterclaim the tenants applied for relief from forfeiture, under s. 146 (2) of the Act. HARMAN, J., held that the breach was incapable of remedy and the notice was, therefore, a good notice under s. 146 (1), and he dismissed the counterclaim on the ground that in the circumstances of the case the tenants were not entitled to relief. The facts appear in the judgment.

Ungoed-Thomas, K.C., for the landlord.

Maurice Berkeley for the tenants.

HARMAN, J.: This is a landlord's action for possession of certain leasehold property known as No. 3, Little Somerset Street, Aldgate. The premises were the freehold property of one John Rowland Osborn, and, in or about 1923, a lease was granted for their use as a proprietary club. Under the Friendly Societies Act, 1896, s. 8 (4), there may be registered:

> Societies (in this Act called working-men's clubs) for purposes of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation.

Under this provision the club with which this action is concerned was registered on Apr. 28, 1921. Apparently, it had trustees and members who paid a subscription. The club was a joint adventure on the part of David Fineberg and Lewis Elboz, who, on Jan. 8, 1924, entered into partnership articles under which they agreed to be partners for their joint lives from Apr. 30, 1923, in the business of billiard room proprietors and conductors, that business to be carried on under the name of the Somerset Hall Social Working Men's Club. The partners were entitled to the profits in equal shares, and it was provided that, on the death of one of them his representatives should have the option of succeeding to his share in the business as from his death, the business thereafter to be carried on as nearly as might be in accordance with the partnership articles. The main partnership asset was the lease of the club premises. This was dated Apr. 13, 1923, and vested the property in the partners as joint tenants for the term of 80 years from Christmas, 1922, at a yearly rent of £150. The lease contained joint and several covenants of a usual character, but, in particular, the following covenant, cl. 8:

> Not to exercise or carry on or permit to be exercised or carried on in or upon any part of the said premises any noisy or offensive trade or business or do or suffer to be done any act or thing which may be or grow to the annoyance or damage of the landlord but may use or permit the premises to be used for the ordinary purpose of a billiard saloon or club including the consumption of liquors and refreshments and holding concerts dances or other meetings on the premises such club being carried on and conducted in a proper and orderly manner and complying with all legal and other necessary regulations.

The lease also contained a covenant "not to assign or underlet the said premises or any part thereof except to such a club or for the purposes as aforesaid without the consent in writing of the landlord," and there was a proviso for re-entry on breach of any of the tenants' covenants.

From the club's inauguration its business was carried on principally by Lewis Elboz, assisted by one John Cohen. In 1933 the plaintiff acquired the fee simple of the property in reversion expectant on the lease. Lewis Elboz died in June, 1938, and in December, 1938, letters of administration to his estate were granted to the defendant, Caroline Elboz, his widow. She exercised the option of succeeding to his share in the partnership business, which was thereafter carried on between David Fineberg and her. On the death of Lewis Elboz the registration of the club under the Friendly Societies Act, 1896, was cancelled by the trustees, and since then there has not been, properly speaking, any club at all. Nevertheless, the business continued under the guise of a club, and the hall was frequented by a number of persons, most of whom were known to the management. David Fineberg and his partner's widow appointed the latter's son, Philip, to manage the club, which he continued to do down to his conviction hereafter stated. David Fineberg died on Aug. 23, 1943, having by his will made on June 8, 1943, appointed his son, the first defendant, and his daughters, the second and third defendants, to be his executors, and having bequeathed the remainder of his property, which consisted largely of his interest in the club, between his four children, the first three defendants and one Caroline Cohen. This will contained the following provision:

> In respect of my business which consists of a half partnership of a proprietary working man's club situate at 3, Little Somerset Street, Aldgate, my son-in-law Philip Elboz shall continue as manager and to conduct all business relating to the above as hitherto to the satisfaction of the above beneficiaries.

The business was now carried on by Philip Elboz with the assistance of John Cohen, and the proceeds were divided among the four children of David Fineberg and the widow of Lewis Elboz (the last defendant). For several days before Feb. 20, 1947, members of the City of London Police Force frequented the club, and as a result a search warrant was applied for and the club was entered by the police on Feb. 20, 1947, at 4.10 p.m. The club was then crowded with men, and 197 persons were arrested and the next day charged at the Mansion House under the Betting Act, 1853, ss. 1 and 3, and convicted, all pleading Guilty. Philip Elboz was fined £100 and ordered to pay 25 guineas costs, the maximum fine under the Act of 1853, as being the occupier using the club for the purpose of betting with persons resorting thereto. Two other persons were fined £50 each and a further six, including John Cohen, £25 each for assisting Elboz in the management. The remainder were fined 6*s.* 8*d.* each, under the statute 33 Hen. 8, c. 9, s. 12, for frequenting the club.

[His Lordship dealt with the evidence in that case and continued:—] After the conviction the defendants and Mr. Philip Elboz paid all the major fines, amounting to some £450, and a family meeting was held, attended by the defendants, Mr. Philip Elboz and Mrs. Caroline Cohen, to discuss the future of the club. It was decided that Elboz could not continue as manager, and at his suggestion the defendants appointed John Cohen to be manager, and he has acted in that position ever since. The club was obviously a profitable venture and each daughter of David Fineberg drew sums varying from £3 to £1 a week as her share of the takings. These takings were said to arise from table money for billiards and snooker, profits from light refreshments, card money and money paid by frequenters for counters used in playing cards. The profits appear to have been no less since the conviction than they were before. Philip Elboz told me that there had been no gambling since the date of the conviction, but, as he said the same thing about the period before the conviction, I reject this statement. It is clear that at the date of the conviction gambling of a highly organised sort was being carried on. Moreover, there were called before me two inquiry agents who were in the club for three days in February, 1948, and saw cards being played at two tables with a number of bystanders. They also saw money and counters on the tables, and one of them saw a frequenter changing counters for money with an attendant who was wearing a white coat, and was, apparently, one of the servants of the proprietors. In my judgment, the conclusion is inevitable that gambling has throughout been conducted at this club, though, perhaps, lately on a smaller and more discreet scale than before. I ought to add that the detective inspector told me that when he was last in the club, namely, in February, 1948, he saw no gambling going on. He also said that this club had given the police no more trouble than others.

In the circumstances I am not surprised that counsel for the defendants abandoned the contention that there had been no breach of covenant. He could do no otherwise. It is obvious that the first three defendants, who are the lessees, had been guilty of a breach of cl. 8 of the lease. Under this clause the premises may be used for the ordinary purposes of a club so long as it is conducted in a proper manner complying with all legal regulations. Clearly, this club was not so conducted on Feb. 20, 1947, and, on any view, the lessees, through their manager, Mr. Elboz, to whom they left the entire control of the establishment, permitted acts to be done which were an annoyance or damage to the landlord within the meaning of the covenant. As a matter of contract, therefore, there has been a breach permitting the landlord to re-enter, and that he claims to do in the action. The only defence is that there has been a failure to comply with the Law of Property Act, 1925, s. 146 (1), in that the notice given before action failed to comply with the requirements of the section. It is well settled that service of a proper notice is a condition precedent to an action for ejectment. Section 146 (1) is in these terms:

> A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action

> or otherwise, unless and until the lessor serves on the lessee a notice (*a*) specifying the particular breach complained of; and (*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach; and (*c*) in any case, requiring the lessee to make compensation in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

The terms of that section, and of its predecessor, s. 14 of the Conveyancing Act, 1881, have often been discussed, and part of it was well explained in the Court of Appeal in *Horsey Estate, Ltd.* v. *Steiger* (1) by LORD RUSSELL OF KILLOWEN, L.C.J., ([1899] 2 Q.B. 91) when he said:

> The object [*i.e.*, the object of s. 14 of the Act of 1881] seems to be to require in the defined cases (1) that a notice shall precede any proceeding to enforce a forfeiture, (2) that the notice shall be such as to give the tenant precise information of what is alleged against him and what is demanded from him, and (3) that a reasonable time shall after notice be allowed the tenant to act before an action is brought. The reason is clear: he ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought to offer any, and, if so, what, compensation; and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him.

A notice was served on Mar. 20, 1947, by the plaintiff's solicitors, setting out the effect of cl. 8 of the lease, alleging the conviction of Philip Elboz and that the club had been carried on in breach of cl. 8. The notice did not require the lessee to remedy the breach nor demand any compensation in money. It is admitted that, having regard to the decision in *Lock* v. *Pearce* (2), the latter omission did not invalidate the notice, but it is said that the former omission is fatal, and it seems to me that this contention is right if the breach is one which is capable of remedy, for the object of the section is to enable a lessee to understand with reasonable certainty what he is to do within the reasonable time allowed. It affords, as has been said, a *locus poenitentiae*. Givers of notices under s. 146 of the Act of 1925 frequently content themselves by merely copying out the words of the section and calling on the lessee to "remedy the breach if capable of remedy." Whether this form of notice is good I need not discuss, though it appears that it probably is so, having regard to the decision in *Piggott* v. *Middlesex County Council* (3), *per* EVE, J. ([1909] 1 Ch. 147). Clearly, the section contemplates that some breaches are, while others are not, capable of remedy, but the cases give, I think, very little guidance as to what is "capable of remedy" within the meaning of the section. In one sense, no breach can ever be remedied, because, *ex concessis*, there must always be a time in which the covenants have not been complied with, but s. 146 clearly involves the view that some breaches are remediable. I observe, in passing, that in *Civil Service Co-operative Society* v. *McGrigor's Trustee* (4) RUSSELL, J., held ([1923] 2 Ch. 356) that bankruptcy was a breach which was irremediable, and the point was discussed also in *Rugby School* v. *Tannahill* (5), where MACKINNON, J., proposed a test which, if it was a good test, would be a satisfactory one.

In *Rugby School* v. *Tannahill* (5) the breach was of a covenant not to use the premises for illegal or immoral purposes, and the notice which was served did not require any remedy for the breach. MACKINNON, J., came to the conclusion that, the breach being a breach incapable of remedy, it was not necessary to demand its remedy in the notice. He said ([1934] 1 K.B. 700, 701):

> The second point has given me rather more difficulty—namely, the contention that the notice was bad because it did not require the lessee to remedy the breach. It is stated that, notwithstanding the absence of a requirement to remedy, the lessee has in fact altered her conduct, and the house is now respectably conducted. *Mr. Fearnley-Whittingstall* for the defendant says that breach of a negative covenant can be remedied by compliance therewith as from a certain day, and instances the breach of a covenant not to use the premises for a children's school, which he says can be remedied by ceasing so to use them. At first sight this is an attractive argument, but it has a very obvious disadvantage from the point of view of the landlord, for, supposing the case of a breach of a covenant not to do something and, when the landlord complained, an immediate abstention from the user of the premises in breach

> of the covenant, the landlord would be deprived of any cause of action, or, if he had already begun one, he would have it dismissed with costs. And that might happen again and again; the landlord would have to give a fresh notice in each case, with the same result. On the other hand it is quite clear that if the covenant is an affirmative covenant to do something, *e.g.*, to repair or to build, then if the repairs are done or the buildings erected within a reasonable time there is no possible danger of a renewal of the breach. I think there is a radical distinction between the two sorts of covenant. A promise to do a thing, if broken, can be remedied by the thing being done. But breach of a promise not to do a thing cannot in any true sense be remedied; that which was done cannot be undone. There cannot truly be a remedy; there can only be abstention, perhaps accompanied with apology. I think the breach of a negative covenant of this sort is not one "capable of remedy" within the section. This does not mean that the penalty for breach of a negative covenant is necessarily greater than that for breach of an affirmative covenant. For the power of the court to grant relief remains . . .

If that remained the law, it would be attractive and easy, and one cannot but regret that that is not the case, but when *Rugby School* v. *Tannahill* (5) went to the Court of Appeal, the court, while agreeing that the breach there in question was a breach which was incapable of remedy, rejected the broader statement which MacKinnon, J., had made. Greer, L.J., said ([1935] 1 K.B. 90, 91):

> In my judgment MacKinnon, J., was right in coming to the conclusion that it was not [*i.e.*, that the breach was not capable of remedy]. I think perhaps he went further than was really necessary for the decision of this case in holding that a breach of any negative covenant—the doing of that which is forbidden—can never be capable of remedy. It is unnecessary to decide the point on this appeal; but in some cases where the immediate ceasing of that which is complained of, together with an undertaking against any further breach, it might be said that the breach was capable of remedy. This particular breach, however—conducting the premises, or permitting them to be conducted, as a house of ill-fame—is one which in my judgment was not remedied by merely stopping this user. I cannot conceive how a breach of this kind can be remedied. The result of committing the breach would be known all over the neighbourhood and seriously affect the value of the premises. Even a money payment together with the cessation of the improper use of the house could not be a remedy. Taking the view as I do that this breach was incapable of remedy, it was unnecessary to require in the notice that the defendant should remedy the breach.

Maugham, L.J., said (*ibid.*, 92):

> . . . I am not prepared to go as far as MacKinnon, J., in his reasons for holding that the notice given to the defendant was valid. The learned judge thought that the breach of a negative covenant was incapable of remedy. I am not satisfied that there may not be some negative covenants with regard to which a breach may be capable of remedy so that as to them a proper notice under s. 146 ought to require the lessee to remedy the breach. My ground for affirming the decision appealed from rests upon a somewhat narrower basis.

He then discussed the basis on which he came to the same conclusion as MacKinnon, J., had reached. I am, therefore, deprived of the assistance that I should otherwise have had from the decision of the court of first instance in that case, and the sea is left still uncharted in consequence.

There were some further observations on the same point by Morris, J., recently in *Egerton* v. *Esplanade Hotels, London, Ltd.* (6). In that case, also, the breach was the allowing of the premises to be used as a brothel. It was much the same type of breach, in fact, as in *Tannahill's* case (5), and the same conclusion was reached, namely, that the breach was not capable of remedy. The notice did not contain any requirement that the breach should be remedied, and one of the points taken in the defence was that point. Morris, J., discussed the decision in *Tannahill's* case (5), and said ([1947] 2 All E.R. 91, 92):

> The matter which I have to consider is whether, on the facts of this case, the breach was capable of remedy. The breach was in March. The notice was served in August, but that, presumably, was because, after the proceedings in court as a result of the police raid on Mar. 11, 1945, there were appeals, and, doubtless, the result of those appeals, which were heard in July, was awaited before the notice was served. In any event, no complaint is made by anyone that the notice was not served earlier. Was this breach a breach capable of remedy, which means a breach capable of remedy within a reasonable time of the date in August on which the notice was served? There were the convictions of two individuals, and the dismissal of their appeals.

> Inevitably there would be some publicity, though I cannot assess the amount of it in regard to those proceedings, but, in my judgment, the breach was of such a nature that it must cast a stigma on the premises and impose a taint which can only be removed if those who have brought it about are no longer associated with the premises. There are, of course, always the beneficent effects of time in effacing the memory of unhappy and unpleasant things, but this was not, in my opinion, a breach which was capable of remedy within a reasonable time. I think I am entitled, when considering this matter, to have regard to the whole amenity of the neighbourhood and what must be the repercussions of events of this kind and their effect on property in the neighbourhood. Under the contract, which existed between the plaintiffs and the first defendants, the first defendants covenanted not to use the premises in the way in which they have used them. Merely desisting from the wrongful user or not continuing to commit further breaches is not, in my judgment, on the facts of this case, a way of remedying the breach. In my view, the conclusion on this second issue that arises is that these breaches were not capable of remedy and that there was no necessity for the plaintiffs to have called on the first defendants to have remedied the breaches of which the plaintiffs complain.

It will be observed that Morris, J., was very careful to say that he was going on the facts of that case only. He held that a breach which had resulted in a conviction of keeping a brothel was not capable of remedy within a reasonable time, because, I think, of the stigma that it laid on the premises and the damage that it would do to the reputation of the house. It was, therefore, submitted to me that one test may be that any breach involving a criminal offence is a breach which is incapable of remedy, but I am not prepared to go so far. It is said, on the other side, that the *Tannahill* case (5) and the *Esplanade Hotels* case (6) are distinguishable, because no stigma nor diminution of value is involved in the present case. It is perfectly true that allowing gambling to go on and allowing a house to be used as a house of ill-fame involve very different degrees of moral obliquity, and many people would think that there was no very great harm, perhaps, in gin rummy. Nevertheless, it is a criminal offence when played, as it was here, in a public place. On the question of value there was a conflict of evidence between two witnesses, but I conclude, on the whole, that, having regard to the situation of this club, to the scarcity of houses, and to the fact that the premises could be used as a warehouse or as a small factory, if adapted to some extent, the result is that there is no substantial damage to the plaintiff. His rent is amply secured and there are more than 50 years to run of the term. It seems to me, however, that on the facts of this case mere cesser of the conduct constituting the breach is no remedy. The lessor is entitled to be protected against the slur which is involved in being said to be the landlord of a gaming house, even though no monetary damage ensue from it. That gambling has ceased cannot alter the fact that the property has been used for this illegal purpose. By ceasing, the lessee merely complies with the law and prevents a further conviction. He cannot wipe the slate clean, as he could by complying, though out of time, with a failure to lay on the prescribed number of coats of paint. I doubt whether a process of whitewashing in the moral as opposed to the physical sense can be a remedy. The breach was the condonation of a crime, and ceasing to commit it is no remedy. Anyhow, I hold on the facts of this case that there was no remedy within the intendment of the statute for this particular breach.

That disposes of the action, but there remains the counterclaim, by which the lessee prays for relief against forfeiture. This is a purely discretionary jurisdiction, which, under the Law of Property Act, 1925, s. 146 (2), the court may grant or refuse "having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances." If the court grants relief, it may grant it on such terms as it chooses. In *Hyman* v. *Rose* (7) an attempt was made in the Court of Appeal to lay down the conditions on which this kind of relief should be granted. In that court [where the case is reported *sub nom.* *Rose* v. *Spicer*, *Rose* v. *Hyman* (7)] Cozens-Hardy, M.R., when discussing s. 14 of the Act of 1881, said ([1911] 2 K.B. 241, 242):

> When Parliament in 1881 empowered the courts to relieve against forfeiture for breach of the covenants in a lease a wide discretion was given to the court either to grant or refuse relief, having regard to the conduct of the parties and to all other circumstances, and in case of relief such terms, including the granting of an

> injunction to restrain a like breach in the future, may be imposed as the court in the circumstances thinks fit. I am aware of the danger of defining the mode in which discretionary powers of this nature ought to be exercised. Yet I think it expedient to attempt to lay down some general principles. In the first place the applicant must, so far as possible, remedy the breaches alleged in the notice and pay reasonable compensation for the breaches which cannot be remedied. In the second place, if the breach is of a negative covenant, such as not to carry on a particular business on the demised premises, the applicant must undertake to observe the covenant in future, or at least must not avow his intention to repeat the breach complained of. In the third place, if the act complained of, though not a breach of a negative covenant, is of such a nature that the court would have restrained it during the currency of the lease on the ground of waste, the applicant must undertake to make good the waste if it be possible to do so. In the fourth place, if the act complained of does not fall under either the second or the third head, but is one in respect of which damages, other than nominal, might be recovered in an action on the covenant, the applicant must undertake not to repeat the wrongful act or to be guilty of a continuing breach. In short, subject only to the maxim *de minimis*, the applicant must come into court with clean hands, and ought not to be relieved if he avows an intention to continue or to repeat a breach of covenant.

Once more, unfortunately, a higher court intervened to remove from judges who were puzzled by the width of their discretion such a valuable support as that. *Hyman* v. *Rose* (7) went to the House of Lords, where Earl Loreburn, L.C., said ([1912] A.C. 631):

> I desire in the first instance to point out that the discretion given by the section is very wide. The court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express to provide a wide discretion, meaning, no doubt, to prevent one man from forfeiting what in fair dealing belongs to some one else, by taking advantage of a breach from which he is not commensurately and irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all.

There does, however, remain for my help the view of Earl Loreburn, L.C., that the rules enumerated by Cozens-Hardy, M.R., though not to be taken as rules, are useful maxims in general, and so it seems to me that I have here a criterion to guide me. There was some discussion of this point in the *Esplanade Hotels* case (6), and it would appear from the report as though Morris, J., declined to relieve against the forfeiture there, but counsel informed me that, in fact, the only order made in that case was one which brought about relief against the forfeiture, and, therefore, anything that was said must have been said *obiter*, and I do not propose to rely on it.

In the present case, there was a long continuance of this breach of covenant. The club continued, in effect, to be run as before. The lessees now express through their counsel their willingness to comply with any conditions that I choose to impose, but it is, as it seems to me, too late. The *locus poenitentiae* which the Act provides has gone by without any true repentance, and, in my judgment, these lessees have not entitled themselves to the mercy of the court and ought not to be afforded an opportunity of setting their house in order. Under the contract the lessor is legally entitled to re-enter, and I see no sufficient ground why the court should interfere to prevent the law from taking its course. There will be judgment for possession, and I dismiss the counterclaim, in both cases with the usual consequences.

Judgment for the plaintiff with costs. Order for possession in one month.

Solicitors: *Stone & Stone* (for the landlord); *Alexander Fine, Hawkins & Co.* (for the tenants).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

STANSBIE *v.* TROMAN.

[COURT OF APPEAL (Tucker and Somervell, L.JJ., and Roxburgh, J.), March 15, 1948.]

Negligence—Duty to take care—Breach—Damage resulting from breach—Decorator leaving house with front door unlocked during known absence of tenants—Entry and theft by third party.

A The plaintiff, a painter and decorator engaged under contract in doing work at the defendant's house, left the house unoccupied while he went to obtain material, and, in order that he might be able to secure re-entry, pulled back the catch of the Yale lock of the front door. He was away from the house for two hours, and during his absence a thief entered the premises by the front door and stole a quantity of jewellery. In a claim by the plaintiff for work and labour the defendant counter-claimed
B for damages for negligence :—

HELD : in the circumstances the plaintiff owed a duty to the defendant to take care of the premises, there had been a breach of that duty, and the entry of the thief which caused the damage was the direct result of the plaintiff's negligence.

Dictum of LORD SUMNER in *Weld-Blundell* v. *Stephens* ([1920] A.C.
C 956, 986 ; 123 L.T. 593, 601), *distinguished.*

[AS TO EFFECT OF ACT OR INTERVENTION OF THIRD PARTY, see HALSBURY, Hailsham Edn., Vol. 23, p. 594, para. 845 ; and FOR CASES, see DIGEST, Vol. 36, pp. 30-34, Nos. *165-205.*]

Cases referred to :

(1) *M'Alister (or Donoghue)* v. *Stevenson,* [1932] A.C. 562 ; 101 L.J.P.C. 119 ; 147 L.T. 281 ; Digest Supp.

D (2) *Weld-Blundell* v. *Stephens,* [1920] A.C. 956 ; 89 L.J.K.B. 705 ; 123 L.T. 593 ; 36 Digest 126, *837.*

APPEAL by the plaintiff, a decorator, against an order of His Honour JUDGE FORBES, made at Birmingham County Court, and dated May 20, 1947, awarding damages to the defendant on a counter-claim in which the defendant claimed damages from the plaintiff for negligence in leaving the front door of the
E defendant's house (in which the plaintiff was working) unlocked during his own and the defendant's known absence, thereby enabling a third party to enter the house and steal a quantity of jewellery. The appeal was dismissed.

R. K. Brown for the plaintiff.

Verne for the defendant.

TUCKER, L.J. : This is an appeal from a judgment of His Honour
F JUDGE FORBES, given at Birmingham. The plaintiff is a painter and decorator and he was engaged to do certain work at the premises of the defendant. In this connection he claimed £79 15*s.* 0*d.* for work and labour done. There was no dispute about that, but the defendant counter-claimed from him the sum of £334 15*s.* 0*d.* damages for negligence, and this appeal relates to the defendant's counter-claim which succeeded before the learned judge.

One day, while the plaintiff was working at the defendant's house, the
G defendant went to business, as was his custom, and his wife also went out for some purpose. During the absence of both of them, the plaintiff was left working in the house. He knew he had been left alone in the house and on similar previous occasions he had been reminded by the wife to pull to the front door when he left. The front door had a Yale lock, and, accordingly, unless the catch was pulled back, when the door was shut it was locked, and entry could only be obtained by the use of the key. On this particular occasion
H the plaintiff had occasion to leave the premises to get some fresh wallpaper. This was not similar to previous occasions when he was leaving the house at the end of his day's work, when he could, no doubt, pull the door to without thought of regaining access to the premises. This time he knew he would have to get into the house again when he returned, and so he pulled back the catch and so left the front door unlocked. He went to some place not very far away where he expected to obtain the wallpaper, but it had to be sent for elsewhere, with the result that he left the house with the front door unlocked for two hours or so. When he got back he found that the front door was open and

that in his absence someone had entered and stolen from the downstairs rooms jewellery to the value of over £300. He waited for some time for the return of the defendant and his wife, but they did not get back until late, and he then telephoned and told them what had happened.

The learned judge stated that the first matter he had to investigate was whether or not there was any duty owed by the plaintiff to the defendant; secondly, whether there had been any breach of that duty; and, thirdly, whether the damage had resulted from that breach. The conclusions at which he arrived were as follows. With regard to the first question, after referring to *Donoghue* v. *Stevenson* (1) he said:

> I think that when the plaintiff was left alone in the house he was in a position to exercise control over access into the house, and this put him in such a relation to the defendant that, in exercising such control, he ought to have had in mind the safety of the defendant's goods which were in the house.

Counsel for the plaintiff argued that there was no duty owed. He said that a duty must arise from a relationship and must be within the scope of the contractual relationship existing between the parties. I agree that the duty must be within the scope of the contractual relationship between the parties, but I think that that contractual relationship did impose a duty on the plaintiff to take reasonable care with regard to the state of the premises if he left them during the performance of his work, or at the conclusion of the working day. That, I think, was the measure of the duty.

The next question is: Was there a breach of that duty? If I am right as to the existence of the duty, there can, in my opinion, be no question but that there was a breach of it, because I do not think it was acting reasonably or taking reasonable care to leave this empty house for two hours with the front door in the condition in which it was. The learned county court judge, dealing with that matter, said that he applied the test of the ordinary reasonable man—quoting from Greer, L.J.: "the man who takes the magazines at home and in the evenings pushes the lawn mower"—and said that he thought that the plaintiff, "having fastened back the latch of the Yale lock, ought not to have left the house for more than a few moments, if at all, and that, in staying away for as long as two hours, he was guilty of negligence." I agree with that finding of the learned judge.

With regard to the third question as to which the learned judge said he had found considerable difficulty, and in regard to which his views had wavered, *viz.*, whether the damage resulted directly from the negligent act, he said this:

> It seems clear that the negligence of the plaintiff was not the direct cause of the defendant's loss. The direct cause was the crime of the thief. The plaintiff was no party to the crime, which was a thing that he never intended. On the other hand, the main purpose of the latch is to keep out thieves, so far as the latch will serve. If the latch be fastened back, the house needs watching, and, therefore, the negligence of the plaintiff really consisted in failure to take reasonable care to guard against the very thing that happened. Forcing a door or breaking a window takes time and may attract attention. The plaintiff's negligence increased the problematic risk of a theft, and the risk matured into a certainty.

Counsel for the plaintiff has referred to *Weld-Blundell* v. *Stephens* (2), and, in particular, to a passage in the speech of Lord Sumner where he said ([1920] A.C. 986; 123 L.T. 601):

> In general (apart from special contracts and relations and the maxim *respondeat superior*), even though A. is in fault, he is not responsible for injury to C., which B., a stranger to him, deliberately chooses to do. Though A. may have given the occasion for B.'s mischievous activity, B. then becomes a new and independent cause . . .

I do not think that Lord Sumner would have intended that very general statement to apply to the facts of a case such as the present, where, as the learned judge points out, the very act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened. The reason why the plaintiff owed a duty to the defendant to leave the premises in a reasonably secure state was because otherwise thieves or dishonest persons might gain access to the premises, and it seems to me that if, as I think he was, the plaintiff was negligent in leaving the house in this condition, it was a direct result of his negligence that the thief got in through this door which was left unlocked and stole these valuable goods. Except that

I would have phrased the nature of the duty somewhat differently from the way in which the learned county court judge put it, I am in entire agreement with the judgment which he delivered in this case, and, in my view, the appeal fails.

SOMERVELL, L.J.: I agree. This is not, I think, one of those cases that falls plainly on one side or other of some line which the law draws. It requires careful consideration. In my opinion, it received careful consideration A from the county court judge, and I do not desire to add anything to what TUCKER, L.J., has said, with whose judgment I agree.

ROXBURGH, J.: I agree.

Appeal dismissed. Judgment for the plaintiff on the claim and for the defendant on the counter-claim for the amounts claimed. Costs on Scale "C" B *with a set-off as to damages and costs.*

Solicitors: *Stafford Clark & Co.*, agents for *Tanfield & Co.*, Birmingham (for the plaintiff); *Swepstones*, agents for *Margetts & Ritchie*, Birmingham (for the defendant).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

C

D

R. *v.* ABERG.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Birkett, JJ.), March 2, 1948.]

Criminal Law—Misprision of felony—Constituents of offence—Benefit of accused person.

E *Trial—Summing up—Good character of accused—Need to refer to.*

Omission by a judge in summing-up to draw attention to the good character of the defendant is not necessarily a misdirection.

Per curiam: If in a future case a count for misprision of felony is included in an indictment the court will have to consider whether the prosecution must show a concealment for the benefit of the person charged.

F [AS TO EVIDENCE OF GOOD CHARACTER OF ACCUSED, see HALSBURY, Vol. 9, p. 188, para. 271; and FOR CASES, see DIGEST, Vol. 14, pp. 361-363, Nos. *3818-3847*.
AS TO MISPRISION OF FELONY, see HALSBURY, Hailsham Edn., Vol. 9, pp. 48, 355, paras. 48, 580; and FOR CASES, see DIGEST, Vol. 15, p. 704, No. *7625*.]

Cases referred to:

(1) *R.* v. *Bliss Hill*, (1918), 82 J.P. 194; *sub nom., R.* v. *Broadhurst, Meanley and Bliss Hill*, 13 Cr. App. Rep. 125; 14 Digest 362, *3834*.

G (2) *Williams* v. *Bayley*, (1866), L.R. 1 H.L. 200; 35 L.J.Ch. 717; 14 L.T. 802; 30 J.P. 500, H.L.; *affg.*, S.C. *sub nom., Bayley* v. *Williams*, 5 New Rep. 441; 15 Digest 704, *7625*.

APPLICATION for leave to appeal.

The applicant, who was a state registered nurse, carried on at her house the business of supplying nurses. In July, 1946, one Konstanda was sentenced H to 4 years' penal servitude for housebreaking. In November, 1946, he escaped from prison, and in the same month he was introduced to the applicant, became a constant visitor to her house, and eventually went to live there, she, according to her evidence (being under the impression that he was a doctor), finding it convenient to have him in the house to give her injections for her asthmatic pains. In January, 1947, on being shown Konstanda's photograph by the police, she denied all knowledge of him and denied that he lived in her house, and, in January, 1947, during another police visit, while Konstanda was actually in the house, she would give no information. She was charged before CASSELS, J., at the Central Criminal Court on an indictment containing three counts (i) aiding and abetting Konstanda in the felony, under s. 3 of the Penal Servitude Act, 1857, of being unlawfully at large, (ii) knowing that he was unlawfully at large, receiving, comforting and assisting him between Jan. 16, 1947, and Nov. 7, 1947, and (iii) knowing that he was unlawfully at large, unlawfully concealing the commission of the felony. She was found guilty on all three counts and sentenced to eighteen months' imprisonment on each of the first two counts and to six months' imprisonment on the third count, the three sentences to run concurrently. Leave to appeal was refused.

Leonard Halpern for the applicant.

LORD GODDARD, C.J., delivering the judgment of the court, stated the facts and continued: Counsel has admitted there was evidence on which the jury could come to the conclusion that the applicant was guilty. The real complaint is that the learned judge in summing-up, did not emphasise her good character. If it is said that it is misdirection on the part of a judge, especially when a defendant is defended by counsel, not to lay stress on the defendant's good character, I cannot say I agree, and I do not think the case of *R.* v. *Bliss Hill* (1) is any authority for the proposition. In that case the judge did comment on the good character of the defendant, but it was said that he had not done so in a proper way. That is a different thing from saying in every case that an omission to refer to the good character of the defendant constitutes a misdirection of the jury so that the conviction must be quashed. In the present case there was no need to refer to the applicant's character because the case was fought on the ground that up to this time she had been a woman of blameless character. There is, therefore, no ground for saying there was any misdirection, and, it being admitted that there was evidence to go to the jury, this court cannot interfere.

There is one further point to which the court thinks it is desirable to refer. The third count was a count for misprision of felony. The jury found the applicant guilty on that count as well as on the other two counts. Misprision of felony is an offence which is still described in the text books, but it is generally regarded nowadays as having become obsolete or as having fallen into desuetude, although there have been recent cases in which counts for misprision of felony have been included in indictments. If in any future case it is thought necessary or desirable to include in an indictment a count for misprision of felony, great care should be taken to see what—at any rate, according to more modern authorities—are the constituents of the offence. I call particular attention to the speech of Lord Westbury in *Williams* v. *Bayley* (2) ((1866) L.R. 1 H.L. 220). It may be that the court will have carefully to consider whether it is necessary to show a concealment for the benefit of the person charged. However, no point of that sort is taken in the present case and it is not necessary to go into the matter because the sentence passed on this count was merely concurrent with the others, and, therefore, there is no prejudice to the applicant. The application fails.

Application refused.

Solicitors: *Wontner & Sons* (for the applicant).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

WILLIAMS *v.* DOULTON (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Atkinson, J.), March 19, 1948.]

Income Tax—Allowance—Child—" Entitled in own right to income "—Wages—Finance Act, 1920 (*c.* 18), *s.* 21 (1), (3) (*as amended by Finance* (*No.* 2) *Act,* 1939, *s.* 9 (3)).

A taxpayer had living with him during the relevant period a son, aged under 16, who earned in wages more than £50 a year :—

HELD : the wages were " income " to which the son was " entitled in his own right " within the meaning of the Finance Act, 1920, s. 21 (3), (as amended by the Finance (No. 2) Act, 1939, s. 9 (3)) and the taxpayer was deprived of his right to an allowance under s. 21 (1) of the Act.

Miles (*Inspector of Taxes*) v. *Morrow,* (1940) (23 Tax Cas. 465), *followed.*

[AS TO CHILD ALLOWANCE, see HALSBURY, Hailsham Edn., Vol. 17, p. 304, para. 602 ; and FOR CASES, see DIGEST, Vol. 28, p. 91, No. *540,* and 2nd Digest Supp.]

Case referred to :

(1) *Miles* (*Inspector of Taxes*) v. *Morrow,* (1940), 23 Tax Cas. 465 ; 2nd Digest Supp.

APPEAL by the taxpayer by way of Case Stated.

CASE STATED by the General Commissioners who had held that the taxpayer's son, who was living with him, was entitled in his own right to wages earned by him and that as those exceeded £50 in the relevant years the taxpayer was deprived of his right to an allowance under s. 21 (1) of the Finance Act, 1920, as amended by s. 9 (3) of the Finance (No. 2) Act, 1939. The decision of the commissioners was affirmed.

The taxpayer appeared in person.

R. P. Hills for the Crown.

ATKINSON, J. : The short and simple point in this appeal is this. The Finance Act, 1920, s. 21 (1), as amended by the Finance (No. 2) Act, 1939, s. 9 (3), provides :

> If the claimant proves that he has living . . . any child who is under the age of sixteen years . . . he shall, subject to the provisions of this section, be entitled in respect of each such child to a deduction of £50 . . .

By sub-s. (3) :

> (3) No deduction shall be allowed under this section in respect of any child who is entitled in his own right to an income exceeding £50 a year.

The two years with which we are concerned are the years April, 1944-45, and April, 1945-46. During that period the taxpayer had living with him his son who was born on Mar. 12, 1930. *Prima facie*, therefore, the taxpayer was entitled to an allowance, but, in July, 1944, the boy went to work, and before the end of the year he had earned in wages over £50. In the following year he earned in wages over £50. He was earning 35*s.* a week, so in a full year he must have been getting nearly £100. The taxpayer says that the boy could not be said to be " entitled in his own right to an income." That expression, he says, implies that during all the time the boy is being maintained he must be entitled to an income and that these are very inapt words to describe wages which the boy earns. The Crown, however, say : " At the end of the year if you look and see whether in the year he was entitled to an income exceeding £50, he obviously was." The words " in his own right " mean merely that the money was his and not an allowance made to the taxpayer in respect of him which would not be his in his own right. An allowance might be from the poor law authorities or a bequest to the taxpayer for the benefit or maintenance of the child. The wording of the Act merely means that it must be money of the boy's own, money which was available for his maintenance. Unfortunately for the taxpayer, the point is not open to him because of a decision in the Irish case of *Miles* v. *Morrow* (1), where the matter was dealt with. In that case a father claimed an allowance under s. 21 (1) of the Act of 1920, as amended by s. 20 (1) of the Finance Act, 1938, in respect of his son, over 16, who lived with him. The son was entitled to an annuity of £50 a year, which was clearly income to which he was entitled in his own right, but, in addition, he earned, in the relevant period, £35 as an articled clerk. It was held that his earnings were income to which he was entitled in his own right, and that, as his total income exceeded £60, the limit then in force, the father was deprived of his right to an allowance. Brown, J., said (23 Tax Cas. 470):

> I can find nothing in the Acts to show that emoluments received by the boy are not his income in his own right. They are paid to the boy, not to his father, and they are paid to him for his services to his employer.

To my mind, that settles the present case. The appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

LINZ *v.* ELECTRIC WIRE CO. OF PALESTINE LTD.

[Judicial Committee of the Privy Council (Lord Simonds, Lord Morton of Henryton, Sir Madhaven Nair), February 9, 10, March 8, 1948.]

Money had and received—Failure of consideration—Company—Invalid issue of shares—Transfer by shareholder to transferees—Subsequent claim against company for repayment of price of shares.

In 1935 the appellant applied for and was allotted 775 preference shares in the respondent company. In 1939 she executed transfers in blank of the shares which, in September, 1941, were completed in favour of transferees, the transfers being registered with the company, the old share certificates being cancelled and new ones issued, and the transferees being placed on the register of members of the company in place of the appellant. In 1943 the appellant began proceedings against the company alleging that the resolution of the company authorising the issue of the shares was invalid and that the allotment of the shares to her was void and claiming the return of the sum paid by her for the shares as for money had and received on a total failure of consideration.

Held: the appellant having been duly registered by the company as a shareholder and having parted for value with her shares by a sale which the company had recognised by the registration of her transferees, she could not claim that she had received something of no value and that there was a total failure of consideration and successfully challenge the validity of the issue of shares.

[As to Failure of Consideration in Case of Money Had and Received, see HALSBURY, Hailsham Edn., Vol. 7, p. 283, para. 394; and for Cases, see DIGEST, Vol. 12, pp. 228-233, Nos. *1888-1928.*]

Case referred to:

(1) *Rowland* v. *Divall*, [1923] 2 K.B. 500; 92 L.J.K.B. 1041; 129 L.T. 757; 35 Digest 120, *234.*

Appeal from Supreme Court of Palestine, sitting as a court of appeal.

The appellant, Margaret Linz, claimed from the respondents, the Electric Wire Co. of Palestine, Ltd., the return of the purchase price of preference shares which the company had allotted to her on her application and which she had subsequently transferred to transferees. She alleged that the shares were invalidly issued, and that, therefore, the consideration for the payment by her of the purchase price had totally failed. The District Court of Haifa dismissed the action, and that decision was affirmed by the Supreme Court of Palestine and now by the Judicial Committee.

Sir Valentine Holmes, K.C., and *Denys Buckley* for the appellant.

Raymond Jennings, K.C., and *Phineas Quass* for the respondents.

The Board took time for consideration.

Mar. 8. **LORD SIMONDS:** In this appeal, which is brought from a judgment of the Supreme Court, sitting as a Court of Appeal, Jerusalem, affirming the judgment of the District Court of Haifa, a number of questions have been raised which their Lordships do not think it necessary to discuss. They concur in the view of the Supreme Court that the appellant's case can be shortly disposed of and, agreeing as they do with that court's reasons and conclusion, do not propose to examine at length facts and contentions which are not strictly relevant to the question now to be considered.

The respondent is a public company registered in Palestine in October, 1934. By cl. 4 of its memorandum of association its capital was £P25,000, divided into 25,000 shares of £P1 each. In April, 1935, one of such shares had been issued to each of the eight subscribers to the memorandum. On Apr. 12, 1935, the eight shareholders purported to pass a resolution which provided that of the unissued share capital of the company £P11,000 should be issued as preference shares carrying the dividend and rights set out therein. The validity of this resolution and of the subsequent issue of preference shares has been challenged on divers grounds. Without determining that question, their Lordships will assume for the purpose of this appeal that the issue was invalid. On Apr. 19, 1935, the appellant made a formal application for £P775 of the said preference shares to be paid for by reichsmarks in Germany and such shares were allotted to her on July 7, 1935, after which the relevant certificate was issued to her and she was duly registered as the proprietor thereof. The transaction was somewhat complicated by the fact that, in consequence of an arrangement made between the respondent company and a company which was conveniently called "Haavara" and of the assumption by the appellant of the obligation to pay certain so-called "transfer fees," she paid in Germany a sum of RM.11,039.24, of which RM.9493.75 represented £P775 at the then rate of exchange of RM.12.25 to £P1 and the balance of RM.1545.49 the fees which she had agreed to pay, and by the further fact that, on the footing that she had been overcharged in respect of those fees, "Haavara" credited the respondent company and the respondent company in turn credited her with a certain sum of RM. which was satisfied by the allotment to her of 38 ordinary shares of the company. In considering the question, to which they must shortly come, whether the appellant is entitled to recover from the respondent company the money paid by her for the preference shares on the footing of a total failure of consideration, their Lordships are content to ignore and treat as the outcome of a separate transaction the receipt by her of the 38 ordinary shares.

The appellant held her shares for four years and then sold her 775 preference shares and also her ordinary shares, of which she had increased her holding to 50, through the Holland Bank Union for £P116,250 and £P3,750 respectively. The transaction is somewhat obscure, but it is not in doubt that she executed transfers in blank which were ultimately, on Sept. 28, 1941, completed as to the preference shares in favour of the Palestine Independent Trust Association, Ltd., and as to the ordinary shares in favour of one Bromberger and that these transfers were duly registered with the respondent company and the old certificates concelled and new ones issued and the transferees placed on the register of members of the company in place of the appellant. It has not been suggested that at this time any doubt had arisen in the mind of the appellant as to the validity of the issue of preference shares, but in the same year another original allottee of such shares began an action against the company and certain of its directors claiming repayment of the money paid by her for such shares on the ground (to put it shortly) that they had not been validly issued. In these proceedings, on Feb. 18, 1943, an order was made confirming terms of compromise by which (*inter alia*) the company admitted that the resolution of Apr. 12, 1935, was not properly passed and that the allotment of preference shares to the plaintiff in those proceedings was void. Shortly thereafter the respondent company circularised the then registered holders of preference shares offering to repay them the amounts paid by them for their shares. No similar offer having been made to the appellant who had previously disposed of her shares, on Mar. 28, 1943, her advisers wrote to the company demanding repayment of the sums paid by her for her 775 preference shares and stating that she withdrew her application for preference shares as there had been a delay for nearly 8 years, and that she would repudiate any allotment of shares the company might be advised to make in the future. At the same time they wrote a letter to the Holland Bank Union (to which, since learned counsel for the appellant relies on it, it is proper to refer) enclosing a copy of their letter to the company and saying: "Now we wish to make it clear that our client does not desire to collect from the company the amount due to her from it and at the same time to retain the sum she received from you in 1939." It cannot, however, fail to be observed that there is an implication that, if for any reason the appellant cannot recover from the company, she will not relinquish the money received from the bank.

The company having refused to accede to the appellant's demand, she brought the action out of which this appeal arises. By it she claimed a refund of the sum paid by her for the 775 preference shares, alleging that she "did not receive the consideration which she bargained for or any consideration." Her action A in simplest terms was for money had and received on a total failure of consideration, and it was frankly admitted by her learned counsel on this appeal that, if she could not sustain that plea, her action was rightly dismissed and this appeal must fail. The question, then, is whether there was a total failure of consideration moving from the respondent company. Their Lordships would at once dismiss as irrevelant to the determination of this question the fact that the appellant spontaneously offered in a certain event to refund to the bank B the money she had received on the sale of her shares. Equally irrelevant is the fact that she obtained substantially less than she had paid for her shares. Her rights against the company must be the same whether she sold them at their par value or for more or less. Their Lordships agree with the learned judges of the Supreme Court in thinking that the relevant plea can by no means be sustained. It appears to them that, having been duly registered as a shareholder C and having parted for value with her shares by a sale which the company recognised by issue of a share certificate to, and registration of, her transferee, she got exactly that which she bargained to get. Whether that transferee, finding that the shares had not been validly issued, would have any claim against her is a question which does not fall to be determined, but it appears to their Lordships to be idle to suggest that one who has parted with her shares for value can at a later date (it may be against the wish and against the interest D of her transferee) challenge the validity of the issue, and, succeeding in that challenge, then claim that she received something of no value and that there was a total failure of consideration. On the contrary, whether the issue was valid or invalid, a matter no longer important to her but vitally important to her transferee, she received something from the company which was worth to her just what she got for it. Their Lordships do not question the general proposition that, where an *ultra vires* issue of shares has been made, the sub- E scribers are entitled to get their money back, but this does not justify the claim of one who has sold her shares at a later date to assert that they have not been lawfully issued, much less to assert, contrary to the plain fact, that there has been, so far as she was concerned, a total failure of consideration. Learned counsel for the appellant relied on the authority of *Rowland* v. *Divall* (1). That case might have assisted him if the fact was that the appellant still held the shares, even though she had received a dividend on them. On this their Lord- F ships express no opinion, but it does not avail him in a case where the shareholder has sold her shares.

For these reasons it is unnecessary to investigate the question whether or not the issue was for any reason invalid—a question, indeed, which it would, as their Lordships think, in any case be improper to discuss in the absence of the transferee, the party truly interested. On the broad ground that the appellant G has failed to sustain the plea of total failure of consideration, their Lordships are of opinion that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors: *Hardman, Phillips & Mann* (for the appellant); *Oppenheimer, Nathan & Vandyk* (for the respondents).

[*Reported by* C. R. L. Phillips, Esq., *Barrister-at-Law.*] H

OADES *v.* SPAFFORD AND ANOTHER.

[COURT OF APPEAL (Tucker, Somervell and Cohen, L.JJ.), March 8, 9, 1948.]

Agricultural Holding—Sale—Purchaser's liability—Agreement by purchaser to pay "outgoing valuation due to the tenant"—Estoppel.

In 1938 F. demised an agricultural holding to O. by a written agreement containing repairing clauses whereby the tenant was liable for dilapidations, but, by a collateral oral agreement made at the same time, it was agreed that the repairing clauses should not be effective unless and until the landlord put the buildings in a proper state of repair. O. gave notice terminating the tenancy as on Apr. 6, 1942, and, after the notice was given, but before it became effective, F. entered into negotiations to sell the holding to S. In the course of these negotiations F. innocently misrepresented to S. that the written tenancy agreement contained the whole of the terms between him and O. Relying on that representation and believing, therefore, that the outgoing tenant was liable for dilapidations, S. agreed to purchase the property and on Mar. 13, 1942, a contract for sale with vacant possession was made between F. and S., a term of the contract being: "In addition to the purchase money the purchaser shall pay the outgoing valuation due to the tenant." The tenant O. duly quitted, and claimed from F. and S. the tenant right to which he was entitled, without any deduction for dilapidations for which he was not liable in view of the collateral oral agreement between him and F. This claim was admitted, and F. claimed against S. under the contract of sale an indemnity in respect of the whole amount so payable to O. S. contended that he was liable to indemnify F. only to the extent of such amount as would have been due if the written tenancy agreement had contained the whole of the terms between F. and O., and he also pleaded estoppel.

HELD: (i) the words "outgoing valuation due to the tenant" meant the sum payable to the outgoing tenant, whatever it might turn out to be, (ii) in the circumstances the defence of estoppel succeeded.

[AS TO LIABILITY OF PURCHASER OF AGRICULTURAL HOLDING TO PAY OUTGOING TENANT'S VALUATION, see HALSBURY, Hailsham Edn., Vol. 1, p. 337, para. 540; and FOR CASE, see DIGEST, Vol. 2, p. 42, No. *229*.]

Case referred to:

(1) *Dalton* v. *Pickard*, (1911), [1926] 2 K.B. 545, n.; 31 Digest 530, *6767*.

APPEAL by the first defendant, Spafford, from an order of His Honour JUDGE SHOVE, at Gainsborough County Court, dated Dec. 23, 1946.

The outgoing tenant of an agricultural holding obtained judgment against the defendants for the amount due to him in respect of tenant right, and the second defendant, his former landlord, in turn succeeded in his claim for indemnity against the first defendant under a contract for the purchase of the holding made by the first defendant with the second defendant. The first defendant appealed against that part of the order which was made pursuant to the claim for indemnity. The Court of Appeal now allowed the appeal. The facts appear in the judgment of TUCKER, L.J.

Lightman for the first defendant, Spafford.
Platts Mills for the second defendant, Fullard.

TUCKER, L.J.: This is an appeal by one of two defendants to certain proceedings in the Gainsborough county court. Mr. Spafford, the first defendant, appeals from that part of the order made by the county court judge giving judgment against him in favour of the second defendant, Mr. Fullard, pursuant to a claim for indemnity which had been made by the second defendant against the first defendant in the course of these proceedings. The proceedings were by Percy Oades, the outgoing tenant of an agricultural holding, against Spafford and Fullard in respect of sums for tenant right and so forth which he claimed as the outgoing tenant. We are not concerned with the claim of Oades, but only with the dispute between the two defendants.

In 1942 Oades was the tenant of an agricultural holding known as Cornley Farm, Misterton, in the county of Nottingham, and he held under a memorandum of agreement dated Mar. 7, 1938, made between himself and

Fullard. In due course he gave notice to terminate that tenancy as on Apr. 6, 1942, and before that notice became effective Fullard entered into negotiations with Spafford to sell the farm to him. On Mar. 13, 1942, the contract of sale was entered into between Fullard and Spafford and the agreement provides for the purchase by Spafford of this farm for the sum of £1,600 subject to the special conditions of sale and common form conditions. The particulars of the property recite that it is now in the occupation of Oades as tenant and refer to its area and so forth. Special condition 9 provides : A

> Vacant possession of the whole of the property will be given on completion.

Special condition 10, which is the condition most relevant to the present appeal, is as follows :

> In addition to the purchase money the purchaser shall pay the outgoing valuation due to the tenant.

There are the common form conditions of sale of the Lincolnshire Incorporated B Law Society, and the first of those conditions provides :

> These general conditions shall be deemed to incorporate the Law Society's Conditions of Sale, 1934 . . . except so far as the same are varied by or inconsistent with these general conditions and the foregoing special conditions. In the case of any variation or inconsistency *inter se* the provisions of the special conditions shall prevail.

C

Clause 7 of the common form conditions is as follows :

> Where the vendor is in occupation of an agricultural holding as defined by the Agricultural Holdings Act, 1923 : (*a*) the vendor shall be treated as an outgoing tenant, and the purchaser as a landlord, and accordingly the purchaser shall pay to the vendor, on completion, all money properly payable, under any statute or custom, to an outgoing tenant by the landlord for seed, labour, unexhausted value of artificial manure cakes and feeding stuffs in accordance with the custom of the district, and D the straw fodder and roots upon the property on the day fixed for completion shall be paid for at consuming value and the amount shall be ascertained pursuant to that Act but no amount shall be debited against the vendor for any dilapidations or for any act or omission committed or omitted prior to the date of the contract.

Oades, the tenant, went out on Apr. 6, 1942. Completion took place on Apr. 24 and, according to Spafford's evidence, he took possession on that day. There was no precise evidence to show who, if anybody, was in actual occupation between E Apr. 6 and Apr. 24. When the tenant, Oades, went out, he made his claim against Fullard, and the county court judge has found that he is entitled to recover against Fullard such sum as the assessor may find due in respect of the items claimed, or such sum as may be agreed, with costs. In the course of the hearing it transpired that, by reason of a collateral oral agreement made between Fullard and Oades when Oades was going into this farm as tenant, it was agreed that the repairing clauses of the tenancy agreement whereby F the tenant was liable for dilapidations should not be effective unless and until the landlord should previously have put the buildings in a proper state of repair. Accordingly, when the claim of Oades against Fullard was being considered by the county court judge, it appeared from the evidence—and there was no conflict about this—that, by reason of that collateral oral agreement made before the tenancy was entered into, Fullard would not be G entitled to set-off against any claims that the tenant had in respect of tenant right any set-off in respect of the dilapidations which should have been carried out by the tenant under his tenancy agreement, and, accordingly, a larger sum was recoverable by the tenant against Fullard than would have been the case if it had been permissible to make a deduction in respect of the landlord's claim for dilapidations. Fullard claimed over against Spafford to be paid by him such sum as should be found to be due to the tenant by Fullard. He H claimed under special condition 10 of the contract on the ground that, in addition to the purchase money, Spafford, as purchaser, was liable to pay the outgoing valuation due to the tenant, *viz.*, the actual sum which was payable by him (Fullard) to Oades. At the hearing before the county court judge, Spafford raised the defence that Fullard was estopped from alleging against him that the contract or agreement between Fullard and Oades was anything other than that contained in the memorandum of agreement dated Mar. 7, 1938. He said :

> During the negotiations leading up to the sale, I had an interview with Mr. Fullard who told me that I should have to pay the tenant right valuation . . . When I was discussing it with Fullard he told me the valuation would not be very high on account of dilapidations and before I signed the contract I saw the tenancy agreement. No one told me the clause was not operative . . . Fullard said it was better to keep the stuff on the farm as when the valuation was made, owing to dilapidations, the balance might go the wrong way.

He then stated that on Apr. 24 he completed the purchase, and he said :

> I did not hear anyone say Oades was not responsible . . . I asked Fullard for the terms of tenancy and for the agreement. I was then given the agreement. I relied on it as an accurate statement of terms.

He was cross-examined, but none of the statements that I have referred to was challenged in cross-examination. In the course of the cross-examination he said :

> Bearing in mind the allowance for dilapidations in the tenancy agreement, I was prepared to go to £1,600 . . . He had not told me of his [Fullard's] liability to put it in condition.

There was no dispute that that was the position as between Spafford and Fullard. Accordingly, Spafford's case was that he was liable to pay to Fullard only such sum, if any, as might be found to be due by Fullard to Oades after deducting the cost of putting the premises into repair under the tenancy agreement, and that he was not liable to pay to Fullard some larger sum which might, in fact, be due by Fullard to the tenant by reason of the collateral oral agreement which was entered into between Fullard and the tenant.

The whole of this appeal, in my view, turns on two points. Counsel for Fullard, first, takes a point on the construction of the contract of sale. He says that, quite apart from any question of estoppel, on the proper interpretation of this agreement, what Spafford was undertaking to pay was such sum as might be found to be due by Fullard to Oades for the tenant right. He says that the terms of special condition 10 mean nothing more or less than that the purchaser shall pay what is due in respect of tenant right and that, apart altogether from any oral agreement between Oades and Fullard, this contract provides for payment by Spafford to Fullard of such sum as was due from Fullard to Oades for tenant right, without any set-off or deduction for dilapidations. Counsel says that that is the true interpretation because this was a sale as between a vendor in occupation and a purchaser and they were contracting on that basis, and the rights as between the landlord and his tenant, whatever they might be, did not enter into the matter at all. He says that cl. 7 (*a*) of the general conditions applies, and that clause expressly says that, where the vendor is in occupation, then, as between vendor and purchaser, no amount shall be debited against the vendor for any dilapidations. Special condition 10, he says, must be construed in the light of cl. 7 (*a*) of the general conditions, and is, in effect, merely a contract to pay for the tenant right.

With regard to that argument, first, I can find no evidence that Fullard (the vendor) was at the material time in occupation of the farm, and that by itself would be sufficient, in my view, to exclude cl. 7 (*a*) of the general conditions, but, however that may be, if there is any conflict between these two conditions, namely, special condition 10 and general condition 7 (*a*), special condition 10 is the one which must prevail. I think in the circumstances of this case, where the parties were negotiating on the basis that there was, in fact, a tenant in possession at the time of their negotiations, and a tenant who was actually going out at the time the contract was made, that special condition 10 must be regarded as the overriding governing condition, and that, on the true interpretation of that condition, Spafford was agreeing to pay what should be found to be due on balance as between landlord and outgoing tenant. It is clear, if authority were needed for that, that, as between landlord and tenant, a valuation involves balancing, on one side, the payment due from the tenant for dilapidations, and, on the other side, sums due from the landlord to the tenant for tenant right and so forth. We were referred to *Dalton* v. *Pickard* (1) in this court, where the tenant had agreed to go out on the following terms. He had written to the landlords saying :

> I am willing to give up the whole of my holding known as "Tonford Farm" at Michaelmas next providing I am allowed fair valuation, and the whole of my live and

dead stock to be included in the valuation, and also an allowance of a half-year's rent. That proposal was accepted and he went out. The parties went to arbitration under the Agricultural Holdings Act, 1908, and the landlords put in a schedule of dilapidations. The tenant protested that when he entered into the agreement he understood that he was to get, as consideration for the surrender, the value of his live and dead stock and half a year's rent, free of all cross claims for dilapidations. He said that, if he had known that claims were going to be made against him for dilapidations, he would never have surrendered. VAUGHAN WILLIAMS, L.J., in the course of his judgment, said ([1926] 2 K.B. 546, 547):

> I see nothing in those letters which deprives the landlords of any of their rights, on the valuation being taken, to bring in their claim for dilapidations or for bad cultivation. It is quite plain that the tenant, by his own letter, anticipates that there will be a valuation. A valuation is a very well known thing in agriculture, and there are always two sides to the matter. There is the landlords' claim, and there is the tenant's claim, and then the balance is what ultimately has to be paid.

I think that Fullard and Spafford were contracting in terms of the sum payable, whatever it might turn out to be, as between Fullard (the vendor) and Oades (the outgoing tenant) and that that is the true meaning to be attached to the words "outgoing valuation due to the tenant" in special condition 10.

That being so, it is necessary to consider the defence of estoppel relied on by Spafford. The county court judge, in the course of his judgment, said:

> Fullard claims against Spafford indemnity . . . Claiming under the purchase agreement, he claims to be paid by Spafford the amount he has to pay to the tenant. The clause in the agreement which covers this case is cl. 10. The contract between the vendor and the purchaser means that the purchaser "shall pay to the landlord the outgoing valuation the landlord has to pay to the tenant." The point taken on behalf of Spafford is: "I knew nothing about this oral agreement about repairs. Therefore, though Fullard cannot set off against Oades the amount of the dilapidations, I am entitled to set it off against Fullard."

The county court judge then said:

> The facts are these. When Spafford was negotiating he asked what the terms of the tenancy were and he was shown the written agreement and nothing was said to him about there being any term or collateral agreement whereby conditions in the written agreement were not fully effective.

The county court judge went on to say that, as fraud was not relied on, Spafford could not succeed with regard to that part of his defence which was based on innocent misrepresentation or breach of warranty. Finally he came to the defence of estoppel and said:

> Another point taken [on behalf of Spafford] is that Fullard, having represented that the terms of the tenancy contained in the tenancy agreement were the effective terms under which Oades held, cannot now say that they were not effective terms. Therefore, the valuation between Spafford and Fullard must be made on the basis that those were the terms, that Spafford is entitled between himself and Fullard to have the valuation made on the basis that the tenant is liable for damages, and, therefore, the valuation should be either reduced or wiped out.

Then the judge read the terms of the contract, and said:

> This means the tenant right valuation without dilapidations. If Spafford is not entitled to claim damages, Spafford cannot read cl. 10 as if the terms of the tenancy had been such "as you represented them to me." Estoppel does not seem to me to avail him.

I confess I am not clear in my own mind as to the precise basis on which the county court judge is rejecting the estoppel argument, but, however that may be, I read his judgment as containing a finding that during the negotiations it was represented by Fullard to Spafford that the terms of the agreement between Fullard and Oades were those contained in the tenancy agreement which Fullard handed to Spafford to see. In my view, that is a sufficient finding to enable Spafford to succeed. It is quite true that, in order to establish estoppel, Spafford has got to prove a representation of fact which it was the intention of Fullard should be acted on, that that representation was, in fact, acted on by him to his detriment, and that the representation was untrue. I think all those necessary ingredients in an estoppel are established in the present case. The whole question turned on what was the agreement between Fullard and Oades. It was in respect of the liability, whatever it might be, of Fullard to Oades that Spafford was being called on to pay, and, accordingly, since he asked to see the relevant contract and was shown a tenancy agreement, but was not told of the existence of the collateral oral agreement, which had the effect of altering the whole import of the tenancy agreement, it seems to me that Fullard is estopped from saying that the real agreement between himself and Oades is contained in anything other than the tenancy agreement which he produced and showed to Spafford. It is only right to say that throughout these proceedings it has been accepted on all sides that the failure of Fullard to tell Spafford of the existence of this collateral arrangement was because it had passed out of his mind altogether. For these reasons this appeal succeeds and the order made by the county court judge will have to be varied.

SOMERVELL, L.J. : I agree, and I do not desire to add anything to what has already been said by TUCKER, L.J., with regard to the relationship between the general condition set out in cl. 7, and the argument based on it by counsel for Fullard, and special condition 10. Nor do I desire to add anything to what has already been said—with which I wholly agree—with regard to the construction of the words, "pay the outgoing valuation due to the tenant," which appear in special condition 10. I only desire to add a very few words on the issue of estoppel, which is one, as my Brother has said, which always requires careful consideration. The actual finding by the judge has already been read out, and I will not repeat it. He sets out that Spafford asked for the terms of the tenancy and that he was shown the written agreement, but nothing was said to him about any collateral bargain whereby the conditions in the agreement were not wholly effective. I think if one restricts oneself to this brief note of the finding, one can imagine cases in which the party (in this case, Spafford) relying on the type of estoppel on which he does rely might well fail to make out his case. If, for example, the landlord (*i.e.*, the vendor in this case) had reason to think that the tenancy agreement was merely wanted in order that the prospective purchaser might look at some particular matter in it—possibly the date when it came to an end, or something of that sort—then the party looking at it might not be able to rely only on that as a representation with regard to some other part of the tenancy agreement on which, if the intention of the landlord had been drawn to the matter, he might have made some qualification or added some relevant matter. But I think that, when one looks at the evidence which has been read, it is perfectly plain that this issue of dilapidations, and the question of the tenant's liability for dilapidations as a factor which would enter into the outgoing valuation due to the tenant, was present in the minds of both Spafford and Fullard and was discussed between them. I think that one is entitled to read the judge's very brief note of his finding in the light of this unchallenged evidence, and I agree that the defence of estoppel is made out.

COHEN, L.J. : I agree. As we are differing from the county court judge, I will quite shortly state my reasons for my conclusions. As I read the judgment of the county court judge, we are differing from him only on one point, *i.e.*, the construction of cl. 10 of the special conditions in the agreement of Mar. 13, 1942. As I understand it, the county court judge found, first, that there was an innocent misrepresentation and it was a misrepresentation which he summarised in the words which have already been read out by my Brother TUCKER, and which I will not repeat; secondly, that that innocent misrepresentation cannot found a claim for damages; and, thirdly, that Mr. Spafford cannot under the guise of breach of warranty claim damages for innocent misrepresentation. With all these conclusions I agree, and I do not think that counsel for Spafford sought to dispute them, either on fact or in law. The county court judge then turned to the defence of estoppel and rejected it, not on the ground, as I read his judgment, that the misrepresentation in question could not found an estoppel, but because, as he construed cl. 10 of the special conditions in the agreement, the effect of it was to bind Spafford to pay the tenant right due to the plaintiff, Oades. If I had agreed with that construction, I should have agreed with the judge's conclusion on the issue of estoppel, for on that construction any misrepresentation as to dilapidations would have been immaterial, but I am unable to construe cl. 10 in the sense in which the judge appears to have construed it. I agree with my Brethren that the effect of cl. 10 of the special conditions is to exclude the operation of cl. 7 of the common form of conditions of sale of the Lincolnshire Law Society. Speaking for myself, I doubt whether that clause was ever applicable to the facts of this case. I agree with my Brother TUCKER that, looking at the agreement in the light of the surrounding circumstances, Fullard was never in occupation of an agricultural holding. I think that any doubt is removed by cl. 10 of the special conditions, which substituted for any obligation which might have existed under cl. 7 of the general conditions, the obligation to pay the amount of the outgoing valuation due to the tenant. I do not wish to go through the question of construction in detail. It is sufficient to say that I read cl. 10 as my Brethren do, in the sense that outgoing valuation means such an outgoing valuation as was indicated in *Dalton* v. *Pickard* (1). Having reached this conclusion on construction, I agree with my Brethren that the representations which are found by the judge to have been made are vital and are sufficient to found estoppel. For these reasons I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *William Bains*, Brigg (for the first defendant); *Collyer-Bristow & Co.*, agents for *Hayes, Son & Richmond*, Gainsborough (for the second defendant).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

RECEIVER FOR THE METROPOLITAN POLICE DISTRICT *v.* TATUM.

[KING'S BENCH DIVISION (Atkinson, J.), March 4, 12, 1948.]

Police—Metropolitan Police Force—Receiver for Metropolitan Police District—Treasurer of fund for the purposes of the police—Power to sue—Accident to police officer through negligence of third party—Hospital charges and officer's wages during illness paid by Receiver—Right of Receiver to recover expenses from third party—Metropolitan Police Act, 1829 (c. 44), *s.* 12—*Metropolitan Police (Receiver) Act,* 1861 (c. 124), *s.* 1.

Under the Metropolitan Police Act, 1829, ss. 10 and 12, the Receiver for the Metropolitan Police District is appointed by the Crown as treasurer of the fund for the purposes of the police and is an agent and servant of the Crown, his duties being (*inter alia*) to pay the wages and allowances of members of the police force and "all other charges and expenses" as directed by a Secretary of State. By the Metropolitan Police (Receiver) Act, 1861, s. 1, the person holding the office of Receiver is a corporation sole with perpetual succession and with power to sue and be sued and "to do all other acts necessary or expedient to be done in the execution of the duties of his office."

Owing to the negligence of the defendant, a police officer was injured in an accident while on duty and had to be in hospital for some months. Under regulations made by the Home Secretary, the Receiver paid the hospital charges and the officer's pay and allowances while he was ill. In an action by the Receiver to recover these expenses from the defendant, it was contended by the defendant (i) that the claim for the hospital expenses should have been brought by the Attorney-General and not by the Receiver, and (ii) that the Receiver was not entitled to recover the pay and allowances paid to the officer while ill because such a claim must be based on the loss of a servant's services and the police officer was the servant, not of the Receiver, but of the Crown:—

HELD: (i) the hospital charges resulting from the defendant's negligence were an expense which the Receiver was legally bound to incur and which he was, therefore, entitled to recover from the defendant, and, since the expenses were paid out of the fund of which the Receiver was the custodian on behalf of the Crown, he alone could bring the action.

(ii) the claim to recover the pay and allowances paid to the police officer during his illness was based, not on loss of service, but on the fact that the Receiver had been compelled by the defendant's negligence to pay the sums in question, and, therefore, the Receiver was entitled to recover.

A *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* ([1936] 3 All E.R. 696 ; 156 L.T. 4), *applied.*

[AS TO THE POWERS OF THE RECEIVER FOR THE METROPOLITAN POLICE DISTRICT, see HALSBURY, Hailsham Edn., Vol. 25, p. 301, para. 490.]

Cases referred to :

B (1) *A.-G.* v. *Valle-Jones,* [1935] 2 K.B. 209 ; 104 L.J.K.B. 358 ; 152 L.T. 513 ; Digest Supp.

(2) *Fisher* v. *Oldham Corpn.,* [1930] 2 K.B. 364 ; 99 L.J.K.B. 569 ; 143 L.T. 281 ; 94 J.P. 132 ; Digest Supp.

(3) *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.,* [1936] 3 All E.R. 696 ; [1937] 1 K.B. 534 ; 106 L.J.K.B. 437 ; 156 L.T. 4 ; Digest Supp.

(4) *Hall* v. *Hollander,* (1825), 4 B. & C. 660 ; 7 Dow. & Ry. K.B. 133 ; 4 L.J.O.S. K.B. 39 ; 34 Digest 181, *1470.*

C

ACTION by the Receiver for the Metropolitan Police District to recover sums which were paid by him out of the police fund in respect of a police officer who had been injured while on duty by reason of the defendant's negligence. ATKINSON, J., held that the sums claimed by the Receiver were expenses necessarily incurred by him and were recoverable by him. The facts appear in the judgment.

D

Flowers, K.C., and *P. O'Connor* for the plaintiff.
Caulfield for the defendant.

ATKINSON, J. : Wood, the plaintiff in another action, was a police officer in the Metropolitan Police Force who, through the negligence of the defendant, E suffered an injury which led to the termination of his employment in the police. For some months Wood received his wages from the Receiver for the Metropolitan Police District who also paid his expenses while in hospital. The motor-cycle which Wood was riding at the time of the accident and which was damaged was the property of the Receiver, who, in the present action, seeks to recover the expenses to which he has been put. The point has been taken by counsel for the defendant that the Receiver is not the proper person to sue for the sums F claimed by him and is not entitled to recover them.

By s. 10 of the Metropolitan Police Act, 1829 :

> It shall be lawful for His Majesty to appoint a proper person to receive all sums of money applicable to the purposes of this Act, who shall be called " The Receiver for the Metropolitan Police District . . . "

G The section goes on to provide that the Receiver must keep accounts and pay all moneys received under the Act into the Bank of England, and such moneys shall be placed in an account entitled " The account of the public moneys of the Receiver for the Metropolitan Police District," and the Receiver :

> . . . shall draw out of the bank from time to time such sums of money as may be necessary for the payment of the salaries, wages, and allowances to be paid as hereinafter mentioned to the persons belonging to the police force appointed under this H Act, and also for the payment of all other charges and expenses in carrying this Act into execution . . .

Section 11 provides that the account shall be audited, and s. 12 provides that the Receiver, out of the moneys so received by him, shall from time to time pay to persons belonging to the police force such salaries, wages, and allowances, and any extraordinary expenses which are necessarily incurred in certain matters, and on receipt of the necessary order the Receiver shall pay such sums as the Secretary of State directs to any of the persons belonging to the said police force as a reward for extraordinary diligence or exertion, or as compensation for wounds, and so on. The last sentence of s. 12 provides :

> . . . and he shall also pay all other charges and expenses which such principal Secretary of State shall direct to be paid for carrying this Act into execution.

It is plain, therefore, that the Receiver is appointed by the Crown and is an agent and servant of the Crown.

The Metropolitan Police (Receiver) Act, 1861, s. 1, provides :

> The person for the time being holding the office of receiver for the Metropolitan Police District shall be a corporation sole, by the name of " the Receiver for the Metropolitan Police District," and by that name shall have perpetual succession, with a capacity by his official name to acquire and hold lands, to hold stock in the public funds, shares in any public company, securities for moneys, and personal property of every description, to sue and be sued, to execute deeds, using an official seal, to make leases, to enter into engagements binding on himself and his successors in office, and to do all other acts necessary or expedient to be done in the execution of the duties of his office.

It seems to me, therefore, that the Receiver has possession of these moneys on behalf of the Crown and is bound to deal with them in accordance with the regulations made by the Home Secretary, and he is given power to sue and be sued wherever it is necessary or expedient that he should do so in the course of his duties.

In this case, I hold that it was through the sole negligence of the defendant that the Receiver has incurred the expenses which he is claiming to recover from the defendant. The Receiver contends that it is expedient for him to sue and recover this money. It is not disputed that, under the regulations, the Receiver was bound to pay (*a*) pay and allowances amounting to £336 17*s.* 6*d.*, due to Wood during the months which expired before his service was terminated ; (*b*) the repairs to the motor-cycle which amounted to £25 5*s.* 1*d.* ; and (*c*) the hospital charges of £27 10*s.* 6*d.* It is admitted that where, through the negligence of the defendant, the Receiver has incurred expenses which can be paid out of this fund, he can recover them in so far as they are an expenditure on property, and, therefore, the Receiver can recover the cost of repairing the motor-cycle. I am wholly unable to understand why the hospital charges should be treated differently. It is said that the Crown ought to have sued for the hospital expenses through the Attorney-General as, for example, was done in *A.-G.* v. *Valle-Jones* (1). It seems to me wholly expedient for the Receiver to have sued in the present case and I would refer to the judgment of MacKinnon, J., in *A.-G.* v. *Valle-Jones* (1), where he said ([1935] 2 K.B. 217) :

> As regards medical expenses and hospital treatment, the claim for damages for these expenses is even more simple. It is put upon the ground that the Crown, having in fact expended the amount claimed under this head, ought to be compensated for these expenses by the person responsible for the negligence which rendered them necessary.

Surely, this sum can be recovered only by the person out of whose funds the money has come. In this case the custodian of a public fund, holding that money on behalf of the Crown, has been obliged to make this payment under the regulations made by the Home Secretary. I have not the slightest doubt that the Receiver is entitled to recover the hospital charges on the ground that they were an expense which, as a result of the defendant's negligence, he was legally bound to incur.

Is there any real difference between the claim for the hospital charges and the claim to recover the pay and allowances ? Counsel for the defence says that the latter claim must be based on loss of services, and, if a servant has been injured through some one else's negligence, the claim can only be made by a person who had been deprived of the loss of the servant's services. That is perfectly true. It was held by McCardie, J., in *Fisher* v. *Oldham Corpn.* (2) that police officers were servants of the Crown, and it is, therefore, said that the Receiver has not lost any services, because the services were rendered, not to him, but to the Crown. That also is true, but here the claim is not based on loss of service. The Receiver is saying that, acting under statutory regulations, he has been compelled to cause this fund of the Crown to be depleted by a sum of £336 17*s.* 6*d.*, money which the defendant, by his negligence, has compelled him to pay. That being so, he is entitled (he says) to be indemnified by the defendant and he relies on the words of the Act that it is his duty to sue and to do all acts necessary or expedient to be done in the execution of his office. He contends that to maintain this fund and recover moneys which he has been forced to pay out under the regulations to no purpose are certainly acts which A are expedient to be done in the execution of his office. It seems to me that this argument is sound. I think the matter comes within the principle enunciated by LORD WRIGHT in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (3), which is, shortly, that where one man is compelled to pay money which another is legally liable to pay, the person paying it can recover from the person on whom the real liability rests. In the present case there is no doubt that the real legal liability for the payment of this money rests on the defendant because the B Receiver was compelled to pay it as a result of the defendant's negligence. As LORD WRIGHT, M.R., said ([1936] 3 All E.R. 707) in *Brook's Wharf & Bull Wharf* v. *Goodman Bros.* (3) :

> The obligation is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from C any consent or intention of the parties or any privity of contract.

That seems to me to be the principle applicable, a principle which was indicated in 1825 in *Hall* v. *Hollander* (4), where a father was suing for an injury to his child, aged 2½ years, and merely based his claim of loss of service. ' There could be no loss of service in such a case, and the plaintiff lost, but it was said by BAYLEY, J., at the end of his judgment (4 B. & C. 662) :

> D In this case, too, it was proved that the father did not necessarily incur any expense ; if he had done so I am not prepared to say that he could not have recovered upon a declaration describing, as the cause of action, the obligation of the father to incur that expense.

HOLROYD, J., said (*ibid.*) :

> It was not established by evidence at the trial that the father was necessarily put to E any expense ; the court are, therefore, not called upon to give any opinion upon his right to recover such expenses.

That is precisely the cause of action which has been submitted here, namely, that the Receiver had necessarily incurred expense as a result of the defendant's negligence. I think the claim of the Receiver is good.

Judgment for the plaintiff with costs.

F Solicitors ; *Ponsford & Devenish* (for the plaintiff) ; *A. J. Clements & Co.* (for the defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* ROSS AND COULTER AND OTHERS (BLADNOCH DISTILLERY CO., LTD.)

INLAND REVENUE COMMISSIONERS *v.* LORD SALTOUN AND OTHERS (WILLIAM LONGMORE & CO., LTD.)

INLAND REVENUE COMMISSIONERS *v.* BARCLAY AND OTHERS (GLASGOW BONDING CO., LTD.)

INLAND REVENUE COMMISSIONERS *v.* BARCLAY (ALEXANDER McGAVIN & CO., (GLASGOW), LTD.)

INLAND REVENUE COMMISSIONERS *v.* D. P. McDONALD & SONS, LTD. AND OTHERS (*ex parte* as to certain Respondents) (D. P. McDONALD & SONS, LTD.)

INLAND REVENUE COMMISSIONERS *v.* RUSSELL AND ANOTHER (PETER DOUGLAS & CO., LTD.)

INLAND REVENUE COMMISSIONERS *v.* LANNON, J. S. & J. BROWN, LTD. AND OTHERS *v.* INLAND REVENUE COMMISSIONERS (J. S. & J. BROWN, LTD.)

HENRY SIMPSON & CO., LTD. AND OTHERS *v.* INLAND REVENUE COMMISSIONERS (HENRY SIMPSON & CO., LTD.)

JAMES McVEY, LTD. AND OTHERS *v.* INLAND REVENUE COMMISSIONERS (JAMES McVEY, LTD.)

INLAND REVENUE COMMISSIONERS *v.* GRAY AND OTHERS (*ex parte* as to the trustee of the property of KRITZ) (JAMES McVEY, LTD.)

INLAND REVENUE COMMISSIONERS *v.* BARR AND OTHERS (*ex parte* as to the trustee of the property of KRITZ) (THOMAS BARR, LTD.)

POMEROY AND OTHERS *v.* INLAND REVENUE COMMISSIONERS (THOMAS BARR, LTD.)

HOLT *v.* INLAND REVENUE COMMISSIONERS (W. H. HOLT & SONS (CHORLTON-CUM-HARDY), LTD.)

WILLIAM LONGMORE & CO., LTD. AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

GARFIELD AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS.

KRITZ *v.* INLAND REVENUE COMMISSIONERS (WILLIAM LONGMORE & CO., LTD.)

[House of Lords (Lord Thankerton, Lord Porter, Lord Simonds, Lord Morton of Henryton, Lord MacDermott), November 11, 13, 14, 17, 18, 19, 21, 24, 25, 27, 28, December 4, 5, 8, 9, 11, 12, 15, 16, 17, 18, 19, 1947, March 12, 1948.]

Revenue—Excess profits tax—Disposal of company's stock at under value—Scheme to avoid tax—Relevance of knowledge of shareholder—Financial benefit—Money received in respect of abortive transaction—Compensation for loss of agency or directorate—" Market value "—Apportionment—Discretion of commissioners—Finance Act, 1943 (c. 28), *s.* 24.

In 1941 and 1942, owing to restrictions on the manufacture of whisky, sales from existing stocks were not being replaced from the distilleries, and, in view of the 100 per cent. excess profits tax, the holders of those stocks—generally distillery companies or bonded warehouse companies—tended to restrict their business to limited sales to their customers, usually blenders, at a small profit, in order to keep within their standard profit, although far below the prices then obtainable in the brokers' market. In those circumstances recourse was had by certain promoters to a scheme by which the benefit of these high prices could be obtained, or largely obtained, without attracting excess profits tax. The essential ingredients of the scheme were (*a*) to secure the control of the company which owned the stock by purchase of the shares either completely or in numbers sufficient to secure control, at a price attractive to the shareholders, (*b*) having thus secured control, to replace the directors by nominees of the promoters of the scheme, (*c*) the disposal of the whisky stocks at a small profit to persons not carrying on a trade or business liable to excess profits tax, and (*d*) disposal thereafter by such persons of the stocks at the high prices obtainable in the brokers' market or elsewhere, and the consequent avoidance of excess profits tax. With some variation of detail such a scheme was inherent in the cases under review which related to matters which occurred prior to the passing of the Finance Act, 1943.

Section 24 of that Act, which operated retrospectively, and aimed at stopping this loophole, provided as follows: "(1) Where any of the stock in trade of a company is disposed of otherwise than for at least its full market value and is so disposed of either to, or directly or indirectly for the benefit or by the procurement of, any persons who directly or indirectly hold, or are in a position to obtain, a controlling interest in the company, and any of that stock is disposed of by any person at a profit but in circumstances in which, apart from this section, the full tax (as hereinafter defined) is not payable or, in the opinion of the [Commissioners of Inland Revenue], is unlikely to be recovered, the commissioners may direct—(*a*) that such sum as may be specified in the direction, being the sum which, in the opinion of the commissioners, is equal to the full tax, shall be chargeable by way of excess profits tax; and (*b*) that that sum shall be a joint and several liability of such persons as may be specified in the direction, being the company and the persons who, in the opinion of the commissioners, obtained (but for this section) financial benefits as a result of the transactions aforesaid and any other transactions which, in the opinion of the commissioners, were effected in connection with or in association with any of the said transactions: Provided that—(i) if the commissioners think fit, the direction may apportion the said sum among all or any of the persons who would otherwise be jointly and severally liable as aforesaid, and where a part of the said sum is apportioned to more than one of the said persons, that portion of the said sum shall be a joint and several liability of the particular persons to whom it is apportioned and not of any other persons; (ii) where any person has (apart from this section) obtained financial benefits as aforesaid but only by reason of the transfer by him of shares which he did not obtain under any such transaction as aforesaid and he has not, apart from that transfer, been concerned in any such transaction as aforesaid, the direction shall apportion the said sum so that there is apportioned to him no greater part thereof than is equal to the amount by which he is, under sub-s. (4) of this section, deemed to have (apart from this section) financially benefited.

"(2) In this section, the expression 'the full tax' means the excess profits tax which, if the stock, instead of being disposed of otherwise than for at least its full market value, had, at the time when it was so disposed of, been sold by the company on its own behalf in the ordinary course of trade for its full market value, would have become payable by or in respect of that company for the chargeable accounting period during which the stock was so disposed of, no account being taken of any relief for deficiencies of profits.

"(3) As between the persons who, by virtue of a direction under this section, become jointly and severally liable for any sum, their respective liabilities shall, unless otherwise agreed between them, be proportionate to the extent to which they respectively benefited financially as a result of all the transactions in question, apart from their liability under this section.

" (4) Where any such transaction as aforesaid consists of the transfer of any shares, the persons transferring the shares shall be deemed to have (apart from this section) financially benefited —(*a*) if they obtained the shares under any such transaction as aforesaid, to the extent by which the consideration which they obtained for the shares exceeds in value the consideration which they gave for the shares ; (*b*) if they did not obtain the shares under any such transaction as aforesaid, to the extent by which the consideration which they obtained for the shares is greater than it might have been expected to be if the stock had been sold by the company immediately before the transfer in such circumstances that the full tax became payable by or in respect of the company.

" (5) For the purposes of this section, a barrister, solicitor or accountant shall not be treated as having obtained financial benefits by reason only that he received in the ordinary course of his profession remuneration in respect of ordinary professional services rendered in connection with any such transaction as aforesaid at a rate not greater than that customary in the profession for services of such a character, a person who carries on a banking business shall not be treated as having obtained financial benefits by reason only that he received interest at not more than the normal rate on a loan made by him in connection with any such transaction as aforesaid, and a person who carries on a business which includes dealing in stock of the kind to which a direction under sub-s. (1) of this section relates shall not be treated as having obtained financial benefits by reason only that he bought some or all of the stock in question at a price representing the full market value thereof and disposed thereof at a profit."

In apportioning the liability for the full tax on the various persons involved the Special Commissioners rejected a contention that original shareholders who had no knowledge of or reason to suspect the subsequent dealings with the company's stocks could not lawfully be made the subjects of directions either under sub-s. (1) (*b*) or under proviso (ii) and sub-s. (4) (*b*), and, having neglected or refused to hear evidence of the value of the shares in the company as a going concern for the purposes of apportionment under proviso (ii) of sub-s. (1), estimated the value of the shares without reference to such evidence and fixed the deemed financial benefit of the original shareholders under sub-s. (4) (*b*) at the maximum figure of the difference between the value so arrived at and the amount received by them from the promoters of the scheme.

Held : (i) (Lord MacDermott *dissenting*) it was open to the commissioners to find as a fact that an original transferor of shares in a company, whether private or public, obtained a financial benefit within the meaning of s. 24 (1) (*b*) as a result of transactions consisting of such a sale and re-sale of stocks as are mentioned in the sub-section and any other transactions which in their opinion were effected in connection with or in association with any of the stock transactions, although such transferor at no time had knowledge that any such transactions were in progress or contemplated.

Decision of the Court of Session on this point, (1946 S.C. 134), *reversed,* and *the decision of the Court of Appeal,* ([1947] 1 All E.R. 148), *affirmed.*

(ii) the absence of such knowledge might be of some evidential value to the commissioners in determining whether in fact there was such connection or association, and, on the other hand, the existence of such knowledge might have evidential value in the contrary direction. It, therefore, remained open to maintain, as a question of law, that there was not legal evidence to justify the commissioners' conclusion in fact that there was such a connection or association.

(iii) the word " and " in the phrase " the transactions aforesaid and any other transactions " in sub-s. (1) (*b*) should be read conjunctively.

(iv) liability under the section did not depend on whether the sale of shares preceded the sale of stock. It was enough if the stock was disposed of " to, or directly or indirectly for the benefit or by the procurement of, any persons who directly or indirectly hold, or are in a position to obtain a controlling interest in the company."

(v) the principles applicable to the question whether the sums with which those to whom several liability was apportioned under sub-s. (1), proviso (i), should be deducted from the total to be apportioned before the residue was imposed as a joint and several liability on the other persons liable were the same as those governing the case of persons severally liable under proviso (ii).

(vi) money, *e.g.*, commission, received in respect of a transaction which was abortive as regards the stock transactions or the transaction for the purchase of the shares was not " a transaction effected in connection with or in association with any of the said transactions " within the meaning of sub-s. (1) (*b*), and, in any event, the onus was not on the recipient of such money to show that he had not received the sum paid to him on his own behalf, but for the commissioners, on relevant evidence, to find that he had so received it.

(vii) reasonable compensation for loss, by a selling agent, of a valuable agency, or, by a director, of an existing tenure of office, by termination before its natural expiry by reason of the associated transaction was not a financial benefit resulting from that transaction within the meaning of sub-s. (1) (*b*).

(viii) commission paid to a financial agent concerned in an associated transaction for introducing the promoters of a scheme to financiers who provided the necessary finance was a " financial benefit " within sub-s. (1) (*b*), and the recipient of such money could not escape liability on the plea that he, although a necessary participant in the scheme, had done no more than receive payment for services rendered.

(ix) a temporary accommodation or loan might constitute a " financial benefit " within sub-s. 1 (*b*).

(x) sub-s. (5) equally applied to the persons referred to whether they knew or did not know of the nature of the transaction ; the sub-section was not inserted *ob majorem cautelam* but as a reasonable and necessary exception to the wide scope of sub-s. (1) (*b*).

Decision of the Court of Session, (1946 S.C. 134), *on this point reversed*, and *the decision of the Court of Appeal* ([1947 1 All E.R. 148), *affirmed.*

(xi) the " market " referred to in the phrase " sold by the company on its own behalf in the ordinary course of trade for its market value " in sub-s. (2) was the open market and the inquiry was not limited by those words to the ordinary course of the trade of a particular company, or, alternatively, of companies carrying on the same type of trade.

Decision of the Court of Session (1946 S.C. 134), and *the Court of Appeal* ([1947) 1 All E.R. 148), *affirmed on this point.*

(xii) the expression " the stock " in sub-s. (2) meant the stock of the company which was disposed of otherwise than for at least its full market value as described in sub-s. (1) ; the extent of any subsequent stock transaction should, therefore, be disregarded.

(xiii) sub-s. (4) was not merely a quantitative provision ; on the natural meaning of its language it was clearly designed to provide that something should be deemed to be a financial benefit within the meaning of the section which would not otherwise fall within the financial benefits referred to in sub-s. (1) (*b*), which involve a question of fact and not of statutory fiction ; and as the deemed financial benefit under sub-s. 4 (*b*), was a specified part of the consideration received for the shares it must be obtained as a result of " such transactions as aforesaid," the effect of sub-s. (4) being to define the financial benefits referred to in sub-s. (1) as including these deemed benefits. Consequently, where, on proper evidence, a transaction for sale of shares by original shareholders was found as a fact to have been effected in connection with or in association with any of the stock transactions the original shareholders obtained the deemed benefit of sub-s. (4) (*b*) as a result of the stock transaction and the connected or associated transaction under consideration and were, therefore, under the joint and several liability imposed by sub-s. (1), subject to the operation of the two provisos.

(xiv) the courts were not entitled to interfere with the exercise of the discretionary power conferred by s. 24 on the commissioners unless either (*a*) the exercise of the discretion had not complied with the conditions provided by the statute for the exercise of the discretionary power, or (*b*) the power had not been exercised judicially ; the scheme of sub-s. (1), including both provisos, formed the statutory basis of the power of apportionment derived from the intention of the legislature, express or implicit in its enactment ; in the exercise of the discretion conferred by A the provisos the question of apportionment and of the amounts to be apportioned should be approached with a view to securing, in so far as practicable, a just and equitable distribution of the full tax ; and, therefore, where the Special Commissioners had applied the maximum amount under sub-s. (4) (*b*) without regard to the financial benefit in fact received by the original shareholders, they had not only exercised their power unjudicially, but had not conformed to the statutory basis of the exercise B of the power of apportionment ; consequently, the direction, so far as it exercised the power of apportionment, would require to be reconsidered as a whole by the Special Commissioners to determine what, if any, was a fair and just proportion of the total sum to apportion to the original shareholders, keeping in view the statutory basis of the exercise of their discretionary power, and taking into consideration any evidence relevant C to the value of the financial benefit, if any, in fact obtained by the original shareholders.

Decision of the Court of Appeal ([1947] 1 All E.R. 148), *reversed on this point.*

Per LORD MORTON OF HENRYTON : The only "conditions provided by the statute for the exercise of the discretionary power" were (i) that the commissioners must make an apportionment in the case of a person D who came within proviso (ii) to sub-s. (1), and, (ii) that the sum apportioned to such a person must not exceed the maximum laid down by that proviso.

(xv) awareness or otherwise of a scheme for disposal of stocks at a price less than the full market value or for evasion of excess profits tax was a relevant matter for consideration by the commissioners in the exercise of their power of apportionment under the provisos to sub-s. (1). E

A company, whose normal financial year ended on July 31, ceased to trade after Nov. 1, 1941, and the computation of the full tax under sub-s. (2) was made by the commissioners on the footing of a chargeable accounting period extending from July 31, 1941, to Nov. 1, 1941 :—

HELD : the company having ceased to carry on business after Nov. 1, 1941, their trading account could not be carried beyond that date, and the appropriate accounting period fell to be determined by the commissioners F under s. 20 (2) (*c*) of the Finance Act, 1937.

Per cur : It is not open to a party on appeal to raise a point of law which was not taken or argued before the commissioners and cannot be brought within any of the questions of law on which the opinion of the court is asked in the Stated Case.

[AS TO THE FINANCE ACT, 1943, s. 24, see HALSBURY'S STATUTES, Vol. 36, G p. 142.]

Cases referred to :

(1) *Inland Revenue Comrs.* v. *Dean Property Co.*, 1939 S.C. 545 ; 22 Tax Cas. 706 ; Digest Supp.

(2) *Donald Campbell & Co.* v. *Pollak*, [1927] A.C. 732 ; 96 L.J.K.B. 1132 ; 137 L.T. 656 ; 43 Digest 335, *1570.*

(3) *Fendoch Investment Trust Co.* v. *Inland Revenue Comrs.*, *Alporteno Investment* H *Trust Co.* v. *Inland Revenue Comrs.*, [1945] 2 All E.R. 140 ; *sub nom.*, *Alporteno Investment Trust Co.* v. *Inland Revenue Comrs.*, *Fendoch Investment Trust Co.* v. *Inland Revenue Comrs.*, 114 L.J.K.B. 291 ; 173 L.T. 35 ; 2nd Digest Supp.

APPEALS from orders of the Court of Session in the *Bladnoch Distillery Co., Ltd.*, case dated Jan. 11, 1946, and reported at 1946 S.C. 134, and other cases (unreported), and an order of the Court of Appeal in the *W. H. Holt & Sons (Chorlton-cum-Hardy)* case, dated Dec. 19, 1946, and reported [1947] 1 All E.R. 148. The cases arose out of claims by the Crown for excess profits tax under

s. 24 of the Finance Act, 1943, in respect of transactions in stocks of whisky under a scheme designed and operated for the avoidance of chargeability to tax. The essential ingredients of the scheme are summarised in the headnote and in the opinion of LORD THANKERTON in the *Bladnoch Distillery Co., Ltd.*, case. The facts in each particular case appear in the opinion of LORD THANKERTON in that case. The questions of law for the opinion of the court are set out, where necessary, at the commencement of each appeal.

A The House took time for consideration.

Mar. 12. The following opinions were read.

BLADNOCH DISTILLERY CO., LTD.

The questions of law in the Case Stated by the Special Commissioners were: "(1) Whether, in estimating the full market value of the whisky stock of the company, we were entitled to take into consideration the prices prevailing on B Nov. 25, 1941, in the brokers' market? (2) Whether, on the facts and evidence, we were entitled to apportion part of the full tax to the original shareholders who sold their shares to Mr. Hogg? (3) Whether there was evidence before us on which we were entitled to fix the value of the shares for the purpose of s. 24 (4) (*b*) of the Finance Act, 1943, at £3? (4) Whether the direction was incompetent in view of the previous proceedings under s. 35 of the Finance C Act, 1941? (5) Whether the direction is right in form, in respect that it apportions the liability for the full tax on the original vendors of the shares in the first place, and only the balance on the persons mentioned [other than the original shareholders]? (6) Whether the persons mentioned [other than the original shareholders] should be primarily liable in payment of the full tax? (7) Whether the persons who knowingly carried through the transactions whereby the full tax was not payable, apart from the provisions of s. 24, should be made D primarily liable? (8) Whether the liability of all parties to the direction should be in proportion to the financial benefit obtained by them or deemed to be obtained by them? (9) Whether we were entitled to impose the maximum liability on the original vendors of the shares? (10) Whether there was evidence before us to justify our retaining in the direction the various persons who appeal against our decision?"

E *The Solicitor-General* (*Sir Frank Soskice, K.C.*), *the Solicitor-General for Scotland* (*Douglas Johnston, K.C.*), *J. F. Gordon Thomson, K.C.* (of the Scottish Bar), and *R. P. Hills* for the Crown.

L. Hill Watson, K.C. (*of the Scottish Bar*), and *D. Watson* for the respondents.

LORD THANKERTON: My Lords, this appeal is the first of a series of appeals, all of which, with one exception, have come from the Court of Session. F The excepted appeal has come from the Court of Appeal. They all arise out of claims by the Crown for excess profits tax in respect of transactions in stocks of whisky by virtue of s. 24 of the Finance Act, 1943, which operates retrospectively. One of these appeals has already been dismissed—*Inland Revenue Comrs.* v. *H. C. Gray*, in relation to Henry Simpson & Co., Ltd. The excess profits tax directed to be chargeable in these appeals amounts to over 4½ million pounds.

The circumstances under which the provisions of this section came to be G enacted—at least so far as whisky transactions were concerned—may be briefly stated. After the outbreak of war, an excess profits tax of 60 per cent. on the trades or businesses to which the section applied was imposed by s. 12 (1) of the Finance (No. 2) Act, 1939. The rate of excess profits tax was increased to 100 per cent. by s. 26 (1) of the Finance Act, 1940. In 1941 and 1942, owing to the restrictions on manufacture by the distillery companies, sales from the existing stocks were not being replaced from the distilleries, and, in view of H the excess profits tax, the holders of these stocks—generally distillery companies or bonded warehouse companies—tended to restrict their business to limited sales to their customers, usually blenders, at a small profit, in order to keep within their standard profit, although very far below the prices then obtainable in the brokers' market. Under these circumstances recourse was made by certain people to a scheme, by which the benefit of these high prices could be obtained, or largely obtained, without attracting excess profits tax. The essential ingredients of the scheme were (*a*) to secure the control of the company which owned the stock, by purchase of the shares, either completely or in numbers sufficient to secure control, at a price attractive to the shareholders, (*b*) having thus secured control, to replace the directors by nominees of the promoters of the scheme, (*c*) the disposal of the whisky stocks of the company at a small profit to persons not carrying on a trade or business liable to excess profits tax, and (*d*) disposal thereafter by such persons of the stocks at the high prices obtainable in the brokers' market or elsewhere, and the consequent avoidance of chargeability to excess profits tax. With some variation of detail such a scheme will be found to be inherent in the subject-matter of these appeals, all of which relate to matters which occurred prior to July 22, 1943, when the Finance Act, 1943, became law.

Section 24 of the Act of 1943 provides as follows :—

> 24.—(1) Where any of the stock in trade of a company is disposed of otherwise than for at least its full market value and is so disposed of either to, or directly or indirectly for the benefit or by the procurement of, any persons who directly or indirectly hold, or are in a position to obtain, a controlling interest in the company, and any of that stock is disposed of by any person at a profit but in circumstances in which, apart from this section, the full tax (as hereinafter defined) is not payable or, in the opinion of the commissioners, is unlikely to be recovered, the commissioners may direct—(*a*) that such sum as may be specified in the direction, being the sum which, in the opinion of the commissioners, is equal to the full tax, shall be chargeable by way of excess profits tax ; and (*b*) that that sum shall be a joint and several liability of such persons as may be specified in the direction, being the company and the persons who, in the opinion of the commissioners, obtained (but for this section) financial benefits as a result of the transactions aforesaid and any other transactions which, in the opinion of the commissioners, were effected in connection with or in association with any of the said transactions : Provided that—(i) if the commissioners think fit, the direction may apportion the said sum among all or any of the said persons who would otherwise be jointly or severally liable as aforesaid, and where a part of the said sum is apportioned to more than one of the said persons, that portion of the said sum shall be a joint and several liability of the particular persons to whom it is apportioned and not of any other persons ; and (ii) where any person has (apart from this section) obtained financial benefits as aforesaid but only by reason of the transfer by him of shares which he did not obtain under any such transaction as aforesaid and he has not, apart from that transfer, been concerned in any such transaction as aforesaid, the direction shall apportion the said sum so that there is apportioned to him no greater part thereof than is equal to the amount by which he is, under sub-s. (4) of this section, deemed to have (apart from this section) financially benefited.
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> (2) In this section, the expression " the full tax " means the excess profits tax which, if the stock, instead of being disposed at otherwise than for at least its full market value, had, at the time when it was so disposed of, been sold by the company on its own behalf in the ordinary course of trade for its full market value, would have become payable by or in respect of that company for the chargeable accounting period during which the stock was so disposed of, no account being taken of any relief for deficiencies of profits.
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> (3) As between the persons who, by virtue of a direction under this section, become jointly and severally liable for any sum, their respective liabilities shall, unless otherwise agreed between them, be proportionate to the extent to which they respectively benefited financially as a result of all the transactions in question, apart from their liability under this section.
>
> (4) Where any such transaction as aforesaid consists of the transfer of any shares, the persons transferring the shares shall be deemed to have (apart from this section) financially benefited—(*a*) if they obtained the shares under any such transaction as aforesaid, to the extent by which the consideration which they obtained for the shares exceeds in value the consideration which they gave for the shares ; (*b*) if they did not obtain the shares under any such transaction as aforesaid, to the extent by which the consideration which they obtained for the shares is greater than it might have been expected to be if the stock had been sold by the company immediately before the transfer in such circumstances that the full tax became payable by or in respect of the company.
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> (5) For the purposes of this section, a barrister, solicitor or accountant shall not be treated as having obtained financial benefits by reason only that he received in the ordinary course of his profession remuneration in respect of ordinary professional services rendered in connection with any such transaction as aforesaid at a rate not greater than that customary in the profession for services of such a character, a person who carries on a banking business shall not be treated as having obtained financial benefits by reason only that he received interest at not more than the normal rate on a loan made by him in connection with any such transaction as aforesaid, and a person who carries on a business which includes dealing in stock of the kind to which

a direction under sub-s. (1) of this section relates shall not be treated as having obtained financial benefits by reason only that he bought some or all of the stock in question at a price representing the full market value thereof and disposed thereof at a profit.

It is unnecessary to quote the remaining four sub-sections in full. They are mainly procedural, a right of appeal to the Special Commissioners by any person aggrieved by a direction being provided by sub-s. (7) and a provision being made in sub-s. (8) that the enactments relating to excess profits tax
A should be deemed always to have had effect as amended and extended by the foregoing provisions of the section.

It may be observed generally that sub-s. (1) begins by prescribing the circumstances, the existence of which is a condition precedent to the power of making a direction conferred on the commissioners. The sub-section then lays down the nature of the direction in sub-heads (*a*) and (*b*), the former sub-head providing that the direction shall specify as chargeable by way of excess profits
B tax the sum which, in the opinion of the commissioners, is equal to the full tax, the meaning of "the full tax" being later defined by sub-s. (2). Sub-head (*b*) of sub-s. (1) provides that such sum shall be a joint and several liability of such persons as may be specified in the direction, being the company and the persons who come within the terms of sub-head (*b*), subject to two important provisos under which a discretionary power of apportionment of the total
C sum is conferred on the commissioners, this discretion, however, being made mandatory to some extent, in the case of the persons affected by the second proviso, *inter alia* by the provision of a maximum limit (to be calculated under sub-s. (4) (*b*)), to the liability of these persons.

The most important contentions in these appeals have related to the proper construction of sub-s. (1) (*b*) and of the correct statutory basis of the discretionary power of apportionment under the two provisos, and, in particular,
D the second proviso. Questions have also arisen as to the proper construction of sub-s. (2) relating to the full tax, and of sub-s. (4). There are also questions as to whether there was evidence which could justify certain of the findings in fact of the Special Commissioners.

These appeals arise on Cases Stated by the Special Commissioners under s. 149 of the Income Tax Act, 1918. The Special Commissioners were the same persons in all the cases, and they had made a direction under s. 24 of the Act
E of 1943 in the case of each company the disposal of whose stock in trade was in question under s. 24 (1). There were eleven of such companies in Scotland, and one in England, and accordingly there were eleven Cases stated for the opinion of the Court of Session and one Case for the opinion of the King's Bench Division. With these general observations, I can turn to the present appeal, in reference to the Bladnoch Distillery Co., Ltd., which may be referred to as
F "the company." At this stage, I will give a brief summary of the facts from the Stated Case.

The company was incorporated in 1937, and carried on the business of distillers of whisky. The issued share capital was £7,500 in £1 shares, which were held as to 6,000 shares by Messrs. Ross and Coulter, a partnership of whisky brokers, as to 500 shares each by three Messrs. Ross, who were the sole partners of the firm and were the sole directors of the company until Nov. 25,
G 1941. They are referred to in the Case Stated as "the original shareholders." Two of the Messrs. Ross are dead, and their trustees along with Messrs. Ross and Coulter and Mr. Herbert M. Ross are the respondents in this appeal other than David Lannon to whose case I will refer later. After certain negotiations with Mr. William Hogg, who had approached them, the original shareholders agreed, by offer and acceptance dated Nov. 25, 1941, to sell their shares to Mr. Hogg for £28 a share, or £210,000, Mr. Hogg also undertaking to discharge
H loans made by Messrs. Ross and Coulter to the company amounting to £12,850. Mr. Hogg, who had in view the re-sale of the shares at a profit, had already agreed to re-sell them to Sir Hector MacNeal, for £29 12*s.* 3*d.* per share, or £222,100, and the discharge of the £12,850 loans, by offer dated Nov. 21, 1941, and acceptance dated Nov. 24, 1941. Further, at or about that time, Sir Hector MacNeal, as the result of an approach by Mr. George Barclay, purporting to act for Mr. James Donald Stewart, agreed to sell the shares to Mr. Stewart, for £270,000 and the discharge of the loans, as shown by memorandum of agreement dated Nov. 25, 1941, it being alleged that an oral agreement to that end

had been entered into early in November. At this time the company possessed 89,874.5 gallons of whisky of its own make at a cost price varying from 3*s.* 1*d.* to 4*s.* per gallon, the aggregate being £16,007 7*s.* 0*d.* At the time when the original shareholders were considering the sale of their shares, the market value of these whisky stocks had risen to an average of about £4 per gallon. Sometime about the first or second week of November, 1941, Mr. Hogg introduced the said George Barclay to Mr. James Barclay, the managing director of the Highland Bonding Co., Ltd., whisky brokers, Glasgow; Mr. George Barclay told Mr. James Barclay that he was acting for clients on behalf of the Bladnoch Distillery Co., and that if a certain deal materialised there might be whisky for sale, and asked Mr. James Barclay whether he would be prepared to dispose of the whisky on behalf of his clients. After Mr. James Barclay had discussed the matter with Mr. Duncan McLeod, a director of Duncan McLeod & Co., Ltd., whisky brokers, it was arranged about the middle of November that the Highland Bonding Co. and Duncan McLeod & Co. should on joint account purchase the whisky stocks of the Bladnoch Co. amounting to about 89,000 gallons for £327,000, that settlement should take place on or about Nov. 25, 1941, and that £250,000 on account of the purchase price should be paid against transfer of the delivery orders for all the whisky stocks, the balance of the purchase price to be paid within six weeks. It was part of the arrangement that the first instalment of £250,000 should be paid to Sir Hector MacNeal. On Nov. 25, 1941, a most important meeting took place in the office of the Clydesdale Bank, Sauchiehall Street, Glasgow—the bankers of the original shareholders—for the purpose of completing the various sales of the company's shares already referred to. There were present at that meeting (1) representatives of the original shareholders, who had with them signed transfers of all the shares in favour of Mr. Hogg, together with the share certificates, and the company's minute book, and a signed minute by the Rosses as directors, appointing Mr. George Barclay and Mr. Scott Moncrieff Jacobsen, nominees of Mr. Stewart, to be directors in their stead; (2) Messrs. Marshall & Maclachlan, Mr. Hogg's solicitors; (3) Sir Hector MacNeal's solicitor; (4) the said George Barclay and S. M. Jacobsen; and (5) a representative of the Commercial Bank on behalf of the Highland Bonding Co. and Duncan McLeod & Co. The first stage of the meeting provided the £250,000 to be paid to Sir Hector MacNeal to finance the dealings as to the purchase of the shares. There were handed over to the representative of the Commercial Bank delivery orders signed by Mr. George Barclay and Mr. Jacobsen as directors of the company in favour of the Commercial Bank for the whole of the company's whisky stocks, in implement of the arrangement for the sale of these stocks already referred to. In exchange for these delivery orders the Commercial Bank handed over bankers drafts and cash for sums totalling £250,000; they included a bank draft in favour of Messrs. Marshall & Maclachlan for £234,950. It should be mentioned that, prior to the meeting, Messrs. Marshall & Maclachlan, on behalf of Mr. Hogg, had arranged with their bankers to certify a cheque drawn by them for £210,000, to be used for payment of the shares to be acquired from the original shareholders. The next stage of the meeting, the necessary finance having been thus supplied, consisted of the implement of the various agreements for purchase of the shares. Messrs. Marshall & Maclachlan, being assured that the cash was there to meet the price of the shares, handed the certified cheque for £210,000 to the representatives of the original shareholders, in exchange for the transfers in favour of Mr. Hogg and the share certificates. These transfers and the share certificates, together with a transfer by Mr. Hogg in favour of Sir Hector MacNeal, were handed over in exchange for the said bank draft for £234,950. There was also handed over to Mr. George Barclay a transfer of all the shares by Sir Hector MacNeal in favour of Mr. Stewart, together with the previously mentioned transfers and share certificates. The £234,950 above-mentioned was made up of £222,100, the price of the shares by Mr. Hogg to Sir Hector MacNeal, and £12,850, the amount of the loan due by the company to Messrs. Ross & Coulter. This latter sum was also paid to Messrs. Ross & Coulter on the day of settlement. After the meeting at the office of the Clydesdale Bank, Mr. George Barclay and Mr. Jacobsen, the new directors of the company, held a meeting of directors at the Central Station Hotel, Glasgow, at which it was agreed that the company should accept an offer made by Mr. Stewart to Mr. George Barclay for purchase of the whole of the company's whisky stocks, including wood, for £21,940, which was to provide the company with a profit of approximately £2,000 over book prices. It is stated in the Case that £21,940 was less than the full market value of the said stocks of whisky, and that is not in dispute.

The Special Commissioners fixed the full market value referred to in sub-s. (2) of s. 24 as £327,000, and computed the full tax for the chargeable accounting period ending July 31, 1942, at £287,110. They further, upon the evidence before them in relation to the sub-s. (4) (*b*) value of the shares, fixed that value at £3 per share, to be contrasted with the £28 per share received from Mr. Hogg, amounting to £210,000, the corresponding total at £3 per share being £22,500. They fixed the deemed financial benefit of the original shareholders under sub-s. (4) (*b*) at £187,500, being the difference between these totals. The final decision of the Special Commissioners was that liability for the full tax of £287,110 fixed by them should be apportioned among three groups, *viz.*, (1) to the original shareholders in proportion to their respective shareholdings, the said sum of £187,500 ; (2) under proviso (i), to six persons separate sums amounting to a total of £19,900 ; (3) the balance of the full tax as a joint and several liability of the company and 16 other persons, including David Lannon, £79,710. At this stage it only remains to mention that the Crown accepted as a finding for the purposes of this appeal the statement by the LORD PRESIDENT (NORMAND) in reference to the Bladnoch original shareholders, *viz* (1946 S.C. 169) :

> It was found in proceedings under s. 35 of the Finance Act of 1941 that the sale of shares by these shareholders, who were the original shareholders in the sense in which I have used the expression, was a *bona fide* sale unconnected with any consideration of evading excess profits tax, and that they knew nothing of the persons involved in the subsequent transactions. It was agreed by counsel that this finding was evidence in the case before us.

If I may say so, this was a proper concession, for the matter is directly referred to in the first two contentions on behalf of the original shareholders in the present Stated Case, and the Special Commissioners were the same persons in both proceedings and had made the finding in the previous proceedings.

The leading contention for the original shareholders, which succeeded in the Court of Session, while a similar contention failed in the Court of Appeal, was that, having sold their shares in ignorance of any scheme for evasion or avoidance of excess profits tax, these shareholders were not liable in payment of excess profits tax under s. 24 of the Finance Act, 1943. This contention may be said to depend on the proper construction of the words " effected in connection with or in association with any of the said transactions " occurring in sub-s. (1) (*b*) of s. 24. As this question was separable from the other questions in the appeals, and a decision in favour of the original shareholders would dispense with any further hearing in a number of the appeals, your Lordships found it more convenient to confine the hearing of the appeals, in the first place, to the hearing of those appeals, in which this contention was raised. Arguments on this contention were fully heard in this appeal, in the presence of counsel appearing in the other appeals, in which this question was in issue, and these other appeals were then heard in turn, the facts of the particular case and any further argument thought necessary being given by counsel. At the close of these hearings, your Lordships intimated to the parties an opinion against the contention of the original shareholders, and, after an adjournment, the hearing of all the appeals proceeded in ordinary course.

I cannot think that there can be much doubt as to the proper canons of construction of this taxing section. It is not a penal provision ; counsel are apt to use the adjective " penal " in describing the harsh consequences of a taxing provision, but, if the meaning of the provision is reasonably clear, the courts have no jurisdiction to mitigate such harshness. On the other hand, if the provision is reasonably capable of two alternative meanings, the courts will prefer the meaning more favourable to the subject. If the provision is so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect.

Turning now to sub-s. (1) (*b*) of s. 24, let me first analyse it. It deals with the imposition of the whole of a sum, already fixed under sub-head (*a*), as a joint and several liability of persons specified in the direction. It then proceeds to define these persons as follows :

> . . . being the company and the persons who, in the opinion of the commissioners, obtained (but for this section) financial benefits as a result of the transactions aforesaid and any other transactions which, in the opinion of the commissioners, were effected in connection with or in association with any of the said transactions.

It seems clear that the company, which has made the first disposal of its whisky stock, and is the prime mover—under the predicated control—in what may be conveniently called the stock transactions, is not subject to any of the qualifying conditions which attach to the other persons specified in the direction, and this may have a bearing on the construction of the provisos and the later provisions. As regards the other persons, the qualifications are (*a*) that they have obtained financial benefits (*b*) as a result of (*c*) the stock transactions and any other transactions which were effected in connection with or in association with the stock transactions.

Confining myself to the case of original shareholders, who are ignorant of—and no parties to—the disposal of the whisky stocks, and fall within the terms of the second proviso, is the transaction for sale and transfer of their shares one of the other transactions referred to in sub-s. (1) (*b*) ? The opposing constructions of the word " effected " are in substance as follows. The Crown maintains that it merely means " brought about," while the respondents maintain that it means " effected by such persons," *i.e.*, by the transferor. The Lord President (Normand) had some doubt whether " effected " had an active or passive meaning if taken by itself, but on consideration of the second proviso, he came to the conclusion that the word " effected " in sub-s. (1) (*b*) involved that the transferring shareholders who are liable are those " who had an active financial interest in the stock transactions either through their transfers alone or through their transfers and in other ways as well." He based this opinion on the use of the phrase " concerned in any such transaction as aforesaid " in the second proviso, which he regarded as signifying an active interest, and in this context an active financial interest, which would exclude from liability original shareholders who had no knowledge of any such arrangement for disposal of the whisky stocks. Following this view, the Lord President held that sub-s. (4) (*b*) applied to a transaction, being a share transfer by an original transferor who was aware of the intended stock transactions and so was enabled to obtain an effective financial interest in them in the form of an advantageous price for his shares, and would be deemed under sub-s. (4) (*b*) to have obtained financial benefits as a result of the transfer and the scheme. He regarded sub-s. (5) as being inserted merely *ob majorem cautelam.* The other learned Lords agreed in substance.

In Holt's case the Court of Appeal subsequently differed from this opinion. Lord Greene, M.R., said ([1947] 1 All E.R. 158) :

> The crucial words are those towards the end of para. (*b*) of sub-s. (1) *viz.*, " transactions which, in the opinion of the commissioners, were effected in connection with or in association with any of the said transactions." Speaking for myself and reading these words in what appears to me to be their natural meaning, I can find no reason for interpreting them as requiring any such subjective or financial links as were suggested to be necessary by *Sir Cyril Radcliffe.* They appear to me to mean exactly what they say and no more, namely, that a transaction may be treated as what I have called an associated transaction if the commissioners find (on proper evidence, of course) that it was " effected in connection with or in association with " any of the main transactions, and this refers to a connection or association in fact and not to some subjective link existing in the minds of the transferors or transferees or both or to some financial link between the profit obtained by the promoters and the payment of the purchase price of the shares. In the present case there can be no doubt to my mind that the sale by the taxpayer of his shares to Mr. Stewart was connected or associated in fact with the purchase by Mr. Stewart of the company's whisky. The sale of the shares was an essential preliminary to the acquisition of control of the company by Mr. Stewart, just as the acquisition of control was an essential preliminary to the purchase of the whisky by Mr. Stewart at an undervalue and its subsequent disposal at a profit. How can this relationship of one transaction to another be better described than by the words " connected " and " associated " ? I do not know.

The learned Master of the Rolls had already pointed out that nowhere in the section are there to be found any express words to the effect that a transferor of shares or any other person is only to be charged with tax if he knew of the existence of a scheme, and that, if such knowledge was to be necessary, nothing would have been easier than to say so in the statute itself.

My Lords, I agree with the construction placed by the learned Master of the Rolls on the crucial words towards the end of para. (*b*) of sub-s. (1), and I further agree with his construction of proviso (ii) in sub-s. (1) and of sub-ss. (4) and (5), and his criticisms of the views of the Lord President. But it is right for me to express my views. In the first place, the opening paragraph of sub-s. (1) appears to me to give an illustration of a connected or associated transaction. The main transactions are those by which the whisky is disposed of, and those concerned are persons "who directly or indirectly hold, or are in a position to obtain, a controlling interest in the company." That would appear to me to indicate the connection or association between control, or ability to obtain control, and the stock disposal transactions, and the state of mind of the shareholder who surrenders such control is quite irrelevant. There has been discussion of the use of "and" in the phrase in para. (*b*) "the transactions aforesaid and any other transactions." For my part, I can see no reason for not reading the word conjunctively, the transactions of both sorts being treated as forming one bundle, so that, although the direct source of the financial benefit may be a unit in the bundle, it is to be regarded, so far as para. (*b*) is concerned, as resulting from the bundle.

Contrary to the view of the Lord President, I am of opinion that proviso (ii) supports the construction of para. (*b*) adopted by the Master of the Rolls. It seems to be at least directly contemplating a transferor of shares who knows nothing about the scheme and has no part in its arrangements for realising untaxed profits on the sales of whisky stocks, but yet falls within the wide net of para. (*b*), as stated in the opening words of proviso (ii). How better could the position of such a transferor be expressed than by the words "he has not, apart from that transfer, been concerned in any such transaction as aforesaid"? I am unable to restrict the meaning of "concerned" as was done by the Lord President. It may be noted that "any such transaction" must refer to what I called the bundle of transactions.

I am of opinion that sub-s. (4) is not merely a quantifying provision. On the natural meaning of its language it is clearly designed to provide that something shall be deemed to be a financial benefit within the meaning of the section which would not otherwise fall within the financial benefits referred to in sub-s. (1) (*b*), which involve a question of fact and not of statutory fiction. It was suggested in argument that its operation was to be confined to sub-s. (3), which immediately precedes it; but that cannot be, as it is expressly referred to in proviso (ii) of sub-s. (1). As the amount of the deemed financial benefit under sub-s. (4) (*b*) is a specified part of the consideration received for the shares, it appears necessarily to follow that the deemed financial benefit is obtained as the result of "such transaction as aforesaid." The effect of sub-s. (4) is to define the financial benefits referred to in sub-s. (1) as including these deemed benefits.

Finally, I agree with the learned Master of the Rolls that sub-s. (5) equally applies to the persons referred to, whether they know or do not know of the nature of the transaction, and that it is inserted, not *ob majorem cautelam* but as a reasonable—and necessary—exception to the wide scope of sub-s. (1) (*b*).

Accordingly, I am of opinion that this contention of the respondents fails, and that it is open to the commissioners to find as a fact that an original transferor of shares obtained a financial benefit within the meaning of s. 24 (1) (*b*) as a result of transactions consisting of such a sale and re-sale of stocks as are mentioned in the sub-section and any other transactions which, in their opinion, were effected in connection with or in association with any of the said transactions, although such transferor at no time had knowledge that any such transactions were in progress or contemplated. On the other hand, it may be that the absence of such knowledge is of some evidential value to the commissioners in determining whether in fact there was such connection or association, and it remains open to maintain, as a question of law, that there was not evidence to justify the commissioners' conclusion in fact that there was such a connection or association. It was suggested by counsel for the Crown that such evidence need not be strictly legal. I cannot encourage such a vague and loose idea—the familiar question means: "Was there legal evidence to justify the conclusion ? "

I should here mention a contention which counsel, on behalf of all the respondents in this appeal, as I understood, sought to raise before this House, to the effect that there was no finding, and no evidence to support any finding, that " the full tax is not payable, or, in the opinion of the commissioners, is unlikely to be recovered," which forms one of the conditions precedent to making a direction prescribed by sub-s. (1). Your Lordships ruled that this contention was not open to the respondents, as it could not be brought within any of the questions of law on which the opinion of the court is asked in the Stated Case. It has long been the practice of the courts in Scotland to require the commissioners to state at the end of the Case the questions of law on which the opinion of the court is desired, so framed as to focus the points of law at issue, the facts relevant to their decision being stated in the body of the case, along with their determinations thereon. It is the practice for the parties to have an opportunity on the draft Case of suggesting the inclusion of further facts and further questions. If the Special Commissioners decline to accept any such suggestions, it is open to the court, if it thinks fit, to send the Case back for the appropriate amendment, under s. 149 (2) (*b*) of the Income Tax Act, 1918. If the omitted question of law has not been raised before the commissioners, on which further evidence might be available, the court, on consideration of an application by one of the parties, according to the circumstances and the nature of the question, may either decline to allow it to be raised at so late a stage, or may think it right to send the case for further investigation and consideration by the commissioners, and the appropriate amendment of the Case. As to the practice of requiring the commissioners to state questions of law, reference may be made to the recent case of *Inland Revenue* v. *Dean Property Co.* (1).

The next question relates to the proper construction of sub-s. (2) of s. 24, and it arises in the case of all the appeals. It was conveniently arranged among the parties that the point should be dealt with in the *Alexander McGavin & Co.* case by *Sir Cyril Radcliffe*, but, as the matter is purely one of construction, I shall deal with it in this appeal, in which the full market value was £327,000, based on the prices obtainable by selling to or through brokers in the brokers' market, in which the highest prices for whisky sold in large quantities were obtainable. The respondents maintain that the words " sold by the company on its own behalf in the ordinary course of trade for its full market value " limit the inquiry to the ordinary course of the trade of a particular company, or, alternatively, of companies carrying on the same type of trade—in this case that of distillers, and, in the *McGavin* case, the business of blending and bottling whisky and storing whisky for customers in its bonded warehouses and also in the export of its own whisky to overseas markets. It was contended that the prices at which the company was in the practice of selling to its usual customers were the test provided by the sub-section, and that the highest prices obtainable in the brokers' market were not relevant. This contention was rejected by the Special Commissioners, and by the Court of Session and the Court of Appeal, and I agree with them. As pointed out, the effect of the respondents' construction is to insert the word " its " before " trade," for which there is no justification. *Sir Cyril* pointed out that the words " full market value " occur once in sub-s. (1) and twice in sub-s. (2). The construction of " the ordinary course of trade " in sub-s. (2) maintained by the respondents entails that the words immediately following—" for its full market value "—restrict the market referred to to the market constituted—if it can be called a market—by the usual customers of the particular company, or of the companies carrying on the same type of business. In my opinion, the market referred to is the open market, particularly as the section is clearly contemplating the disposal of large stocks of whisky ; but I also wish to point out that the respondents' contention would seem to affect the construction of " full market value " in sub-s. (1), and also the computation of the full tax referred to in that subsection, with the result that the whole section would become practically ineffective and sterile.

I now come to the second stage of the second question of law—" Whether upon the facts and evidence we were entitled to apportion part of the full tax to the original shareholders who sold their shares to Mr. Hogg." The original shareholders' ignorance of the scheme being no bar to further inquiry, was there evidence on which the Special Commissioners were entitled to hold that the transaction for the sale of the shares to Mr. Hogg was " effected in connection with or in association with any of" the stock transactions ? I find ample evidence in the facts stated to justify such a conclusion. I have referred to most of them already, and I may summarise the important points. There can be no doubt that it was essential to the scheme of Mr. Stewart for the sale of the company's stocks, which he had already arranged to sell to MacLeod & Co. and the Highland Bonding Co. about the middle of November, to get control of the company by purchase of the shares. The completion of the various essentials of the scheme all took place on the same day, Nov. 25, 1941. Mr. Hogg's offer to purchase the shares and the original shareholders' acceptance took place on that day ; the original shareholders were represented at the meeting and took part in the completion, at which, by various stages their shares came to vest in Mr. Stewart's nominees, and, in fact, it was they who appointed Mr. Stewart's nominees as directors of the company, after which they resigned. It must have been obvious that the payment by Mr. Hogg of the purchase price of their shares awaited Mr. Hogg's receipt of the money due to him as a seller of the shares. I am of opinion that the Special Commissioners were entitled to find that the sale by the original shareholders of their shares was effected in connection with or in association with the stock transactions. It follows from the views I have already expressed as to sub-s. (4) (*b*) and its effect on sub-s. (1) (*b*) that the original shareholders obtained the deemed benefit of sub-s. (4) (*b*) as a result of the stock transactions and the connected or associated transaction under consideration. It also follows that the original shareholders are under the joint and several liability imposed by sub-s. (1) (*b*), but subject to the operation of the two provisos. The first proviso is a matter for the discretion of the Commissioners of Inland Revenue, and, on appeal, of the Special Commissioners ; the second confers the same discretionary power, but it is subject to certain mandatory provisions.

It is often a delicate question as to how far the courts are entitled to interfere with the exercise of such a discretionary power, but I apprehend, generally speaking, the courts are not entitled to interfere unless either (*a*) the exercise of the discretion has not complied with the conditions provided by the statute for the exercise of the discretionary power, to which I will refer as the statutory basis of the power, or (*b*) the power has not been exercised judicially. The first of these grounds involves a question of construction of the statutory provision, which is open to the courts on any appropriate occasion ; the second ground will arise on a particular exercise of the discretionary power. I, therefore, do not consider that it is within the province of the courts to give general directions or lay down any general rules for the exercise of the power outwith that which is involved in construction of the statutory provision.

At the close of the hearings in this appeal and the next appeal—in the *Longmore* (No. 1) case—your Lordships intimated the opinion that the Special Commissioners had failed to exercise their discretion judicially in that, for the purposes of proviso (ii), they treated as irrelevant the value of the shares on the footing of the company continuing as a going concern, and stated that that intimation dealt with one ground only, and not necessarily the only ground, for remitting these cases. I would now add the further ground that they have misconceived the statutory basis of the discretionary power conferred by provisos (i) and (ii). The whole of the appeals, including the appeal in *Holt's* case, were heard by the same Special Commissioners between Nov. 11 and Dec. 19, 1942, and consideration of all the cases amply justifies the Lord President's statement as to the grounds on which the commissioners and the Special Commissioners proceeded. I must first advert to the so-called tainted money argument which was submitted by the Crown in the Court of Session, although Crown counsel fought shy of it before your Lordships. The use of the adjective " tainted " was not condemnatory, but explicative. I quote from the opinion of the Lord President (Normand) as follows (1946 S.C. 158, 159) :

> The construction of this section maintained by learned counsel for the Inland Revenue was, throughout the arguments, one of lucid simplicity. They started from the premise that the section was designed to collect the full tax on a transaction which would otherwise escape tax. Accordingly, they said, the section treated as tainted money the sum realised as profit by the resale of the stock obtained from the company

> at a price below the full market price by a person in a position to control the company. This " tainted money " was they said, subject to tax to be ingathered from every person into whose hands it could be traced. Therefore, they argued, if this tainted money could be traced through various bank accounts into the hands of persons who received it under any contract or transaction in any way associated with the transactions by which the stock had been sold by the company and resold for the profitable price, these persons became liable to a direction making them jointly and severally liable for the whole tax, subject to the commissioners' power to apportion under proviso (i) or their duty to apportion under proviso (ii) . . . Moreover, counsel for all parties agreed in submitting to us that this argument fairly represented the grounds on which the commissioners and the Special Commissioners had proceeded . . . The Special Commissioners have also treated as irrelevant to their decisions evidence that the price obtained for the shares was not more than a reasonable price for shares in the company as a going concern. The price was indeed treated as if it were in fact a financial benefit resulting from the sales of stock if it was paid out of a bank account which had been swelled by the payment into it of tainted money.

While it is true that these passages relate primarily to questions under sub-s. (1) (*b*) and sub-s. (4) (*b*), the neglect, or refusal, of the Special Commissioners to hear evidence as to the value of the shares in the company as a going concern for the purposes of an apportionment under proviso (ii) of sub-s. (1), and their application—except in one case—of the maximum under sub-s. (4) (*b*) as the amount of the apportionment, appears to be only explicable by their application of the tainted money theory. It being equally the duty of the commissioners, as we have impliedly held, to take into account the value of the shares on the footing of the company continuing as a going concern, it is clear that they proceeded on the same lines as the Special Commissioners. Counsel for the Crown suggested that it would involve an impossible task for the commissioners, but I cannot accept this. The commissioners have ample powers under sub-s. (9). It may be that in certain cases it may not be possible to get satisfactory evidence on this matter, but that will not absolve them from their duty to seek for such information.

The one case in which the Special Commissioners did not apply the maximum amount under sub-s. (4) (*b*) as the amount to be apportioned to the original shareholders under proviso (ii) of sub-s. (1) was the case of *D. P. MacDonald & Sons, Ltd.*, in which the Special Commissioners, having fixed the financial benefit of the original shareholders under sub-s. (4) (*b*) at £15 per share, expressly used their discretion under proviso (ii) of sub-s. (1) to apportion a lesser sum to the original shareholders as it was necessary for them, many of them holding conflicting interests, to employ agents to negotiate the sale of the shares, and the high price obtained was largely due to the services of these agents. The exercise of the discretionary power in this instance does not, in my opinion, obviate their misapprehension of the proper basis on which to exercise the power, nor does it affect their failure to exercise the power judicially in the matter under consideration.

My Lords, in my opinion, the scheme of sub-s. (1) is reasonably clear, and does not depend on any tainted money theory. The conditions precedent to a direction involve the promoters of the scheme, who by their control obtain the disposal of its stock by the company at the low price, and secure the untaxed profits on the resale of the stock. Next, the direction assesses the amount of the lost tax and places that amount as a joint and several liability of the company, the promoters, who *ex hypothesi* have obtained financial benefits, and any other person who has obtained a financial benefit as a result of the stock transactions and any associated transaction, but this is subject to the power of apportionment under provisos (i) and (ii). It seems clear to me that this power of apportionment was intended to enable the commissioners to modify the liability of persons who were neither the company nor the promoters, and whose financial benefit was not dependent on the results of the stock transactions.

Apart from sub-s. (4) a person will not be under joint and several liability under sub-s. (1) (*b*) unless he has in fact received a financial benefit as the result of the stock and any associated transaction, so that an original shareholder might have been able to prove that he sold the shares at a loss, and received no financial benefit, but sub-s. (4) (*b*) precludes such a contention on his part by enacting the deemed benefit. Accordingly he is primarily liable jointly and severally, but by proviso (ii), the statute clearly prescribes that each original share-

holder is to be released from joint and several liability and to be liable *in singulum* for his apportioned share. It is of importance to note that the deemed amount under sub-s. (4) (*b*) is only relevant as a maximum, and that necessarily implies, in my opinion, that it is open to the shareholder to establish either that he obtained no financial benefit at all, or the amount of the financial benefit in fact received by him. I have difficulty in seeing that an apportionment of any sum could be defended as a judicial exercise of the power, if it were established
A that the original shareholder had sold at a loss. This is on comparable lines with the provision of sub-s. (4) (*a*).

I would add on consideration of the statutory provisions, that it would seem to be essential to any fair and reasonable exercise of the power of apportionment under either proviso that the commissioners should inform themselves of the amount of the financial benefit accruing to persons other than the company and the promoters.

B In my opinion, the scheme of sub-s. (1), including both provisos, above explained forms the statutory basis of the power of apportionment derived from the intention of the legislature, express or implicit in its enactment.

In my opinion, in applying the maximum amount under sub-s. (4) (*b*) without regard to the financial benefit in fact received by the original shareholders, the commissioners and the Special Commissioners have not only exercised
C their power unjudicially, but have not conformed to the statutory basis of the exercise of the power of apportionment. In this matter I regret that I am unable to agree with the learned MASTER OF THE ROLLS, who said in *Holt's* case ([1947] 1 All E.R. 160) :

> The profits made by others seem to me to have no bearing on the question what ought to be apportioned to the taxpayer. Whatever profits the others may have made, the taxpayer's profit is ascertained, and there can be nothing unfair in
> D apportioning to him a proportion of the tax commensurate with his profit whatever the profit made by other persons may have been. The commissioners, in my opinion, were entitled to act on the material that was before them.

I differ from the learned MASTER OF THE ROLLS as to the relevance of other persons' financial benefits, but, in addition, he is incorrect in saying that the respondent's profit was ascertained, for it was only the deemed financial benefit
E under sub-s. (4) (*b*) that was ascertained, which affords only a maximum limit under proviso (ii) of sub-s. (1), when the actual financial benefit is under consideration. In the Stated Case, the following passage is of interest, *viz* :

> The apportionment made by the Commissioners of Inland Revenue was based upon the view that the share of the total liability to be borne by Mr. Holt should be ascertained by taking the difference between the price received by him for his shares, *i.e.*, £38 7*s*. per share and the value of the shares as computed by the said commissioners
> F under the said s. 24 (4) (*b*) (*i.e.*, £8 per share).

That the Special Commissioners adopted the same view is clear from their decision, which was as follows:

> The original shareholder, Mr. S. S. Holt, sold his shares, 36,500 £1 shares for £1,399,775. His financial benefit in accordance with the terms of sub-s. (4) (*b*) is, therefore, the difference between £1,399,775 and £292,000, *i.e.*, £1,107,775, which
> G must be apportioned to Mr. S. S. Holt under proviso (ii) in order to arrive at the amount of the "full tax" to be borne by him.

In my opinion, in view of the invariable practice of the commissioners and the Special Commissioners as to any evidence tending to show the actual benefit, the word "must" is used in order to express a necessary consequence.

In the present case, the Special Commissioners, having fixed the sum of £287,110 as equal to the full tax and chargeable under sub-s. (1) (*a*), proceeded
H to apportion that sum by apportioning to them £187,500, the amount of the deemed financial benefit under sub-s. (4) (*b*), which they say "must be apportioned to" them in order to arrive at the amount of the full tax to be borne by them ; they then apportion, under proviso (i), to a second group of persons, as individual liabilities, the exact amount of the financial benefits which the Special Commissioners held them to have received, amounting to a total sum of £19,900, and thereafter the Special Commissioners apportion the balance of £79,710 to the company, Mr. Stewart, the promoter, and various other persons. This appears to be giving at least to the company and the promoter the greatest

advantage from the exercise of the discretionary power of modification conferred by the provisos, which is the reversal of that which I find to be the statutory basis of that discretionary power. This question must depend on the terms of the particular statutory provision, and such cases as *Donald Campbell & Co.* v. *Pollak* (2) are of no assistance. It follows that, in my opinion, the direction under appeal, so far as it exercises the power of apportionment will require to be reconsidered as a whole by the Special Commissioners, in order to determine what, if any, is a fair and just proportion of the total sum to apportion to the original shareholders, keeping in view the statutory basis of the exercise of their discretionary power, and taking into consideration any evidence relevant to the value of the financial benefit, if any, in fact obtained by the original shareholders.

My Lords, I have advisedly said that the direction under appeal will require to be reconsidered as a whole, because, in my opinion, the commissioners, in considering sub-s. (1) (*b*) are bound by their direction to impose liability, either as a joint and several liability under that sub-section or as a liability under an apportionment under the two provisos, for sums amounting to the sum made chargeable by sub-s. (1) (*a*), and that they have no power to reduce that total liability. Their only option is not to make a direction. It follows that, if as a result of the opinion of the court on the Stated Case, a person is excluded from the direction altogether, or the liability of a person included in the direction has to be reconsidered, with a possibility of an alteration in the direction, the distribution of liability is, or may be, altered, and a fresh direction is or may be necessary so as to distribute the total sum chargeable.

In order that it may not be thought that I have forgotten a fact mentioned by the SOLICITOR-GENERAL for England, I should mention that the commissioners received on Nov. 3, 1944, a sum of £78,460 from the company in discharge of their joint and several liability for £79,710, under deduction of £1,250 still in dispute in connection with the inclusion of David Lannon, but this cannot affect the question of the proper apportionment to the original shareholders by the Special Commissioners, but is a matter between the Inland Revenue Commissioners and the company, which is not *hujus loci.*

My Lords, in order to avoid any misapprehension, I may explain that, according to the practice of the Scottish Courts, to which I have already referred, of requiring specific questions of law to be formulated in the Stated Case, these questions are directly related to the statements of the facts and the determinations of the commissioners which are set out in the Stated Case, and the answers to the questions are similarly limited. If, for instance, the question of law is : " Whether the commissioners were entitled to make an apportionment of the full tax under proviso (ii) of s. 24 (1) (*b*) on the original shareholders ? ", and, on the Case, as stated, it is found by the court that the discretionary power of apportionment has not been exercised judicially, that question must be answered in the negative. But that answer in no sense negatives the exercise of the power of apportionment in a judicial manner. Indeed—if not sufficiently obvious—it is necessarily implicit that the answers are given to the Case as stated.

I am, therefore, of opinion that the appeal should be allowed, that the interlocutor of the First Division of the Court of Session in regard to the original shareholders, dated Jan. 31, 1946, should be reversed except in regard to expenses, and that the questions of law in the case should be answered as follows—the first question in the affirmative, the second question at this stage in the negative, in that relevant evidence has not been taken into consideration, the fifth, sixth, seventh and eighth questions in the negative, in that the proper basis of apportionment has not been observed, the ninth and tenth questions in the negative, in view of the answers to the foregoing questions, and find it unnecessary to answer questions three and four, no submission having been made in regard to them. There should be no order as to the costs of this appeal. The case should be remitted to the Special Commissioners to proceed as accords.

I turn now to the case of David Lannon, who has been included among those jointly and severally liable for the balance of £79,710. The facts of his case are simple and permit of a short answer. Some time in October, 1941, Sir Hector MacNeal, on the introduction of Mr. Lannon, approached Mr. Isaac Wolfson with a view to obtaining financial accommodation for his purchase of the shares from Mr. Hogg. It was stated that in this matter Mr. Lannon acted as the representative of Glazier & Sons, Ltd., a company carrying on business as finance brokers and estate agents. Mr. Wolfson was not interested, but referred Sir Hector to the chairman of the Anglo-Federal Banking Corporation, who arranged for a loan to be available to Sir Hector, but this loan was not made use of by Sir Hector. On hearing this, Mr. Lannon claimed on behalf of Glazier & Sons, Ltd. a commission of £1,250 as earned by them, and, on Sir Hector's refusal to pay, an action for that amount was raised in the name of Glazier & Sons, Ltd. in the Court of Session on Dec. 1, 1941, and on Dec. 4, £1,250 was paid to Mr. Lannon, receipt of which he acknowledged on behalf of himself and Glazier & Sons, Ltd. This sum was paid out of a bank account into which the balance of the proceeds of the re-sale of the company's whisky had been paid. The Special Commissioners held that it had been proved that Mr. Lannon had received a financial benefit. The Special Commissioners' finding was:

> David Lannon received £1,250 for effecting an introduction. We are not satisfied that this sum belonged to Glazier & Co., Ltd. We hold that Mr. Lannon has obtained a financial benefit as a result of the transaction and that he is rightly included in Group II, joint and several liability.

In the Court of Session it was held that it had not been established that Mr. Lannon had received any financial benefit. The LORD PRESIDENT said:

> The Special Commissioners were not entitled to hold that it was affirmatively proved that Lannon had obtained a financial benefit merely because they were not satisfied that the sum in question belonged to Glazier & Co. Before they could make any apportionment of liability against Lannon they had to be affirmatively satisfied that Lannon had received the payment on his own account.

They answered the tenth question of law in the Stated Case in the negative, so far as it applied to the present respondent Lannon, and found the other questions superseded. While I would be prepared to agree with the view of the LORD PRESIDENT, in whose opinion the other learned judges concurred, I prefer to base my agreement with their answer to the tenth question on the ground that the commission of £1,250 was paid in respect of a transaction which was abortive as regarded the stock transactions or the transaction for the purchase of the shares, and, therefore, it did not become "a transaction effected in connection with or in association with any of the said transactions" within the meaning of sub-s. (1) (*b*) of s. 24. I may add that this case appears to afford a good example of the tainted money principle applied by the commissioners and the Special Commissioners.

I am of opinion that the appeal against the respondent Lannon should be dismissed with costs, and that the interlocutor of the First Division should be affirmed.

My Lords, while we are differing on questions of construction of the complicated and somewhat obscure section under consideration from the views taken by the Special Commissioners, I feel sure that your Lordships will agree with me in expressing our appreciation of the careful consideration so faithfully given by the Special Commissioners in discharge of the difficult and arduous task presented by these appeals.

LORD PORTER: My Lords, the question in these appeals for your Lordships' consideration is the construction of a section of an Act of Parliament passed, *ex post facto*, in order to deal with certain schemes devised with the object of avoiding liability for payment of excess profits tax. From its terms the Act is intended to ensure that the attempt will not succeed or be repeated, but it remains to be determined to what length those terms go. The material parts of the section have been fully set out by the noble Lord on the Woolsack. Their effect has been dealt with before your Lordships' House in a number of separate but interrelated compartments, the first and most important of which being whether knowledge of, or, it may be, participation in, the scheme is a necessary element in bringing the section into operation against those whom the Revenue assert to be subject to the liabilities which it imposes. The solution of this question depends solely upon the true construction of the Act under consideration, and that construction must be resolved by an application of the ordinary rules. It is true that the Act was passed more than a year after the events with which it was intended to deal and that it is a taxing Act. I agree that it must be strictly construed, but nevertheless, if its meaning is plain, its plain words must be followed. If, on the other hand, two constructions are possible, the consequences following the one or the other may rightly be taken into consideration, and if the balance between the two constructions is equal, that in favour of the subject is to be preferred.

Approaching the matter in this way it is plain that the preliminary conditions required by sub-s. (1) are fulfilled in most of the cases now in issue. The stock in trade has been disposed of (i) for less than its true value, (ii) to or for the benefit or by the procurement of persons directly or indirectly holding or in a position to obtain a controlling interest in the company which would be liable to pay the tax if due. Further, either the whole or part of that stock has been disposed of by someone at a profit with the result that full excess profits tax is not payable or not likely to be recovered. The cases in which it is said that these requirements are not fulfilled must be separately dealt with.

In the generality of cases, therefore, the commissioners must direct that a sum which is equal to the full tax shall be chargeable as excess profits tax. So far there is no dispute. The difference arises upon the construction of the following portions of the section. It is not the right to charge, the tax but the persons to be charged and the proportions in which the tax is to be imposed upon them which is in controversy. Apart from the provisos, a sum equal to the full tax is to be a joint and several liability of those specified in the Act, *viz.* :—a class composed of the company and the persons who, in the opinion of the commissioners, obtained financial benefits as a result of the transactions aforesaid—those transactions being the sale and re-sale of the stock—*and any other transactions which, in the opinion of the commissioners, were effected in connection with or in association with any of the said transactions.* I have italicized the words which, in my opinion, are those vital to the solution of the problem for your Lordships' determination.

I come later to the effect of the provisos and the succeeding sub-sections ; for the moment it is, I think, helpful to consider only the construction of the words italicized and though the liability of certain other persons has also to be borne in mind, to concentrate upon the position of shareholders who sold their shares without participating in any scheme for selling the stocks of whisky and neither knew nor suspected that any such scheme was afoot. The financial benefit which brings those who have obtained it within the ambit of the Act must be the result either of the sale and re-sale of stocks alone or of the sale and re-sale of stocks and some associated transaction. It is not enough that it should be the result of the associated transaction only : the word "and," in my view, not the word "or," is rightly used. It cannot be said that the sellers of shares in the cases under consideration obtained financial benefits as a result of the sale of stocks alone. If they are subjected to the mischief of the Act it can only be because the sale of their shares is rightly described as an associated or connected transaction.

In Scotland where the claim of the Revenue failed, the argument on behalf of the Crown appears to have been founded on a contention that once the conditions precedent which bring the Act into operation have been established, any person who has received financial benefit as defined by the Act is liable if money derived from the sale of stock could be traced to his hands, because the money so received was, to use the cant phrase employed in argument, "tainted money." Such a claim, in my view, rightly failed. The Scottish cases, however, when argued before your Lordships' House were not so broadly based. The position was accepted that the financial benefit did not result from the main or a connected transaction merely because money derived from those transactions had found its way into the pockets of those on whom an apportionment had been made. The benefit, it was admitted, must be derived, not from the receipt of money, but from the sale and purchase of shares or from some service rendered in connection with the scheme.

What then is an associated or connected transaction ? I do not think any general definition can be given. The connection must be direct and be judged in reference to the circumstances of each case. I doubt if one can be more exact. The commissioners must use their judgment and that judgment will prevail provided there are facts upon which it can fairly be supported. Whether such facts exist is a question for the court which, if the point is raised, must determine whether they constitute evidence from which a connected transaction can be spelt out. If, however, such evidence does exist, it is for the commissioners to draw the inference whether the transaction is or is not a connected one. If that issue be in dispute, the facts found and inferences drawn should be clearly and separately stated. If the facts as stated do not of themselves warrant the drawing of an inference of association, your Lordships are not, in my view, entitled to speculate whether there may not be other unstated facts known to the commissioners which have influenced their minds. The result must depend only upon what is stated. Undoubtedly a purchaser of shares for the purpose of acquiring control of a company and selling its stocks of whisky takes part in a transaction connected on his part with that sale and with the profit made upon it. And if the only question was whether such purchasers were caught by the terms of the section, the inquiry would be at an end. But, say the subjects, the wording of the section shows that, though the company is always involved, the persons affected are only those who participated in or at any rate knew of the scheme before they bought or sold their shares. "Connected," they argue, means joining in the scheme and "associated" has no wider meaning. The consciousness of what is being done forms the connection. The sellers must be personally involved, and, lest there should be any doubt whether their knowledge and participation is required in order to bring them within the mischief of the Act, the use of the word "effected" shows that an intentional act alone constitutes an associated transaction; it must be effected by them. In considering this argument it is, in my opinion, of advantage to determine what would be the true construction of this wording if it stood alone before turning the mind to the question whether any assistance can be obtained by an analysis of the other provisions of the section. No doubt the transaction must be effected and effected in connection with the disposal of the stock. Action by someone is required in order to effect any object, but the question still remains, by whom must the act be done and must the actor be aware of the result aimed at? The passive voice is, as the Revenue authorities point out, that which is used. The sub-section does not state who is the actor or who is to be implicated. Clearly if the seller of the shares was a party to the scheme for selling the stock, he would rightly be described as selling his shares in connection with the sale of the stock. Similarly, if the purchaser of the shares acquired them for the purpose of selling the stock, his purchase would rightly be described as effected in connection with the subsequent sale of the stock; indeed that would be its object. The purchase of shares is, therefore, in either case effected by someone in connection with the sale of the stock, *i.e.*, by the seller of the shares, if he is a participant in the sale of stock, but if not by the purchaser who bought the shares in order that he might have control of the stock. Such an "effecting" of the transactions seems to me to be enough. The knowledge, much less the participation, of the vendor is not required in order to comply with the provisions of the section.

It is true that the result of such a construction may be to make shareholders, who acted within the law when they sold their shares, liable to the Revenue authorities for large sums and in particular to impose that liability upon those who were entirely ignorant of any scheme to avoid excess profits tax or who even stipulated for a continuance of the business of the company whose shares they were selling a stipulation which, if carried out, would make the accomplishment of the scheme impossible. But the Act was passed in order to make a legitimate act illegitimate in the sense that its object was to impose tax which would otherwise not be due: the only question is how far its tentacles extend and it would be odd if in the case of the same company those who sold shares were divided into two categories, the suspicious and alert who could not resist the claim of the Revenue to take away their profit, and the innocent and ignorant who would escape all liability. Perhaps the best illustration of the oddity of such a result is exemplified in the case of a public company where some of the shareholders might be well aware of the scheme, others suspicious of the purchaser's intentions and a third class totally unaware of anything save that a good, but possibly, in its view, no more than a fair, price, was being obtained.

Moreover, the Act nowhere in terms limits its effect to the case of those who have knowledge of the matters which impose liability and the reference in the second proviso to a person who " obtained financial benefits but only by reason of the transfer by him of shares " points, in my view, to those who sell in ignorance of any scheme as nevertheless possibly being concerned in a connected transaction. Furthermore sub-s. (5) is apparently inserted in order to protect those who would otherwise be implicated, including persons ignorant of the scheme. There is no reason for supposing it is drawn *ex abundanti cautela.* The safeguard for those who suffer from its provisions is rather to be found in the discretion given to the commissioners and a judicial exercise of that discretion.

When the Act is considered as a whole, I do not think this view is reversed. Proviso (i) to sub-s. (1), as I see it, gives a very wide discretion to the commissioners. They must impose liability to the extent of the whole excess profits tax lost to the Crown : primarily upon the company and as a joint and several liability upon all those who benefited by the sale of stock, but, as I think, with the obligation in a proper case to differentiate between the various beneficiaries. The second proviso limits the liability of shareholders whose only participation was that the sale of their shares was a transaction in fact connected with the sale of stock. It withholds any right in such a case to charge them other than individually and limits that individual liability to a sum which the Act deems to have been their utmost financial benefit, thereby providing the maximum which can be charged but not stipulating that that maximum sum must be imposed. The sub-section does two things : (i) it brings the provisions of the Act into operation if the sale of shares is effected in connection with the sale of the stocks as that phrase is interpreted above, and enacts that the original holder is to be deemed to have financially benefited if a greater price was received than would have been obtained had the stock been sold before the shares were disposed of. To that extent it is definitive. But it is also quantitative inasmuch as it declares and limits the maximum which can be imposed on those holders. The Act will come into operation although they have received no actual financial benefit, provided they are deemed to have received one, but the fact that they are subject to its terms does not compel the commissioners to apportion to them any particular share of the full tax, or at the most more than their actual profit beyond what they would have obtained from a sale of shares in a going concern.

Whether apart from the provisions of the second proviso and the terms of sub-s. (4) a sale of shares would necessarily be regarded as a transaction connected with the sale of stock or would not be so regarded, it is plain from those provisions that the Act does regard the two transactions as connected one with the other, at any rate in some cases. If the shares are sold direct to those who devised or carried out the scheme, the connection is reasonably obvious, but the case where there is an intermediate purchaser requires further consideration and liability, as I think, depends upon whether the original purchase was made directly or indirectly in connection with a scheme for the avoidance of excess profits tax or whether it was a genuine purchase for retention or re-sale of shares in a company intended to be carried on. I have deliberately used the expression "directly or indirectly" in this connection inasmuch as, in my view, a sale of shares is connected with a sale of stock if the purchaser at the time of his purchase intends to resell to persons whom he knows to be contemplating the selling of the stock, after acquiring control of the company by the purchase of the shares. To buy shares in order to re-sell a going business at a profit is one thing : to buy in order to re-sell the shares to those who purchase in order to make their profit by selling the stock is another—the former, as I think, escapes the Act, the latter does not.

In order to justify the application of the Act, there must, of course, be some evidence from which it can be inferred that the original purchase and subsequent sale of the shares was made with this object in view, as, *e.g.*, a purchase and sale at a price which would be quite unjustified having regard to the value of the shares in a going concern, unless the ultimate intention was to sell to those who were minded to sell the stock rather than carry on the business. On the other hand, a lapse of time occurring between the purchase of the shares and the disposal of the stock is one among many matters for consideration when determining the object of the original purchase of shares.

The principle is, I think, clear and is not really in dispute. " I admit," said the SOLICITOR-GENERAL for England, "that an innocent transfer " (by which

I understood him to mean a transfer from shareholders who neither knew of nor contemplated a sale of stock to avoid excess profits tax to transferees who did not purchase in order themselves to carry out such a sale of stock or with the object of re-selling the shares to those whom they knew to intend to do so) "followed by a transfer to schemers is not hit." The question is one of fact, not of law, and is a matter for the commissioners to determine. But, it is said, the provisions of the first sub-section are not unambiguous and the construction suggested does or may do great injustice to those who, though they have parted with their shares, yet neither participated in or even knew of the scheme. There is ground for this criticism, especially if the discretion undoubtedly given to the commissioners is not judicially exercised : if, for instance, they feel themselves obliged to direct payment by ignorant shareholders (by which I mean those ignorant of and not involved in the scheme) of the maximum sum permitted by sub-s. (4). The construction of the first part of that sub-section and its application is clear enough. In the case of shareholders who have obtained their shares under a transaction connected with the sale of stock, the financial benefit is the difference between what they gave for the shares and what they obtained by their re-sale, and once they are shown to have had a financial benefit they may be made jointly liable for the whole excess profits tax lost. The commissioners may, but are not obliged to, subject them to so drastic an imposition. Similarly in the case of sub-s. (4) (*b*), a shareholder who has not acquired his shares in connection with such a transaction but has sold them in such a connection is deemed to have derived a financial benefit if and to the extent that the ultimate price obtained for the shares exceeds the price which would have been obtained if the stock had been disposed of before the sale of the shares. That is his maximum financial benefit, but in that case he is not saddled with a joint and several liability for the whole sum lost but only with his individual gain calculated on the basis stated above. It is manifest, however, that if the maximum burden is cast upon such a vendor of shares a very severe liability may be imposed upon persons who are not implicated in the scheme and may have derived little or no benefit from it. They may get no more for their shares than they are worth in the market whilst the company's stock of whisky is intact and yet be liable for a large sum because the shares of a company which has disposed of all its stocks of whisky have very little value left.

One need not go outside the instances afforded by some of the cases under your Lordships' consideration in order to find examples of such a result. The shareholder has given up the value of his shares in return for the price received. It may be that he was unwilling to sell and yet felt himself under an obligation to follow the wishes of his fellow shareholders ; he may have believed himself to be and may actually be receiving less than their value and yet suffer from a direction requiring him to find a sum much in excess of anything he has received : a trustee may be faced with the duty of obtaining the best price which he can for his *cestuis que trustent*, and by doing so saddle himself or them with a heavy loss, a financial agent carrying on his business in the ordinary way by introducing a lender to the purchasers of the shares which will enable them to complete the purchase, may be ignorant of the object of the loan and make no undue charge for his services, and yet have a serious liability cast upon him. Indeed all this may happen and has happened in cases where the sufferer was in complete ignorance of the object of the purchase and though, as the Revenue authorities admit and indeed insist, he has done no more than that which the law allowed him to do, when he acted as he did. The only answer on behalf of the Crown, which your Lordships have heard, is that excess profits tax has been lost, that it must be recovered from someone, that the commissioners are entitled to consider from whom the State will be likely to get the money, that the payment of taxes is always a heavy burden, and that, although it is a harsh measure, the Act imposes the liability tempered only by the discretion of the commissioners whose decision is unfettered or at any rate is to be assumed to have been judicially exercised even where the maximum liability is imposed, because, although none of the facts stated of themselves justifies the result, yet there may be unstated reasons which influenced their decision.

My Lords, I recognise that the commissioners have no easy task in reaching a correct conclusion in the case of an Act loosely drawn and vaguely phrased.

The Special Commissioners' task is even harder, but I cannot take the view that your Lordships or any tribunal to which an appeal is taken is entitled to speculate as to what influenced their minds. Once a Case is stated those who have to give a decision upon it are bound by its terms and must not go outside them. Nor can any question arise as to the party upon whom the onus of proof lies. The facts are found in the Case and the duty of a tribunal to which the Case is submitted is to answer the questions put upon the material provided.

It is necessary, therefore, in the light of the facts stated to decide whether there was evidence upon which the Special Commissioners could judicially apportion the full tax as they did, bearing in mind that the discretion and the decision is theirs and theirs only, always provided that there is evidence to support it. That they are under no obligation to apportion the maximum sum is not in dispute. Indeed the Solicitor-General for England stated in terms in arguing the *Longmore* (No. 1) case that the commissioners must not construe sub-s. (4) as compelling them to impose the maximum obligation on sellers of shares.

If the commissioners had applied their minds to the questions : What was the actual gain of the persons against whom a direction was to be made ? whether they were ignorant of or parties to the scheme ? in what capacity did they hold the shares and such matters ? and if they had found facts which gave ground for imposing the maximum liability permitted by the Act, I should not think your Lordships entitled to interfere, even though those sitting to hear the appeal, should differ from the result arrived at by the Special Commissioners. As my Lord on the Woolsack has stated, generally speaking the courts are not entitled to interfere unless either (*a*) the exercise of the discretion has not complied with the conditions provided by the statute for the exercise of the discretionary power, or (*b*) the power has not been exercised judicially. But the commissioners do not appear to have considered these relevant matters. Indeed in certain of the cases they expressly refused to consider the value of the shares in the companies concerned, if regarded as going concerns, on the ground that evidence of that character was irrelevant, and in the one instance where they imposed a liability less than the maximum upon original shareholders they have done so on the ground of the comparative smallness of the sum concerned and the expense incurred in obtaining it. The approach seems to have been that it is the duty of the commissioners to apportion the maximum sum permissible under the Act unless some exceptional circumstance is proved which would enable them to reduce it, and in fact nothing has been considered to be exceptional unless one regards the comparative insignificance of the sum involved as coming within that category. Indeed the Special Commissioners in more than one case, after finding the maximum liability which can be imposed on an original shareholder, state in terms that that sum *must* (the italics are mine) be apportioned to him. I cannot read that statement as meaning other than that the imposition of the maximum is imperative. The right approach, on the other hand, is, in my view, to take all the matters referred to into account and to arrive at the resulting figure after giving them full consideration. The adjustment of the appropriate figure is, of course, for the commissioners, but there is nothing in the Act to preclude them from apportioning to ignorant shareholders a sum no greater than the actual difference between what they would have got by a sale to a willing buyer of their shares in a going concern, and what they got from the transaction complained of, and normally I should have expected a judicial exercise of their discretion to lead to some such result. If, as I think the Act permits, the sum apportioned to the original shareholders is made a primary liability and is deducted from the total amount of tax due before the residue is apportioned to the company and the contrivers of the scheme, the result of charging the maximum sum upon the former persons who are no parties to the plot is to relieve the real participants from payment of a large portion of the tax lost and indeed possibly to leave them with a profit. I cannot think that such a result was intended or is necessitated by the terms of the Act. It was suggested, however, that such an approach was not justified or at any rate not required in the case of those who bought shares to sell again. They, it was said, came under the terms of proviso (i) to sub-s. (1) and not, as was the case with original shareholders, under proviso (ii). Proviso (i), it was insisted, contemplated an imposition of the whole joint and several liability for the residue of tax lost after the proper sum had been apportioned to the original shareholders. Such an apportionment, it was contended, should normally be made and, if in their discretion the commissioners chose to do so, there was no ground in law for cavilling at their decision. I cannot accept this view. It is true that proviso (i) unlike proviso (ii) is prefaced with the words " if the commissioners think fit, the direction may apportion," but this phrase, in my opinion, still requires a judicial discretion to be exercised, and involves the taking into consideration, in arriving at a proper conclusion, of the same matters which are material in the case of original shareholders.

The questions asked in the Cases Stated assumed a variety of forms, but in substance I think their content was the same, *viz.*: On the facts and evidence were the commissioners entitled to apportion as they did? My answer would be " No," because matters vital to a correct decision were not taken into consideration, and because the receipt of money derived from the carrying out of the scheme is considered a sufficient cause for apportioning the maximum sum allowable.

Another, though I think less important, set of questions has been asked, *i.e.*, should the original shareholders have been charged with their proportion (whatever it might rightly be) first, and the residue only imposed upon other persons implicated. So far as I am aware no argument to the contrary was presented to your Lordships and the course adopted has obvious convenience in practice. It cannot, as I think, be maintained that the commissioners were wrong in adopting this course though I doubt if they were obliged to do so.

The question whether the sums with which those to whom several liability only is apportioned under sub-s. (1), proviso (i), should also be deducted from the total to be apportioned before the residue is imposed as a joint and several liability on the other persons liable, has also to be answered. The principles applicable to this matter seem to be the same as those governing the case of persons severally liable under proviso (ii). In either case, I cannot see any ground in law for quarrelling with such an apportionment.

Three contentions put forward in some of the cases have yet to be dealt with. It was suggested that at least one of the conditions precedent to bringing the Act into operation was lacking in that it had not been proved that the full tax was not payable or unlikely to be recovered. Your Lordships have already ruled that this point was not open to the subjects as it was not taken or argued before the commissioners. I have had the opportunity of reading the speech of my noble friend on the Woolsack and find myself fully in agreement with his observations.

Even if they were wrong in these matters, however, the subjects contended that the commissioners had incorrectly interpreted the phrase " full market value " in sub-s. (2). Their submission was that those words meant " at such prices as the companies were accustomed to sell to their customers." Such a sale, they said, was made in the ordinary course of business, whereas a sale in the brokers' market was extraordinary and the sum obtainable there irrelevant. My Lords, I am not sure that a sale to a company's regular customers can ever be described as a sale at a market value, but even assuming that such a sale was repeatedly made by a large number of companies at an agreed price and could be so described, that is not the market in which sales in bulk would be made. Confining the attention to the cases argued before your Lordships, in every one the sale was made in the brokers' market; no difficulty appears to have been encountered in finding such a market or in selling in it and it appears to be the natural market in which to sell whisky in bulk. At any rate there was evidence from which the commissioners could draw this conclusion, and, as my Lord on the Woolsack has stated, the wording is " in the ordinary course of trade " not the ordinary course of its (*i.e.*, the particular company's) trade and leaves open for decision what the meaning of " the ordinary course of trade " is.

A further argument presented to your Lordships was based on the suggestion that if the sale of shares preceded the sale of stocks the shareholders could not be hit by the provisions of the Act, because the benefit was not the result of the sale of the shares but of the preceding sale of stocks. This contention neglects, as I think, substance for form. The question depends not on the sequence of events but on the substance of the transaction. Sub-section (1) must indeed be complied with but it is drawn very widely—it is enough if the stock is disposed of " to or direct or indirectly for the benefit or by the procurement of any persons who directly or indirectly hold or are in a position to obtain a controlling interest in the company."

It is difficult to envisage wider provisions. They leave the commissioners great latitude in determining whether the necessary conditions have been complied with, not by adjudicating on any narrow considerations, but by taking a wide view of the inferences to be drawn.

In the cases under review there is ample evidence that the benefit was derived from the conjoint sales. Indeed it is difficult to see how any other conclusion could be arrived at, inasmuch as the shareholders would not have obtained the price they did had the purchasers not intended the ultimate profit to be obtained by a sale of the stocks, and the purchasers were equally dependent for their financial benefit on the selling of the stocks in the highest market available.

My Lords, if these principles be sound, I think that they give the solution to most of the problems in the series of cases now under consideration and as I have had an opportunity of reading and agree with the reasoning and result reached by my noble and learned friend on the Woolsack, I do not think it necessary to do more than refer to the salient points. In this first case—(*a*) the company have no ground of complaint. In their case it is not necessary that they should enjoy financial benefits either as the result of the dealings in whisky stocks or associated transactions. (*b*) The commissioners had ample evidence on which they could find that the sale and purchase of the shares was effected in connection and association with the dealing with the stock of whisky and that the original shareholders had obtained a financial benefit as the result of the method of such dealings. Had the original shareholders been protected by their ignorance of the scheme, they would of course have escaped liability as they did in the Court of Session, but once that shield is taken away they have no ground of escape from at least a potentiality of apportionment. (*c*) It follows from what has been said above that the commissioners have correctly interpreted the meaning of the words " sold by the company on its own behalf in the ordinary course of trade for its full market value." (*d*) As to the apportionment, I agree with my noble and learned friend that the commissioners have gone wrong in law in two respects, (1) they have apportioned on what has been called the tainted money principle, *i.e.*, they have apportioned a liability on all those who received money obtained by means of the scheme, and (2) they have apportioned the maximum amount without regard to the relevant factors, and indeed have failed to recognise their relevance.

As to David Lannon, I agree with the noble Lord on the Woolsack that money received for a transaction which had no part in bringing about the main transaction cannot be a transaction associated with it and I hold also that the onus is not on Mr. Lannon to show that he had not received the sum paid to him on his own behalf, but for the commissioners on relevant evidence to find that he had so received it.

LORD SIMONDS : My Lords, having had the advantage of reading the opinion which has been delivered by my noble and learned friend, LORD THANKERTON, I can bring my own observations within a narrow compass. On what is perhaps the governing issue in the case, an issue on which different views have been taken by the Court of Session in Scotland and the Court of Appeal in England, I would first say a few words. That issue is whether any person can be made subject to liability under s. 24 of the Finance Act, 1943, unless it is established in regard to him that he was (as it was sometimes said) aware of, or (as it was at other times said) a participator in, the transactions by which excess profits tax was evaded. I shall not, I hope, be thought wanting in respect for the learned judges of the Court of Session if I say that I find it impossible to justify by the language of the section the view entertained by them that such awareness or participation is a prerequisite of liability. I share with them the repugnance that any court of justice must feel for the result which appears to follow from the opposing construction adopted by the Court of Appeal, but, as appears from the opinions of the noble and learned Lords who have preceded me, a judicial exercise by the commissioners of the discretion vested in them under the provisos to sub-s. (1) will mitigate, if it cannot wholly remove, the otherwise intolerable harshness of the section. I would add that these provisos not only perform this salutary task but in my opinion supply a cogent reason why the view of the section taken by the Court of Session is wrong; for, if awareness or participation is a condition of liability, I see no reason why shareholders, without whose co-operation no scheme for evasion of tax could succeed, should be placed in a more favourable position than any other participator.

Next, my Lords, it is right that I should express my view on a matter much debated in these cases, *viz.*, what is the meaning and effect of the words occurring in sub-s. (1) (*b*) "obtained financial benefits as a result of the transactions aforesaid and any other transactions which, in the opinion of the commissioners, were effected in connection with or in association with any of the said transactions." It is clear at least that "the transactions aforesaid" must mean the disposals of whisky stock mentioned in the earlier part of the sub-section. But it has been urged that, if a beneficiary is to be made liable, it must be shown in respect of his financial benefit that it results not only from what has been usefully called an "associated transaction" but also from the "aforesaid transactions" and here the copulative "and" is invoked to enforce the argument. In my view this argument is fallacious. Assuming that the alleged beneficiary was concerned only in an associated transaction, it seems to me automatically to follow that his financial benefit was the result of that transaction and of the transaction with which it was associated. I do not doubt that there may be room for differences of opinion whether a transaction is an associated one nor do I doubt that it is open in any case to the beneficiary to contend that there was no evidence on which the commissioners could form the opinion that the transaction was an associated one. But, if that opinion is formed and cannot successfully be challenged, then, as it appears to me, the financial benefit must flow from the *unum quid* which consists of the main and the associated transactions. To take a simple illustration. An original shareholder sells his share to the promoters of a scheme and from the sale obtains, as I will assume, a financial benefit. He obtains it from an associated transaction and it may be said that it is unaffected by the main transactions, which, formally at least, however much earlier the plans may have been laid, can only be effective at a later date. If, for instance, the scheme of the promoters went awry and they were unable to dispose of the whisky stock at a profit, the financial benefit of the shareholder would be the same. But this argument appears to me to ignore the whole plan of the section. Once more the second proviso to sub-s. (1) is a clear pointer, for it unmistakably assumes (and that is why I have chosen this illustration) that such a shareholder does obtain a financial benefit which is the result of the main transactions and an associated transaction.

The expression "financial benefits" as used in the sub-section has given rise to further controversy. In the first place in its application to shareholders who have sold their shares it was urged that sub-s. (4) (under which shareholders transferring their shares are "deemed" to acquire a financial benefit) has no application unless it is first established that the transaction has resulted in an "actual" benefit to the shareholder. I find it difficult to follow this argument. Sub-section (1) (*b*) contemplates that amongst other persons obtaining financial benefits may be shareholders who transfer their shares. How is it to be ascertained whether such persons have obtained a financial benefit and what is the measure of it? The answer is supplied by sub-s. (4), the single purpose of which is to define the benefit obtained by a shareholder who transfers his shares. The shareholder obtains a financial benefit under sub-s. (1) because he is deemed to obtain it under sub-s. (4). In the second place it was urged as a matter of general application that no person could be said to obtain a financial benefit within the sub-section, if all that he did was to receive payment for services rendered by him. A typical case, where such a contention was raised, was that of a financial agent who received a commission for introducing the promoters of a scheme to financiers who provided the necessary finance. This appears to me at once to contradict the plain meaning of the words and to defeat their plain intention. On the assumption that the financial agent was concerned in an associated transaction (and without this assumption no question of liability arises) I can think of no words more apt than "financial benefit" to describe the commission that he receives, nor on the scheme of the whole section can I see any reason why he, who has assumedly been a necessary link in the chain, should not be among those on whom liability is placed. If I had any doubt on this point, it would be removed by a consideration of sub-s. (5). That sub-section would be unnecessary, if liability could be escaped on the plea that a participant in the scheme had done no more than receive payment for services rendered.

I must now turn to an aspect of the case to which the learned judges of the Court of Session found it unnecessary to give much consideration. I refer to the discretionary power vested in the commissioners by the provisos to sub-s. (1). It is clear that, apart from these provisos, the section might operate on persons whom I will call innocent shareholders, though it is not a happy expression, with a harshness which I should hesitate to ascribe to the legislature: not on them alone, for your Lordships have observed cases in which "innocent" persons other than shareholders have been subjected to disproportionate and crippling liabilities. But it is in regard to innocent shareholders that the question has been chiefly debated and I will direct my observations to them, remarking however that *mutatis mutandis* they are applicable to other persons also.

In the case of innocent shareholders the position appears to be that in every case the commissioners have imposed on them the maximum liability which the section authorised, *i.e.*, they have ascertained the financial benefit which the shareholder is deemed to have obtained and then have fixed his liability at that amount. They have disregarded the real value of the shares and, in one case at least, have rejected as irrelevant evidence directed to that value and they have made no distinction between innocent shareholders and shareholders who, though not otherwise concerned in the scheme, were aware of it. In the result they have, in effect, imposed drastic penalties on persons who not only had no knowledge of any scheme prejudicial to the revenue but may well have obtained no higher price for their shares than they would have obtained in an open market between willing vendor and willing purchaser. Of this no better example could be furnished than that of the shareholders in *Lord Saltoun's* case. The question then arises what course this House should take. Counsel for the Crown have with great perseverance pressed on your Lordships that, as the power vested in the commissioners under the provisos in question is a discretionary one, no case had been made out for any interference by the court with their exercise of it and in support of their argument they cited words that I used in this House in the *Fendoch Company* case (3) ([1945] 2 All E.R. 145, 146). My Lords, I do not wish to qualify those words which were approved by the noble and learned Lords who heard the case. But I did not intend nor can my words fairly be read as meaning that a discretion vested in the commissioners is not to be exercised by them judicially. Here, I think, two points arise, as has been clearly indicated in the opinion of my noble and learned friend LORD THANKERTON. For, though, generally, it may be said that a discretion has not been judicially exercised, if its statutory basis, which rests on a true construction of the statute, has been misconceived, it is convenient in this case to treat as in a separate category the failure of the commissioners to exercise their discretion properly just because they misinterpreted the statute. A consideration of all the cases leaves me in no doubt that they did misinterpret it. For it is, to my mind, impossible that, if they had realised what was the full scope of the discretionary power vested in them on the construction which your Lordships have put on the statute, they could consistently have imposed on innocent shareholders the maximum liability without regard to the market value of their shares or imposed on other persons a wholly disproportionate burden. In the broader sense too the commissioners have not exercised their discretion judicially, in that they have, as already stated, rejected relevant evidence. But this was itself clearly due to the same misinterpretation of the statute and I think it unnecessary to say more about it.

I do not ignore that, as the liability of shareholders and others is reduced, so a greater burden must be borne by other persons. This may involve the promoters in a liability far exceeding any profits that they have made. That will be for the commissioners to determine. They may think it more suitable that the company itself should bear any additional burden. Their decision, whatever it may be, will at least avoid a result which appears a very grave injustice to those who have been called innocent shareholders and have done nothing to forfeit that description.

The importance of this case has led me to add these general observations on the construction of the statute, but I would end where I began by saying that in general and in detail I concur in the opinion of my noble and learned friend LORD THANKERTON.

A **LORD MORTON OF HENRYTON :** My Lords, with the qualifications which I am about to mention, I agree with the opinion which has just been delivered by my noble and learned friend LORD THANKERTON. I agree with his observation that, generally speaking, the courts are not entitled to interfere with the exercise of such a discretionary power as is conferred by s. 24 in the present case "unless either (*a*) the exercise of the discretion has not complied with the conditions provided by the statute for the exercise of the discretionary B power or (*b*) the power has not been exercised judicially." To my mind, however, and here I think I am not wholly in agreement with my noble and learned friend, the only "conditions provided by the statute for the exercise of the discretionary power" in the present case are, first, that the commissioners must make an apportionment in the case of a person who comes within proviso (ii) to sub-s. (1) and, secondly, that the sum apportioned to such a person must not exceed C the maximum laid down by that proviso. The commissioners and the Special Commissioners have complied with both of these conditions throughout the series of cases now under consideration by your Lordships' House. On the other hand, I think it is impossible for the commissioners or the Special Commissioners to exercise their discretion judicially unless they consider, in the case of a person coming within proviso (ii), the amount of real financial benefit, as distinct from the "deemed" financial benefit, which that person has obtained D as a result of the sale of his shares, and, in the case of a person coming within proviso (i), the amount of the real financial benefit which that person has obtained as a result of the transactions in question and how far (if at all) that person is removed from actual complicity in the stock transactions. It will shorten my observations in several subsequent cases under appeal if I now state how, in my view, the commissioners and the Special Commissioners have gone wrong in the exercise of their discretion in the present case, and it will be con- E venient if I use the phrase "innocent shareholders" to denote persons who transferred their shares without knowing that any such stock transaction as is described in sub-s. (1) was in progress or in contemplation. The SOLICITOR-GENERAL for England took exception to the use of this phrase. He suggested that it seemed to impute guilt to one body of persons and innocence to another. He pointed out that, at the time when the transactions now under consideration were carried out, they were legal and that the Finance Act, 1943, does not make F them illegal, but merely imposes certain taxes. That is quite true, and I shall use the phrase only in the sense already stated. I would point out, however, that the section, and particularly proviso (ii), indicates that, in the view of the legislature, innocent shareholders (as above defined) deserved more favourable treatment than persons who were parties to a scheme of tax evasion, even although such scheme was within the law at the time when it was devised and G carried out.

My Lords, I think the general scheme of s. 24 as to the liability of the persons, including the company, coming within sub-s. (1) (*b*) is as follows. If the commissioners make a direction under s. 24, that direction must extend to a sum equal to the "full tax," no more and no less. *Prima facie* that sum will be a joint and several liability of all the persons coming within sub-s. (1) (*b*). It is realised, however, that so sweeping a provision might give rise to great hard- H ship and it is substantially modified by the provisos which follow. Proviso (i) is of general application and gives the commissioners a discretion to make an apportionment for any of the persons coming within sub-s. (1) (*b*), whether they are innocent shareholders or not. Proviso (ii) is closely linked with proviso (i). It singles out a class of persons and provides that in the case of any member of that class, the direction "shall apportion the said sum" in the manner described in the proviso. Thus it is directory in the sense that the commissioners are bound to make an apportionment in such a case, with an upper limit on the amount to be apportioned, but it leaves the commissioners free to apportion less than the maximum amount. On the other hand, in the case of persons who do not come within proviso (ii), the commissioners can apportion or not as they think right and there is, in my view, no upper limit to the sum which they can apportion to any person. Sub-s. (3), which I need not read, deals only with the liability *inter se* of persons made jointly and severally liable for any sum.

I do not think it matters whether one regards the commissioners as having two separate discretions under the two provisos, or whether one regards the discretion under proviso (ii) as being a sub-division of the general discretion under proviso (i). The discretion or discretions must be exercised judicially, after a fair consideration of all the relevant facts, and in my view the Special Commissioners have failed to exercise their discretion under proviso (ii) judicially in the present case and in others of the series of cases now under appeal. The reason for this failure is that they have misconstrued the statute in thinking that it was their duty to make the innocent shareholders liable for the maximum amount laid down in the section. This misconstruction probably arose from the "tainted money" theory to which my noble and learned friend LORD THANKERTON has alluded. As a result of this misconstruction of the section, they have regarded as irrelevant any evidence as to the market value of the company's shares at the time of the transfer thereof, on the footing that the company was to continue as a going concern.

My Lords, in ascertaining the maximum sum for which any innocent shareholder can be made liable under s. 24, only two figures are relevant, *viz.*, the amount which he got for his shares and the (4) (*b*) value of his shares. If the former sum exceeds the latter, the difference represents the maximum liability. I cannot doubt, however, that when the commissioners come to consider whether, in the exercise of their discretion, they will make an innocent shareholder liable for a lesser sum, and if so, for what sum, a most relevant enquiry is : What sum represents the real financial benefit, as distinct from the "deemed" financial benefit, which that shareholder obtained as a result of the transactions in question ? That sum is surely the amount by which the sale price of his shares exceeded the market value of his shares at the time of the transfer, on the footing that the company was to continue as a going concern. It is difficult to imagine circumstances in which an innocent shareholder ought fairly to be made liable for any greater sum, in the exercise of the discretion conferred by the section, yet the Special Commissioners never embarked on this inquiry at all. It does not appear that any evidence of the market value was tendered in this case but counsel for the innocent shareholders contended that "there was no justification for imposing on the original vendors of the shares the maximum amount of liability under the section." That contention was rejected, and I feel no doubt that, throughout the series of cases now before your Lordships' House, the Special Commissioners regarded evidence of market value as irrelevant. The same Special Commissioners considered each of these cases, and in one of them (*Inland Revenue Comrs.* v. *Lord Saltoun and others. Re William Longmore and Co., Ltd.*) the point arose directly for decision. The innocent shareholders in that case sought to rely on a statement prepared by Mr. J. D. Hourston, a chartered accountant, computing the value of the shares and treating the company as a going concern. The Special Commissioners observed, in the Stated Case :

> . . . no evidence was led on behalf of the Commissioners of Inland Revenue as to the value of the shares except upon a computation in terms of sub-s. (4) (*b*) of s. 24 of the Finance Act, 1943, this being, in their view, the only relevant consideration. We did not accept Mr. Hourston's valuation as relevant.

Thinking, as I do, that the Special Commissioners ruled out from consideration the question of the market value of the shares at the time of the transfer, and that they could not properly exercise their discretion under proviso (ii) without considering this question, I agree that they failed to exercise their discretion judicially, and that this case must be remitted to the Special Commissioners for reconsideration.

I also agree that, as a result, the direction under appeal will have to be reconsidered as a whole, and it may be convenient to point out that in exercising their discretion under proviso (i) the Special Commissioners are entirely free to apportion to any person a sum which is either greater or less than the amount of cash which he received in the course of the transactions under consideration. This discretion also must be exercised judicially, but apart from this implied requirement I can find no statutory basis to which the Special Commissioners were bound to conform in exercising it.

Finally, I regret to find that I cannot wholly agree with the answers proposed by my noble and learned friend LORD THANKERTON to the questions of law asked in the Stated Case. I think that some of the questions are so phrased that they cannot suitably be answered either "yes" or "no." I agree that A question (1) should be answered in the affirmative, but I would answer question (2) and also question (10), so far as it relates to the shareholders, as follows: These persons come within s. 24 (1) (*b*). The Special Commissioners may apportion part of the full tax to these persons if, in the judicial exercise of their discretion, they think fit so to do. Questions (3) and (4) were not argued, and need not be answered. Questions (5) to (8) inclusive are closely linked together. B They are not very happily worded but I think that in question (5) the Special Commissioners are saying, in effect: "We have gone through the process of first apportioning to the innocent shareholders the full difference between the sale price of their shares and the (4) (*b*), value, and then apportioning the balance of the full tax upon the persons mentioned in pt. II of the direction of the commissioners. Was this right?" In questions (6), (7) and (8) they suggest certain other possible methods of apportionment. I do not think that any C of these four questions can be answered satisfactorily by a simple negative or affirmative, and I would answer them as follows:—The Special Commissioners should view the situation as a whole, considering all relevant facts. The statute leaves them to decide, in the exercise of their discretion, how the liability for the full tax should be spread over the company and the other persons coming within sub-s. (1) (*b*), having regard to the necessity for apportionment, and the upper limit laid down, in the case of persons coming within proviso (ii). D

I would agree that question (9) should be answered in the negative, because the Special Commissioners have failed to exercise their discretion judicially. I find nothing in the statute which prevents them from imposing the maximum liability on the original vendors of the shares, in this case or in any other of the series of cases under appeal, if, exercising their discretion in a judicial manner, they come to the conclusion that this is the proper course.

E My Lords, in all other respects I agree with the motion proposed.

LORD MACDERMOTT: My Lords, the series of appeals of which this appeal is the first raises a number of questions as to the true construction of s. 24 of the Finance Act, 1943, which may conveniently be dealt with in this opinion. The most important are those affecting the basis of chargeability to the tax imposed by sub-s. (1) of that section and I will begin with them.

F The opening sentence of this sub-section states the conditions which must be satisfied before the commissioners can make a direction bringing the charging provisions of the section into operation. These conditions may be sufficiently summarised for present purposes as follows—(i) There must have been a disposal of some of the stock in trade of a company at less than its full market value to or for the benefit or by the procurement of any persons holding, or being in a position to obtain, a controlling interest in the company; (ii) there G must have been a disposal of "that stock" or part of it by some person "at a profit"; and (iii) that disposal at a profit must have been in circumstances in which (apart from s. 24) the full tax (as defined in sub-s. (2)) is not payable or, in the opinion of the commissioners, is unlikely to be recovered. No point is open with regard to the third of these conditions. Of the others it may be observed that condition (ii) relates to what has already been so disposed of as to come within condition (i). To avoid confusion, I will refer to transactions I within condition (i) as the small price transactions; to those within condition (ii) as the big price transactions; and to both categories together as the stock transactions.

Where these three conditions are satisfied the sub-section provides that the commissioners may direct that a sum equal to the full tax shall be chargeable by way of excess profits tax; and—

> (*b*) that that sum shall be a joint and several liability of such persons as may be specified in the direction, being the company and the persons who, in the opinion of the commissioners, obtained (but for this section) financial benefits as a result of the

transactions aforesaid and any other transactions which, in the opinion of the commissioners, were effected in connection with or in association with any of the said transactions.

It was to the terms of para. (*b*), enacting as they do the general basis of individual liability, that much of the argument on this branch of the case was directed. The nature and extent of that liability, once it attaches, may be left aside for the moment. And it may, I think, be assumed that when the paragraph speaks of " the transactions aforesaid " and, at the end, " the said transactions " it refers to what I have called the stock transactions. Proceeding thus to the question of chargeability, it may be said that the language of the paragraph makes the liability of any person, other than the company, depend on three related factors : (i) Such person must have obtained a financial benefit, (ii) as a result of—the stock transactions and (iii) any other transactions which were effected in connection with or in association with *any* of the stock transactions. In so stating the requirements of para. (*b*) I have omitted any reference to the words " in the opinion of the commissioners " which occur twice therein as I do not think they assist in determining the questions of construction concerning liability. For the same reason I have not mentioned the bracketed words " but for this section." They signify nothing more, in my view, than an attempt on the part of the draftsman to meet the difficulty of describing as a benefit something which will subsequently be removed or reduced retrospectively by virtue of sub-s. (8). I should also add here that I do not think the true meaning of para. (*b*) makes what I have enumerated as the third factor a pre-requisite of liability in every case, for it is conceivable that financial benefits might accrue from the stock transactions alone, though in most cases, no doubt, a share of the profit resulting from those transactions would only be obtained because of some connected or associated transaction as well. This does not mean that the connecting " and " should be read " or." I see no reason why the ordinary conjunctive meaning should be rejected, but I would construe the passage in question as referring to financial benefits which are a result of the stock transactions *or* of those transactions and any other transactions which were effected in connection or in association with any of the stock transactions. Having regard to the facts, however, this point is not of immediate importance and it is necessary to consider all three factors. It will be convenient to do so in the reverse order to that stated above and using the words *connection*, *result* and *financial benefit* as short headings.

Connection.—The question here is as to the nature of the connection or association requisite to supply the third factor. Stated broadly, the substance of the controversy on this aspect was whether the words " and any other transactions which, in the opinion of the commissioners, were effected in connection with or in association with any of the said transactions " implied some degree of knowledge of a relevant stock transaction (either contemplated or in progress) on the part of the person to be charged. The Crown contended that such knowledge was not, on the true meaning of the enactment, a pre-requisite of liability. For the subjects concerned it was urged that it was. The Court of Appeal has upheld the Crown's submission. The Court of Session has taken a different view. On this question I find myself, unfortunately, unable to share the conclusion favoured by your Lordships and the Court of Appeal. I prefer, though, as shall appear later, with some qualification, that of the Court of Session. In view of this divergence and as the grounds of my opinion are not the same as those of the Court of Session, I will state my reasons in my own words.

My Lords, at first sight the suggestion that chargeability to tax depends in any way upon the state of mind of the person charged is strange almost to the point of being startling, but so are the terms of s. 24 and they must be examined without any undue regard for what is usual in taxing statutes. Your Lordships in the course of the discussion have heard much of the objects of this particular piece of legislation and of the dire results which it was said would flow from this or that interpretation of its provisions. Considerations of this kind may, on occasion, have their place, but the immediate purpose of the present investigation must be to see what the section says when read according to the natural meaning of the words used and in conformity with the canons of construction applicable to statutes generally.

If it is said of A that he effected a transaction " in connection with " another transaction, the meaning is conveyed, I think quite clearly according to the ordinary usage of language, that A was then conscious of the other transaction. A, of course, might effect a transaction connected in fact with another transaction of which he was altogether unaware, but in that event I do not think it would occur to anyone to say that A had effected a transaction " in connection with " that unknown transaction. And if the words " or in association with " are added to " in connection with " the implication of knowledge is, to my A mind, no weaker. Indeed, it may well be stronger, for " association " is perhaps the more purposeful word. If I understand the argument of the Crown aright, the view I have just expressed on the example given was not seriously challenged, but it was said that the wording of para. (*b*) was such as to avoid this implication of knowledge and particular stress was laid on the use of the passive " were effected." The construction favoured by counsel on behalf of the Crown was that these two words were the equivalent of " came B about " and that, while admittedly a transaction had to be brought about by some person or persons, there was nothing in the section which made it essential, for the purpose of establishing the necessary connection or association, to inquire as to the state of mind of the parties to the relevant transactions. This came, in the course of the hearing, to be called the Olympian retrospect construction. It will be convenient to retain the expression for, though the C metaphor is perhaps not altogether appropriate, it reflects the Crown case that the commissioners' task at this stage of the procedure could be discharged by looking down when all was over and treating as connected transactions those which in fact were somehow linked together. My Lords, I am not disposed to regard this use of the passive as in itself significant. In the example I have just given the use of the passive would not alter the sense of the statement at all, and this, of course, is generally true of a change of voice, so long D as one knows from the context who the actor is. The question remains whether the words " were effected "—(i) mean " were effected by such persons "—*i.e.*, the persons who obtained financial benefits, or (ii) were used with the intention of leaving the determination of connection or association at large and untrammelled by considerations of a subjective nature. In seeking the answer I shall, for the moment, not look beyond the wording of para. (*b*), though later, of course, the rest of the section must be explored. With the field thus limited E I think it may be said that either construction is possible ; but, in my opinion, the natural import of the words favours the first, for the expression " were effected " is, I think, more aptly used in relation to a connection or association brought about consciously than in introducing the Olympian retrospect. Had the intention been to establish that, nothing would have been simpler than to use some such phrase as " . . . and any other transactions which, in the opinion of the commissioners, were connected with . . ." etc. After all, the words F " were effected " are not synonymous with " came about." They invite the question—effected by whom ? And inasmuch as para. (*b*) must be concerned to some extent with what those it taxes have done, it seems to me that the reasonable and natural answer suggested by the context is—by the persons it is intended to charge.

Before taking a wider survey it will be well to dispose of an alternative G submission advanced on behalf of the Crown. It was to the effect that even if the words in question were to be read as implying knowledge of a stock transaction, the condition would, as a matter of construction, be fulfilled if that knowledge resided in the mind of any of the parties to the connected transaction. Thus, if A, having planned and prepared for the stock transactions, obtains, in order to get control of the company, the shares of B who is in complete ignorance of any such transactions, then on this contention, the H connection will suffice to strike B with liability because the share transaction has been effected by A in connection with a stock transaction, though not by B. My Lords, I think this submission must be rejected. I can see no reason why, in inquiring as to an essential element of B's chargeability, the relevant transaction should be coloured by A's knowledge rather than by B's ignorance. In my view the Crown cannot pick and choose to its advantage in this way. Once established, liability under the section may be joint, but the process of establishing liability is a several process and it would cease to be that if what spells liability for one individual could, so to speak, be borrowed in order to fix liability on another. I can find nothing in any part of this drastic section to warrant such an irrational procedure and I think it may be left out of account.

If I am right in this, the rival interpretations of the part of para. (*b*) now under consideration are but the two already mentioned, *viz.*, (1) the Olympian retrospect construction and (2) that which I prefer, thus far, and which would read " were effected " as meaning were effected by the person whose liability is in question. The textual rendering of the second would be " were effected by such persons," to march with the plural form of the paragraph, but it, as already indicated, must be applied in a several manner in order that individual liability may be determined. For the reasons mentioned earlier this second construction, in my view, connotes knowledge on the part of the person effecting the connecting transaction. But knowledge of what ? As I read the judgments in the Court of Session, it was there thought that what was necessary was knowledge of the scheme for evasion. With respect, I do not think that is so. On this interpretation the requisite knowledge is but such as to enable it to be said that the person to be charged effected a particular transaction in connection with *any* of the stock transactions. Knowledge of both stock transactions —which would come very near indeed to knowledge of the scheme—is not therefore essential. I think it is enough, for the purposes of the section, if the individual concerned knows that a disposal of the company's stock is in progress or contemplation. On the wording of the enactment, I am unable to hold that complicity or participation in the scheme, or even a knowledge of it, is required if this particular construction prevails. It will be convenient to term it the knowledge construction, and the knowledge it connotes the relevant knowledge.

I now turn to the section at large to see if it repels or confirms the interpretation thus tentatively favoured. I confess myself unable to find anything in the framework of the section which is incompatible with the knowledge construction. The Crown insisted that there was nothing penal about this legislation and that, as no question of unlawful conduct was involved, it was beside the point to apply a *mens rea* test. That may be so, but I do not think it disposes of the knowledge construction. The broad purpose of this retrospective enactment was to recapture by taxation what would have been exigible as a result of the big price transactions under the earlier excess profits tax legislation had those responsible for such transactions not conceived and put into practice a scheme for evading the tax. The general pattern of the scheme, as commonly employed, has already been detailed and I need not describe it again. It meant, almost necessarily, that the promoters had to effect transactions with others outside their own circle. Those others might become active participants or abettors in the scheme or without being that they might act with knowledge of an impending disposal of the stock, or, yet again, they might know nothing of what was really afoot. The argument for the Crown fails to convince me that the release of this last category would derange the general design of the section. It was said that as a direction thereunder had to cover the full tax, those who received substantial benefits out of profitable stock transactions could not be left out of account, no matter how ignorant or innocent they were ; the Crown must have its full tax and Parliament had spread the net widely to this end. Now if those who were without knowledge are let out, those left in, or some of them, will undoubtedly have to bear a greater burden. But I do not think this argument really advances the Crown case. It may have been assumed (to take one type of transaction) that those who got a handsome price for their shares, with the rate of excess profits duty at 100 per cent., would in most cases have the relevant knowledge ; or it may have been thought right to pursue only those who promoted or abetted the scheme for tax evasion or who, knowing that stock was going to be sold, chose to proceed with a connected transaction to their own financial benefit. There would be nothing irrational about an enactment which sought to discriminate in that manner in favour of those who had no knowledge at all of what was on foot. But whether or not that was the theory of s. 24 is a question which cannot well be settled by pointing to the full tax and saying that a wide net has been provided to gather it in. One still has to measure the net by what the enactment says and I therefore turn again to the detail of the section.

Though proviso (ii) of sub-s. (1) clearly postulates liability, it was called in aid of both constructions. It makes apportionment obligatory in favour of any person who has obtained financial benefits within the meaning of para. (*b*) " but only by reason of the transfer by him of shares which he did not obtain under any such transaction as aforesaid and he has not, apart from that transfer, been concerned in any such transaction as aforesaid . . ." In the Court of Session the LORD PRESIDENT laid considerable stress on the use here of the A words " concerned in " which he regarded as signifying an active financial interest in the stock transactions and thus implying knowledge thereof on the part of the original shareholder. On this point I prefer the view of the MASTER OF THE ROLLS, who found himself unable to give this special meaning to the phrase " concerned in." It is an expression apt to take its colour and significance from its context and I do not find it of any positive assistance in determining the question under discussion. Then it was said, on the other hand, that the B terms of this proviso showed that liability could attach to an original shareholder whose only part in the connected transactions was the act of transferring his shares, inasmuch as it could not have been intended to confer the measure of relief granted by the proviso on those who were participants in the scheme for evasion. The MASTER OF THE ROLLS put it thus ([1947] 1 All E.R. 158) :

> If only transferors with knowledge are to be hit, it is only to such " guilty " C transferors that the limitation of liability in proviso (ii) will apply. And I ask myself, why should the legislature thus go out of its way to favour guilty transferors above other participants in the transaction ? I can see no answer to this question. It would seem more natural to have left such transferors to share the joint and several liability imposed on other persons, since it would have been their deliberate act which had enabled the scheme to be put into operation.

I think it is clear from the context that the MASTER OF THE ROLLS, in speaking D of knowledge, meant knowledge of the scheme. So read, I would respectfully agree with his reasoning. But there is, I think, a substantial distinction to be drawn between those who know of the scheme and are prepared to advance it and those who know only that the stock is going to be sold. If the knowledge construction (as I have stated it above) is the true construction, it would appear reasonable enough that the legislature should have thought fit to lessen the burden for those who were caught just because they were aware of a stock E transaction, though not otherwise implicated in the scheme. I, therefore, think that proviso (ii) is consistent with the knowledge construction. It would be pressing its language too far to say that it points positively to that construction, yet I cannot but feel that the words " only by reason of the *transfer by him* " help to support the view I have expressed concerning the Crown's submission on the significance of the passive " were effected."

F The next part of the section which has a bearing on the question in hand is sub-s. (4) (*b*). I need not set it out. It will suffice to say that, when read with sub-s. (2), it provides that an original shareholder shall be deemed to have financially benefited to the extent by which the price he has got for his shares exceeds what might have been expected if the stock had been sold by the company *immediately before* the transfer in the ordinary course of trade for its full market value. It was not disputed that the *datum* line so fixed might G be well *below* the fair or market value of the shares of the company as a going concern at the date of transfer, or that the result of the paragraph—at least in cases where the sale of the stock was such as virtually to put the company out of its normal business—was that original shareholders could be fixed with " financial benefits " considerably in excess of the actual gain which they had obtained by transferring their shares. In this respect sub-s. (4) (*b*) stands in striking contrast to sub-s. (4) (*a*) which measures the financial benefit for H mesne transferors (who in the ordinary course would be nearer the centre of the scheme) at their actual profit on re-sale. Counsel on behalf of the Crown were unable to advance any theory to account for the peculiar terms of sub-s. (4) (*b*) or to explain why the fair value of the shares at the date of the original transfer should not have been adopted as the *datum* line. My Lords, I find it hard to see any reasoned purpose in sub-s. (4) (*b*) if, as the Crown contends, original shareholders who were ignorant of *any* of the stock transactions, may be struck with liability under the section. As several of the cases which your Lordships have been investigating go to show, the " financial benefits " deemed to have been obtained by such shareholders (if sub-s. (4) (*b*) applies to them) could, if exacted in taxation, amount to a capital charge on the pre-transfer value of their holdings. But on the knowledge construction a rational basis for sub-s. (4) (*b*) is, I think, discernible. If, with the rate of excess profits tax at 100 per cent., a shareholder chooses to transfer his shares, knowing that a disposal of the company's stock is intended by its new masters, it might well be said, notwithstanding his ignorance of any scheme to evade taxation, that he should have no reason to expect better terms than if the disposal had taken place before he sold his holding. It may be that the computation of the liability of the company to the tax would be affected to some degree by the change of control, but, in the ordinary course, the transferor could not be expected to have adjustments of this sort in mind. What he might fairly be assumed to have contemplated, if aware only of an impending disposal of stock, is that the profits accruing therefrom would in all probability be swept into the Exchequer to much the same extent as if realisation had taken place before the share transfer. I think, therefore, that sub-s. (4) (*b*) supports the knowledge construction unless the considerations just mentioned can be regarded as offset by a further argument advanced on behalf of the Crown which must now be examined. This was to the effect that the discretion conferred on the commissioners by provisos (i) and (ii) to sub-s. (1) would enable the drastic consequences of sub-s. (4) (*b*) for original shareholders caught by the Olympian retrospect construction, but ignorant of any stock transaction, to be tempered so as to accord with the merits. It would, I think, be going far to hold that the *basis* of chargeability under s. 24 depended on a discretion such as this. Be that as it may, however, I find myself quite unable to see in the commissioners' discretionary powers any satisfactory protection for those who, on account of their ignorance of any of the stock transactions, ought, in common fairness, to be sheltered from the full rigour of sub-s. (4) (*b*) if the Crown's view of the construction of sub-s. (1) (*b*) is to prevail. Let me take a hypothetical case. A, an original shareholder, transfers his holding in complete ignorance of what is afoot. The fair value of his shares at the date of transfer is £x. He sells for £$x + y$ and the sub-s. (4) (*b*) value is £$x - z$. If the knowledge construction be rejected A may be called upon to pay £$y + z$ without any right to contribution from anyone else. Were the commissioners free to reduce that liability to £y (or less) simply because A's merits made such a step just and proper I should find less difficulty in this contention, but the section does not leave the commissioners really free to recognise A's merits in this manner. Their direction must cover the full tax and what comes off A's shoulders must be borne by some one or more of the others charged whose individual merits would all have to be investigated and weighed before the discretion could be exercised in other than an arbitrary and haphazard fashion. Such a process might be possible for the Special Commissioners after a full hearing. But the argument under discussion must be tested by reference to the commissioners whose duty it is to make the charging direction. If the present appeals are to be taken as fair samples of the sort of case dealt with by s. 24, I must confess myself at a loss to see how the commissioners, notwithstanding the powers conferred on them by sub-s. (9) as to obtaining information, could be expected to exercise such a discretion in a manner equitable to all. It goes without saying that I intend no reflection whatever on the competence and impartiality of these gentlemen. But their procedure is not apt for this purpose. They do not hear or see the parties concerned and they, in their turn, may have no opportunity of knowing the full facts or of making informed submissions. In such circumstances the protection which, according to the Crown, the discretion would afford original shareholder A is, to my mind, so fraught with uncertainty and practical difficulty as to rob it of all weight in the determination of this question of construction. I do not forget that the learned SOLICITOR-GENERAL suggested that the problem of balancing the merits of all concerned might be avoided by throwing abatements given to individuals on to the company. I can find no warrant for such a procedure in the section and, if I may say so, I think the suggestion recognises rather than resolves the difficulties to which I have referred. I, therefore, leave sub-s. (4) (*b*) with my view of the correct interpretation of sub-s. (1) (*b*) strengthened rather than weakened.

The only other part of the section relied on as throwing light on this branch of the case was sub-s. (5). I do not think it can be said to point conclusively in either direction. But I am of opinion that it is quite compatible with the knowledge construction and I incline to the view that its phraseology suits that construction better than the other. The expression "in connection with any such transaction as aforesaid" which it uses in relation to barristers, solicitors, accountants and bankers must, I think, be taken as referring to any of the stock transactions mentioned in the charging provisions of sub-s. (1), for only in such A a connection would danger lurk. If so, how could a member of one of the professions named "render services in connection with" a stock transaction without knowledge thereof? Or how could a banker receive interest "on a loan made by him in connection with" such a transaction without being aware of it? So far the language used certainly suggests that "were effected" in sub-s. (1) (*b*) means "were effected by such persons" or an equivalent. Sub-section (5) then proceeds to exonerate the merchant who deals in stock of the B kind in question and who, having bought some of it at full market value, subsequently disposes of it at a profit. The MASTER OF THE ROLLS regarded this provision as supporting the view of the Crown. He said ([1947] 1 All E.R. 159):

> Such a merchant might or might not know the circumstances in which and the purpose for which Mr. Stewart had bought the whisky, but in either case the sub-section relieves him of liability, thus setting a limit to the sequence through which C the transaction can be pursued.

This passage refers to knowledge of the scheme for evasion and presents an attractive argument against accepting such knowledge as an essential pre-requisite of liability. But it can have no applicability, in my opinion, if the knowledge construction prevails and the degree of knowledge it connotes is sufficient to attract liability; for sub-s. (5) seems designed to relieve the merchant D who has been a party to a big price stock transaction and has, therefore, knowledge of it. As I have said, this sub-section is not conclusive. But it is, I think, not without some significance that, on its terms, it may be said of everyone it protects that *he* effected a transaction "in connection with . . . any of the said transactions."

For these reasons, my Lords, I would hold in favour of the knowledge construction as that which accords best with the language the legislature has seen E fit to use. While I do not suggest that this interpretation leads to an ideal distribution of the burden of the full tax, I find it less generally inequitable in this respect than the alternatives which have been discussed. And I may perhaps be allowed to add (though I do not rest any conclusion on this) that it helps to rescue what must be reckoned a virtue in taxing legislation as long, at any rate, as respect is paid to the proposition that "the tax which each individual is bound to pay ought to be certain and not arbitrary" (SMITH, F WEALTH OF NATIONS, 1863 ed., bk. V, c. II, p. 371). For, unlike that urged by the Crown, it serves to limit and define the field of connected transactions under sub-s. (1) (*b*) and to restrict the ambit of the commissioners' discretion so as to make the judicial exercise thereof a feasible task.

Result.—Apart from the company only those who obtained financial benefit *as a result* of the stock transactions and the connected transaction or transactions G are fixed with liability under the section. It is not enough to find that the person to be charged has been a party to a connected transaction and has obtained financial benefit. Such phrases as "the totality of transactions," "the global whole" and "the *unum quid*" were used frequently by counsel in the course of the debate to denote that from which the "financial benefits" had to arise. These expressions serve a purpose but their comfortable rotundity must not be allowed to divert attention from the actual wording of the enact- H ment or to obscure the distinction which it makes between connection and causation. The words "as a result" cannot be left out of account. What follows them must, I think, be the cause of the financial benefits, and the cause in the sense in which the law understands the word and its equivalents. It must not be too remote and it must be more than a mere *causa sine qua non.* In the chain of causation both the stock transactions must play a part as well as the connected transaction, though the latter need not have been effected in connection with more than one of the stock transactions. It may be that the facts and circumstances linking the connected transactions will, in some instances, establish the requisite causation without more. But in my opinion this need not always be so. The case of the respondent, James Bell & Co. (Leith) Ltd., in the *Longmore* (No. 1) appeal, may be taken as an illustration. That respondent was selling agent for the Longmore Company in the South of Scotland under an agreement in writing which provided for the payment of commission and that the contract might be terminated at six months' notice by either side. The purchase of the Longmore Company's shares and the consequential change of control meant the end of this agency without notice and also the end of fees for the respondent Longmore directors. The agreement for the purchase of the Longmore shares provided for the payment of £7,500 to the Longmore directors to be distributed by them as they might decide between the selling agent and themselves, as directors, as compensation for loss of office. The directors paid the agent out of this amount the sum of £2,500 and there was evidence, which does not appear to have been disputed, that this was a reasonable measure of compensation for the loss of the agency without notice. The commissioners held that the agent company had obtained a financial benefit within the meaning of sub-s. (1) (*b*) of s. 24, and made it jointly and severally liable, with forty-seven others, for the sum of £348,803. The Special Commissioners affirmed the agent's liability but limited it, by apportionment under proviso (i) of sub-s. (1), to £2,500, the sum actually received. Now, even if it may be assumed that this receipt was a connected transaction and a financial benefit and that the £7,500, the fund out of which it was paid, was the result of the stock transactions, can it be said that the agent company's financial benefit was the result of the stock transactions and the connected transaction ? I do not think so. To hold that it was would be to stretch the chain of causation very far indeed. The agent cannot be regarded, on the terms of the Stated Case, as having got this payment merely because its principal shareholder was a Longmore director. It got it because it had a *bona fide* claim and the Longmore directors decided that £2,500 was a reasonable settlement of that claim. It was their payment and in other circumstances might well have been made out of the assets of the Longmore Company. As the facts are, it may be possible to discern a connection between this payment and the stock transactions, but I do not think it can properly be described as a result of them in law. In my view, the decision of the commissioners was wrong. It seems to me but another application of the untenable "tainted money" principle, which was not accepted by the courts below or advanced in argument before your Lordships.

I may add here that, in my opinion, the words "as a result of" are equally applicable to all persons, other than the company, whom it is proposed to specify in the direction. It was suggested that where a transfer of shares was found to be a connected transaction the transferor was struck with liability by virtue of sub-s. (4). The MASTER OF THE ROLLS appears to have favoured this view though it seems to necessitate reading the "and" as "or" in the passage in sub-s. (1) (*b*)—"as a result of the transactions aforesaid and any other transactions . . ." With all respect I cannot share that view. Once such a transfer has been held a connected transaction I think sub-s. (4) settles the existence and quantum of the financial benefit. But it still remains to ask whether that benefit has been obtained as a result of the stock transactions and the connected transaction. If effect is to be given to the wording of sub-s. (1) (*b*) I do not see how that step can be omitted in the process of determining liability.

Financial benefit.—I doubt if it is possible to find a comprehensive and satisfactory definition of this expression and I do not think the present series of appeals requires the attempt to be made. In cases falling within sub-s. (4) I need not add to what has already been said. In cases outside that sub-section I think it may suffice to state two propositions—(1) where the transactions in question involve a transfer of money or other property from the person alleged to have obtained a financial benefit, the existence and extent of the benefit should be determined by the net position, that is, after what that person has parted with is taken into account ; and (2) where the financial benefit is obtained in respect of services rendered, or for the loss of the right to render services, the extent of the benefit should be determined without regard to the value of such services or right. It cannot be said that these rules have a common theory of enrichment. But I think they reflect the intention of s. 24. The principle of the first appears to be that adopted by sub-s. (4) notwithstanding the arbitrary measure of its second paragraph, and the second seems to be clearly recognised by the terms of sub-s. (5) relating to professional services. The rate of remuneration "customary in the profession for services of such a character" presumably connotes a fair reward for the work done. If the value of that work could be set off against the fee the financial benefit would be *nil* A and sub-s. (5), as enacted, would be unnecessary.

There remains several subsidiary questions on the construction or operation of s. 24 which I may deal with shortly.

I agree with your Lordships and the courts below as to the meaning of "full market value" in sub-s. (2).

I further agree that in the same sub-section the expression "the stock" means the stock of the company which was disposed of otherwise than for at B least its full market value as described in sub-s, (1). This meaning disregards the extent of any subsequent stock transaction but, on the wording of the sub-section, it is, I think, the only possible interpretation.

I am also of opinion that in the exercise of the discretion conferred by the provisos to sub-s. (1) the question of apportionment and of the amounts to be apportioned should be approached with a view to securing, in so far as practicable, C a just and equitable distribution of the burden of the full tax. This, to my mind, is the intention of the statute. That it has not been fully realised by the commissioners and Special Commissioners appears, I think, from the failure to regard evidence as to the fair value at the date of transfer of the holdings of the original shareholders who knew nothing of the stock transactions, and from the common practice of apportioning to such shareholders the full amount of their financial benefits as computed under sub-s. (4) (*b*), irrespective of D whether or not the aggregate of the financial benefits resulting from all the relevant transactions exceeded the full tax.

My Lords, as I fear my inability to share the conclusions of the House regarding the basis of liability has already led me to express my own at greater length than I had intended, I will conclude this opinion by applying my views of s. 24 to the present appeal as briefly as possible.

The findings as to the stock transactions are stated by the Special Commis- E sioners in a way which raises an initial difficulty. The small price transaction appears to have taken place *after* the big price transaction. The interval of time may have been short but the findings suggest a slip on the part of the promoters of the scheme in that the sale of the company's stock of some 89,000 gallons for £21,940 to Stewart seems to have been effected at a meeting held subsequently to that of Nov. 25, 1941, at which the shares were transferred F and the events relied on by the Crown as showing the purchase of the 89,000 gallons for £327,000 by the Highland Bonding Co., Ltd. and Duncan MacLeod & Co., Ltd., were completed by the handing over by the new directors of delivery orders for the company's stock "in implement of the arrangement for sale" previously made. If such was in fact the order of the transactions the conditions precedent to the making of a direction by the commissioners were not satisfied. But this point was not raised before the Special Commissioners and G they put no question regarding it. It is, therefore, possible that had they directed their minds to it the relevant facts and circumstances might have been set out more fully and so as to put a different complexion on the matter. This possibility makes it undesirable to determine the present appeal on that ground alone and I will, accordingly, proceed on the assumption that there was jurisdiction to make a direction.

It was conceded that the original shareholders knew nothing of the stock H transactions. The facts regarding the payment of £1,250 to David Lannon have already been fully stated and I need only add that there was nothing to show that he had any knowledge of the stock transactions. I would, therefore, dismiss the appeal of the Crown in its entirety, as regards the original shareholders on the ground of lack of the relevant knowledge, and as regards Lannon on the same ground and, alternatively, because his financial benefit was not a result of the stock and any connected transactions.

On this conclusion it becomes unnecessary for me to deal with the several questions submitted by the Special Commissioners. But in view of what I have said earlier concerning the statutory discretion, I would, if I may, record the opinion that the answer to the fifth question should be an emphatic negative.

Appeal against the respondents Ross & Coulter and others allowed. No order as to costs of appeal.

Appeal against the respondent Lannon dismissed with costs.

Solicitors: *Solicitors of Inland Revenue for England and for Scotland* (for the Crown); *Ellis, Peirs & Co.*, agents for *Maurice Kidd & Co.*, W.S., Edinburgh (for the respondents Ross & Coulter and others): *Stanley Wise & Co.*, agents for *D. G. M'Gregor*, W.S., Edinburgh (for the respondent Lannon).

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The questions of law in the Case stated by the Special Commissioners were:—(1) Whether in estimating the full market value of the whisky stocks in question we were entitled to take into consideration the prices prevailing on May 4, 1942, in the brokers' market. (2) Whether upon the facts and evidence we were entitled to apportion any part of the full tax to the original vendors of the shares or any of them. (3) Whether upon the evidence before us we were entitled to fix the value of the shares for the purpose of s. 24 (4) (*b*) at £4. (4) Whether the sums received by the directors as compensation for the loss of office or any part of them represent financial benefits within the meaning of the said s. 24. (5) Whether the sum received by James Bell & Co., Ltd. represents a financial benefit within the meaning of the said section. (6) Whether there was evidence before us to justify our retaining in the direction the other persons and companies who appeal against our decision. (7) Whether the direction is right in form in respect that it apportions the liability for the full tax upon the original vendors of the shares in the first place and only the balance on the persons mentioned [other than the original shareholders]. (8) Whether the persons mentioned [other than the original shareholders] should be primarily liable in payment of the full tax. (9) Whether the persons who knowingly carried through the transactions whereby the full tax was not payable, apart from the provisions of s. 24, should be made primarily liable. (10) Whether the liability of all parties to the direction should be in proportion to the financial benefit obtained by them or deemed to be obtained by them. (11) Whether we were entitled to impose the maximum liability on the original vendors of the shares.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *The Solicitor-General for Scotland* (*Douglas Johnston, K.C.*), *J. F. Gordon Thomson, K.C.* (of the Scottish Bar), and *R. P. Hills* for the Crown.

L. Hill Watson, K.C. (of the Scottish Bar), and *D. Watson* for the respondents Lord Saltoun and others.

R. P. Morison, K.C., and *J. B. W. Christie* (both of the Scottish Bar) for the respondents Hendry or Allen and others.

LORD THANKERTON: My Lords, like the appeals in relation to the *Bladnoch Distillery Co., Ltd.*, in which judgment has been delivered, these appeals are concerned with the recovery of excess profits tax under s. 24 of the Finance Act, 1943, the construction of which has been fully discussed in the *Bladnoch* case.

The first group of respondents are what have come to be termed the original shareholders, whose interests have been attended to by a committee known as Lord Saltoun's committee. The second to fifth respondents are the original directors of the company, or their representatives. The sixth respondent, James Bell & Co., (Leith) Ltd., was the selling agent of the company in the south of Scotland.

The principal shareholder in the company was the fifth respondent, Mr. Duncan Macpherson, who had been selling agent for the company since 1932 under an agreement afterwards taken over by the sixth respondent, on its incorporation. The company was incorporated in 1880 and is a public company. It carries on the trade of distillers, and owns the Milton Distillery, Keith, the oldest distillery in Scotland. In December, 1941, its share capital was £35,000, divided into 70,000 shares of 10*s.* each, of which 35,000 had been issued. It had then a stock of about 177,896 gallons of whisky, valued in its books at £27,159, and casks valued at £3,300. Negotiations for the purchase of its shares were initiated at his own instance by Mr. R. J. Cumming, a shareholder, the other party to these negotiations being Mr. John D. Stewart (who had acquired the shares and bought the whisky stock of the Bladnoch company), acting through Mr. George Barclay. The negotiations were taken up by the directors of the company, who circularised the shareholders as to the terms offered and recommended their acceptance. The requisite number of shareholders having accepted the offer, the purchase money was lodged in the bank against the transfer of shares on Apr. 28, 1942, and two of the directors resigned, being replaced by two nominees of Mr. Stewart. On May 8, 1942, the two remaining original directors resigned, and 34,475 shares out of the 35,000 shares were then transferred to nominees of Mr. Stewart, the purchase price being paid at the agreed rate of £9 per share, amounting to £310,275. It was a term of the agreement for purchase of the shares that £7,500 would be paid for distribution as the directors might decide, between Mr. Duncan Macpherson, the Scottish agent of the company, and the directors as compensation for loss of office. Mr Macpherson was the principal shareholder in James Bell & Co., who by that time had succeeded him as Scottish agents, and they received £2,500 out of the £7,500, and the four directors received £1,225 each.

It is unnecessary to go into details as to the financing of the purchase of the shares. It was provided by a loan of £370,000 from the Anglo-Federal Banking Corporation, Ltd., on the security of delivery orders for the company's whisky stocks amounting to 177,896 gallons, which had been sold by the company, then under his control, to Mr. Stewart on May 4, 1942, for £33,178. On Aug. 13 Mr. Stewart resold 28,956 gallons to the company at the same price as he had bought them from the company, *viz.*, £4,326, leaving 148,940 gallons bought from the company for £28,852, which were resold by Mr. Stewart during August and September, 1942, for £480,287, at full market price with the exception of about 16,000 gallons, which were sold for less than full market price. This full market price was fixed by the Special Commissioners under sub-s. (2) of s. 24 at £555,200, and the full tax at £512,530.

I will first deal with the appeal against the original shareholders. The only additional fact that may be mentioned is that the terms of the agreement for the purchase of the shares clearly contemplated the continuance of the company as a going concern. Before the Special Commissioners it was conceded on behalf of the Commissioners of Inland Revenue that neither Lord Saltoun, who gave evidence, nor any of the shareholders represented by him had any knowledge of any scheme to dispose of the stocks in such a way as to avoid payment of excess profits tax and in selling their shares did not do so in order to facilitate any such scheme. I may add that I can see no ground for questioning the probity of Lord Saltoun in relation to these transactions. The Special Commissioners expressed a similar view. It was not disputed that the original directors also knew nothing of any such scheme.

This case is equally covered by the decision of your Lordships that the absence of such knowledge does not preclude a finding by the commissioners that a transferor of shares obtained a financial benefit as a result of the stock transactions and an associated transaction, and it will suffice to refer to the speeches and the decision in the *Bladnoch* case. Counsel for the original shareholders and counsel for the other respondents conceded, on that view, that the Special Commissioners were entitled, on the facts in this Stated Case, to find that the transaction for the sale of their shares was an associated transaction within the meaning of sub-s. (1) (*b*).

It was contended on behalf of the original shareholders that there was no finding that the price paid for the shares resulted from these transactions, but, in my opinion, the effect of sub-s. (4) (*b*) is that the deemed benefit computed thereunder must necessarily have resulted from these transactions within the meaning of sub-s. (1) (*b*) for the reasons given by me in the *Bladnoch* case, to which I may refer.

A fresh contention was submitted by the original shareholders, which they had also maintained before the Special Commissioners, that would appear to be without foundation. As I understood it, the contention was that, while for the purposes of determining the full market value and the full tax under sub-s. (2) the Special Commissioners deducted the 28,956 gallons of stock resold to the company in August, 1942, and treated the case as if the stock sold on Aug. 4, 1942, was 148,940 gallons, they had not given credit to the company for the 28,956 gallons as an asset, in valuing the shares under sub-s. (4) (*b*). Mr. Aikman, H.M. Inspector of Taxes, gave evidence on behalf of the present appellants, and produced a statement, in which he brought out a value of £3 10*s*. per share for the purposes of sub-s. (4) (*b*). One item states the capital as £57,105, which includes the 177,896 gallons of whisky at book prices; another item adds the sale of whisky less the sum credited in the company's accounts, an amount of £525,228, which would seem to be a sale of 148,940 gallons. Mr. Aikman made no allowance for goodwill. The Special Commissioners determined the value of the shares under sub-s. (4) (*b*) at £4 per share, stating that they did not restrict themselves to the book values of the fixed assets and did not neglect to give a value to goodwill and post war credit, but took into account all the special circumstances of the case as they appeared to them. The respondent shareholders have failed to substantiate the grounds of their complaint on this head, and the third question of law in the Case Stated should be answered in the affirmative.

In this appeal the same question arises as to the computation of the full market value under sub-s. (2) as arose in the *Bladnoch* case, and I need only refer to the decision in that case, which covers this case. The first question of law should be answered in the affirmative.

As to the exercise of the discretionary power of apportionment under proviso (ii) of sub-s. (1), the intimation of your Lordships made during the hearing was made at the close of the hearing of this appeal, and covers it, and for the reasons given by me in the *Bladnoch* case, to which I may refer, and which are equally applicable to the present case, I am of opinion that the Special Commissioners have failed to conform to the statutory basis of the power of apportionment, and failed to act judicially in the exercise of that power, in that they treated as irrelevant the value of the shares on the footing of the company continuing as a going concern. It is to be noted that, as stated in the Case, the Special Commissioners had such evidence before them in the second of two statements submitted by Mr. Hourston, chartered accountant, on behalf of the shareholders, but held it irrelevant. Mr. Hourston's first statement related to the valuation of the shares under sub-s. (4) (*b*). In this view, I am of opinion that the appeal should be allowed, that the interlocutor of the First Division of the Court of Session in regard to the original shareholders, dated Jan. 31, 1946, should be reversed, except in regard to expenses, and that the questions of law in the Stated Case, so far as affecting the original shareholders, should be answered as follows:—the first question in the affirmative, the second question at this stage, in the negative, in that relevant evidence has not been taken into consideration and that the proper basis of apportionment has not been observed, the third question in the affirmative, the questions seventh to tenth in the negative, in that the proper basis of apportionment has not been observed, the eleventh question in the negative, and find it unnecessary to answer the sixth question. There should be no order as to the costs of the appeal. The Case should be remitted to the Special Commissioners to proceed as accords.

I now take the appeal against the respondents other than the original shareholders. The original directors of the company were Mr. G. D. Allan, represented by his widow, the second respondent, Mr. S. W. Mayer, the third respondent, Colonel H. J. Kinghorn, now represented by the fourth respondents, and Mr. Duncan Macpherson, the fifth respondent. The sixth respondent was the selling agent for the company. These respondents were all included in the direction appealed against in respect of the shares distributed to them out of the sum of £7,500 in terms of the agreement for purchase of the shares, each director receiving £1,225, and the selling agents receiving £2,500, as I have already stated. These respective sums were apportioned by the Special Commissioners under proviso (i) of sub-s. (1) as an individual liability. The First Division of the Court of Session discharged them from the direction, as a corollary to their having held that the transaction for the sale of the shares was not effected in connection with or in association with the stock transactions.

As I have taken the contrary view, it appears to me to follow logically that these payments, which were stipulated for as part of the agreement for purchase of the shares, are part of a transaction which the Special Commissioners were entitled to hold, and did hold, to be an associated transaction. There remains the question whether there was evidence on which the Special Commissioners were entitled to hold that these payments, in whole or in part, were financial benefits obtained as the result of the associated transaction within the meaning of sub-s. (1) (*b*). As regards the original directors, it was admitted that none of them had a written contract of service. Mr. Mayer became a shareholder of the company in 1904 ; he became a director in 1913 and had been chairman of the directors since 1921. Colonel Kinghorn had been on the board of directors for six years prior to May, 1942, and Mr. Macpherson joined the board in October, 1940. Mr. Allan, who was secretary of the company, joined the board in June, 1941. At the annual general meeting, held on Nov. 7, 1941, the total directors' fees was fixed at £400, to be paid annually until subsequently altered. The directors received no fees in respect of the part of the year from Oct. 1, 1941, to May, 1942. It appears to me that at least they had a right to remain in office until the end of the year on Sept. 30, 1942. It was also maintained before the Special Commissioners that it was frequently the practice of companies to pay compensation to directors who have no security of tenure. The Special Commissioners decided that the directors had received a financial benefit as a result of the transaction in respect of the sum of £1,225 received by each. In my opinion, the Special Commissioners must have based this conclusion on an application of the tainted money principle, with which I fully dealt in the *Bladnoch* case, and have not correctly understood the meaning and effect of the words "financial benefits as a result of" in sub-s. (1) (*b*). The contracting parties in this case were the purchaser of the shares, who made the offer, and the shareholders who accepted it, and the payment of £7,500 was truly made to the company, which was thereby put in funds to pay the "compensation" to the directors, it being a condition of the agreement that the directors should resign before the expiry of their appointment by the company. In my opinion, reasonable compensation for loss of an existing tenure of office by termination before its natural expiry by reason of the associated transaction is not a financial benefit resulting from that transaction within the meaning of the statutory provision. There was such an element in the present case, which the Special Commissioners have disregarded, and their decision rests on a mistaken construction of the statutory provision. It may be that the alleged practice of companies may be found to be in a comparable position, but the matter has not been considered or investigated. While it seems that it will be enough under sub-s. (1) (*b*) to find that any part of the sum in question is a financial benefit, I am of opinion that, for a proper exercise of the power of apportionment under proviso (i) the amount of the financial benefit in fact should be ascertained. Accordingly, on the facts as stated, the matter must be reconsidered by the Special Commissioners, with the consequent reconsideration of the direction as a whole, for the reasons stated by me in the *Bladnoch* case ; and, as matters stand, the fourth question in law should be answered in the negative. I therefore propose that the appeal should be allowed, that the four interlocutors of the First Division of the Court of Session in regard to these respondents dated Jan. 31, 1946, should be reversed, except in regard to expenses, and that in each case the questions of law should be answered as follows :—the first question in the affirmative, the fourth question at this stage, in the negative, in that relevant evidence has not been taken into consideration, questions seventh to tenth in the negative and find it unnecessary to answer the remaining questions. There should be no order as to the costs of the appeal. The Case should be remitted to the Special Commissioners to proceed as accords.

Though the facts are somewhat different, I have come to the same conclusion in regard to the sum of £2,500 paid to the sixth respondent. As I have already stated, Mr. Duncan Macpherson, the fifth respondent, who was an original director, was the selling agent of the company in the south of Scotland, under the restriction that he was not to represent any other Highland malt distillery, being paid a 5 per cent. commission per proof gallon on all whisky sold by him. The agreement was terminable by six months' written notice on either side. On its incorporation, the sixth respondent took over the benefit of this agreement. The Special Commissioners had evidence before them by Mr. Duncan

Macpherson that he regarded £2,500 as rather on the low side for compensation for the loss of a valuable agency but he had agreed to accept it because he was receiving £1,225 as compensation for loss of office as a director. Evidence in support of the contention that the £2,500 was genuinely compensation for loss of office and was not a financial benefit under s. 24 was given by Sir David Allan Hay, chartered accountant, Glasgow, who stated, *inter alia*, that the general thought behind the payment of compensation to an agent was that he might have organised his business for the purpose of dealing for his principal and that if he loses that agency he suffers financial loss until a new agency is acquired. This is relevant evidence for the consideration of the commissioners, especially in view of the restrictive nature of the agency under the agreement. Accordingly, the fifth question of law should be answered in the negative, and, with the substitution of the fifth question for the fourth question, I propose a motion in the same terms as in the case of the original directors.

LORD PORTER: My Lords, so far as the original shareholders are concerned, this case only differs from that just dealt with in that it is concerned with a public and not a private company and I see no logical ground of distinguishing between the two. I agree that the financial benefit received by the original shareholders from the sale of their shares resulted from the combined result of that and the sale of the stocks of whisky.

The full market value in this as in the other cases was ascertained upon correct principles.

Again as in the last case the commissioners have failed to act judicially in the apportionment which they have made in that they have acted on the tainted money principle and have failed to take into account the value the shares would have had if sold to purchasers intending to carry on the business as a going concern.

I may add that the commissioners have rightly acquitted Lord Saltoun, and those shareholders whom he represents, of all complicity in the scheme and have recognised that he and they have throughout acted with complete propriety.

So far as the directors and agents are concerned, I also consider that their remuneration for loss of their position is no doubt an associated transaction, but how much is properly described as a recompense for loss of office and how much, if any, a financial benefit has yet to be ascertained.

LORD SIMONDS: My Lords, I concur in the reasoning and conclusions of the Noble Lord on the Woolsack.

LORD MORTON OF HENRYTON: My Lords, in this case the respondents are firstly a group of innocent shareholders, Lord Saltoun and others, secondly, three directors of the Longmore company and the legal personal representative of the fourth director. All four directors were also innocent shareholders, but in addition to the purchase price of their shares they received £1,225 each as compensation for loss of office. The last respondent is James Bell & Co. (Leith) Ltd., the recipient of a sum of £2,500.

It is plain that in this case there was evidence upon which the Special Commissioners were entitled to find that the innocent shareholders, including the four shareholders who were also directors, came within s. 24 (1) (*b*), and their counsel did not feel able to argue the contrary, in view of the interim intimation given by your Lordships on Nov. 28, 1947. It is equally plain that this case also must be remitted to the Special Commissioners for reconsideration in the light of the opinions expressed by your Lordships in the *Bladnoch* case. The Special Commissioners have again apportioned the maximum sum to the innocent shareholders and they have ruled out as irrelevant certain evidence as to the market value of the shares which was, in your Lordships' view, both relevant and important. I have already referred to this matter in the course of my opinion in the *Bladnoch* case.

It is necessary, however, to consider the question whether there was evidence upon which the Special Commissioners could properly hold that the four directors, who lost their office as directors by reason of the transfer of shares, but received £1,225 each as compensation for loss of office, thereby " obtained financial benefits " within sub-s. (1) (*b*). For my part, I think there was such evidence. It was the duty of the Special Commissioners to consider to what extent (if at all) the financial benefit to each director represented by the sum of £1,225 was greater than the financial loss to that director represented by his immediate loss of office. To that extent, and to that extent only, each director in his capacity as a director obtained a financial benefit as a result of the share transaction. It must be borne in mind that in the case of these sums a financial benefit must be obtained in fact if the directors are to be A brought within sub-s. (1) (*b*). Sub-section (4) does not apply to this particular transaction, and accordingly the directors are not "*deemed* to have financially benefited." In my view, however, the Special Commissioners might not unreasonably come to the conclusion that part of the £1,225 represented an actual financial benefit to each director. On the other hand, it was, in my view, quite impossible for the Special Commissioners, if they had directed their minds to the real question as stated above, to come to the conclusion B that the whole of the £1,225 represented a financial benefit obtained by each director. To take only one point, at the annual general meeting of the company held on Nov. 7, 1941, the total directors' fees for the year ending Sept. 31, 1941, were fixed at £400, "such remuneration to be paid annually until altered at any subsequent annual general meeting." At the date when the shares were sold and the directors lost their office they had done seven months' work as directors, since Oct. 1, 1941, and as a result of the sale they received no C remuneration for their seven months' work. This was a financial loss which should be set off against the financial benefit represented by the £1,225 and there are obviously other matters to be weighed against that benefit. I can only guess at the mental process which enabled the Special Commissioners to come to the conclusion that each director obtained a financial benefit to the extent of £1,225 as a result of the sale of the company's shares. They D clearly did reach that conclusion, and under proviso (i) they apportioned that sum to each director. The Special Commissioners must have misdirected themselves in this matter, and when the Case is remitted to them they should, in my view, reconsider it on the lines I have already indicated. It may be that they were misled by the "tainted money" theory, which has been mentioned in the *Bladnoch* case.

I should add that the Special Commissioners also purported to apportion E certain sums to the same four persons in their capacity as shareholders, under proviso (ii). In fact, these four persons do not come within proviso (ii), as they did not obtain financial benefits *only* by reason of the transfer by them of shares. This is, however, a matter of form rather than of substance, as these four persons come within sub-s. (4) (*b*) in regard to their transfer of shares, and I do not doubt that, if the Special Commissioners had made an apportionment to them as shareholders under proviso (i), they would have apportioned F the same sum as they purported to apportion under proviso (ii).

My Lords, a similar question arises in regard to a sum of £2,500 received by James Bell & Co. (Leith) Ltd., as compensation for the loss of that company's position as sale agent of the Longmore company for the south of Scotland. The Special Commissioners came to the conclusion that the whole of this sum of £2,500 was a "financial benefit" within the meaning of s. 24, G but limited the liability of the Leith company to that sum, under proviso (i). Here again, I think there was evidence upon which the Special Commissioners could come to the conclusion that the financial benefit to the Leith company, represented by the sum of £2,500, was greater than the financial loss to that company represented by the immediate loss of this agency. For instance, the agency could have been ended by six months' notice on either side. On the other hand, here again I think that the Special Commissioners must have H misdirected themselves when they found that the whole of the £2,500 represented a financial benefit obtained by the Leith company, and this matter also must be reconsidered by them.

I would add that, in my view, any financial benefits obtained by the directors in their capacity as directors, or by the Leith company, clearly came within sub-s. (1) (*b*). These financial benefits were received by the directors and the Leith company respectively as a result of the sale of the shares in the Longmore company to the Stewart group ; in fact, the directors insisted, not unnaturally, that compensation to them and to the Leith company should be a term of the agreement for the sale of the Longmore company's shares. That sale would never have taken place but for the existence of a scheme to carry out the stock transactions and was an essential step in that scheme, though the innocent shareholders, including the directors, were quite unaware of these facts. Thus the financial benefits obtained by the directors and the Leith company were obtained, in my view, as a result of the stock transactions and another transaction, namely, the sale of shares, which was effected in connection with the stock transactions.

I concur in the motion proposed, and make no further comment on the form of the answers to the questions of law in this case or in any other of the series of cases under appeal, as these answers are in the form thought appropriate by the majority of your Lordships' House in the *Bladnoch* case.

LORD MACDERMOTT : My Lords, it was conceded in this appeal that none of the respondents had any knowledge of the stock transactions. The appeal of the Crown would therefore fall to be dismissed in its entirety had my views regarding the construction of s. 24, as expressed in the *Bladnoch* case, prevailed. Those views, however, must now give place to the conclusions of law already adopted by your Lordships in that appeal. Applying those conclusions, I consider that the original shareholders and also the directors (in respect of their compensation for loss of office) were properly retained in the direction by the Special Commissioners and that the case should be remitted for reconsideration of the amounts apportioned. I think that the financial benefit obtained by each director as such was, *prima facie,* the amount received by him as compensation from the purchasers of the shares, but this would not preclude the Special Commissioners from apportioning less if they thought fit, and on that account it is well that the remit should cover this class. As regards the respondent, James Bell & Co. (Leith) Ltd., (the selling agent) I would dismiss the appeal because, in my opinion, its financial benefit was not a result of the stock and connected transactions. I have given my reasons for that opinion in the *Bladnoch* case and need not repeat them here.

Appeal allowed. No order as to costs of appeal.

Solicitors : *Solicitors of Inland Revenue for England and for Scotland* (for the Crown) ; *Beveridge & Co.*, agents for *L. Mackinnon & Son*, Aberdeen, and *Macpherson & Mackay*, W.S., Edinburgh (for the respondents, Lord Saltoun and others) ; *Thomas Cooper & Co.*, agents for *Boyd, Jameson & Young*, W.S., Edinburgh (for the respondents Hendry or Allan and others).

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The questions of law in the Case stated by the Special Commissioners were :—(1) Whether in estimating the full market value of the whisky stocks in question we were entitled to take into consideration the prices actually obtained by Duncan MacLeod, Ltd., in the brokers' market ? (2) Whether upon the facts and evidence we were entitled to apportion part of the full tax to the original vendors of the shares or any of them ? (3) (*a*) Upon the facts stated were the sales and transfers of shares by the original vendors " other transactions which were effected in connection with or in association with any of the said transactions " within the meaning of s. 24 (1) (*b*) of the Finance Act, 1943 ? and if not (*b*) Is the direction lawful in so far as it directs a charge upon the original vendors of shares ? (4) If question 3 (*b*) is answered in the affirmative, were we in applying s. 24 (1) (ii) and (4) (*b*) of the said Act :—(*a*) entitled to apportion preferentially upon the original vendors of shares so much of the " full tax " as was equal to the amount by which they were deemed to have financially benefited ; and to treat the balance of the " full tax " as being the limit of the liability of all other persons who obtained financial benefit ? or (*b*) bound to make a trial apportionment of the " full tax " as between (i) the original vendors of shares and (ii) all other persons, in proportion to the respective benefits of these two classes ; and thereafter to make a trial apportionment, against the original vendors of shares, of a sum no greater than either (i) their amount of the final apportionment, or (ii) their respective financial benefits ? (5) Whether there was evidence before us upon which we were entitled to fix the value of the shares for the purposes of s. 24 (4) (*b*) at £6. (6) Whether there was evidence before us to justify our retaining in the direction the persons who appeal against our decision.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *The Solicitor-General for Scotland* (*Douglas Johnston, K.C.*), *J. F. Gordon Thomson, K.C.* (of the Scottish Bar), and *R. P. Hills* for the Crown.

Sir Cyril Radcliffe, K.C., *F. Heyworth Talbot* and *T. P. McDonald* (of the Scottish Bar) for the respondents, Barclay and Holt.

A *Scrimgeour, K.C.*, for the respondents, Long John Distilleries, Ltd.

LORD THANKERTON : My Lords, the only respondents called in this appeal are those persons conveniently described as the original shareholders, and the questions at issue are mainly covered by the decision in the case of the *Bladnoch Distillery Co., Ltd.*

The company was incorporated in 1937. It continued the business carried B on by its predecessor under the same name as bonded store and warehouse keepers ; further, it had from time to time devoted its surplus moneys to the purchase of whisky, and, by December, 1941, had accumulated a stock of 60,382 gallons of whisky of its own. The capital of the company was £25,000, divided into 25,000 shares of £1 each. Prior to Dec. 20, 1941, these shares were beneficially owned by Mr. James Barclay, 15,000 shares, Mr. Stanley S. Holt, 100 shares, Mrs. D. S. Holt, now represented by her husband, the said Mr. C Holt, 4,900 shares, and Long John Distilleries, Ltd., 5,000 shares.

In the view that I take of this appeal, it will only be necessary for me to deal with one of the questions of law, on which the opinion of the court is desired, which is as follows :

> (3) (*a*) Upon the facts stated were the sales and transfers of shares by the original vendors " other transactions which were effected in connection with or in association D with any of the said transactions " within the meaning of s. 24 (1) (*b*) of the Finance Act, 1943 ? and if not (*b*) Is the direction lawful in so far as it directs a charge upon the original vendors of shares ?

On the question of the proper construction of sub-s. (1) (*b*), I may refer to my opinion in the *Bladnoch* case, in which it was held that absence of knowledge, on the part of the original shareholders, of the promoters' scheme for disposal of the stocks would not preclude the commissioners from finding that E the transaction for sale of the shares was in fact connected or associated with the stock transactions. In my opinion I said :

> On the other hand, it may be that the absence of such knowledge is of some evidential value to the commissioners in determining whether in fact there was some such connection or association, and it remains open to maintain, as a question of law, that there was not evidence to justify the commissioners' conclusion in fact that there was such a connection or association.

F I might have added that the existence of such knowledge might have evidential value in the contrary direction. It will therefore be necessary to consider closely the evidence in the present Stated Case in order to decide whether on the facts stated the Special Commissioners were entitled to find that there was such a connection or association—for that is the more correct form of the question.

G In November, 1941, the respondent Mr. James Barclay was approached by Mr. George Barclay, who asked whether the shares of the company could be bought. Mr James Barclay having consulted his co-shareholders, who agreed to sell provided they received a reasonable price, he had a meeting in London with Mr. George Barclay, Sir Hector MacNeal, Mr. G. B. Morgan and another. Mr. George Barclay, Sir Hector MacNeal and Mr. Morgan had been concerned along with Mr. J. D. Stewart (who was the ultimate purchaser H of the shares and the whisky stocks in the present case), in the transactions in the *Bladnoch* case. No offer resulted from this meeting.

On Dec. 4, 1941, Mr. James Barclay had a call from Dr. Oscar Rabinowicz, who had been previously introduced to him by Mr. Duncan MacLeod, and was asked whether he could buy the business of the company. Mr. MacLeod's company had been one of the joint purchasers at full market prices of the Bladnoch stocks from Mr. Stewart. Mr. James Barclay replied that he would require to consult his co-shareholders, but there was discussed a possible selling price of £7 per share. The shareholders agreed to sell at this price, and on

Dec. 12, 1941, an offer to sell all the shares of the company for £175,000 (at the rate of £7 each) was addressed to Dr. Rabinowicz. The offer was accepted by Dr. Rabinowicz. The offer provided for settlement on Dec. 19, 1941, when the purchase price was to be paid in exchange for transfers of the 25,000 shares. It was part of the arrangement that the then directors of the company would resign.

Dr. Rabinowicz gave evidence that he was a Czecho-Slovakian refugee with ample funds, that he had purchased the shares of the company as an investment, and that he was interested in the company's business as a " running business."

On Dec. 15, 1941, Dr. Rabinowicz received a letter from a firm of Manchester stockbrokers, on behalf of Mr. Stewart, asking if he was willing to sell the shares of the company, and offering to pay £8 per share for a quick deal, which they said was a top price and not subject to negotiation. Dr. Rabinowicz did not reply, but was soon approached by Mr. George Barclay, as representative of Mr. Stewart, and he arranged to resell the shares to Mr. Stewart for £8 per share, and he received a letter dated Dec. 18 " purporting to come from Mr. Stewart " confirming the arrangement, completion to take place forthwith. Dr. Rabinowicz stated that he had agreed to resell the shares because he had received a good offer which gave him a quick profit of £25,000.

The crucial paragraph in the Case Stated is as follows :

> On Dec. 20, 1941, £175,000 was paid to Dr. Rabinowicz by Mr. George Barclay out of £200,000 made available to him at the Commercial Bank of Scotland, Glasgow, by the Anglo-Federal Banking Corporation, Ltd. (hereinafter called the " Anglo-Federal Bank "). £175,000 was paid by Dr. Rabinowicz to Mr. Kidd on behalf of the original shareholders in exchange for transfers of all the shares in the company and resignations of the then directors. In the place of the original directors who resigned as aforesaid the said Mr. George Barclay and Mr. Spence (a business associate of Sir Hector MacNeal) were appointed directors.

Thereafter, at a meeting of the new directors it was noted that the ownership of the share capital of the company had been assigned to Mr. Stewart, and a sale of the whisky stocks of the company to Mr. Stewart, stated in a letter by him to these directors to have been already arranged, was made at the price of £25,000 as evidenced by the books of the company. There is no evidence, and no suggestion that the original directors were parties to, or knew of the previous arrangements. In due course, as was usual in these schemes, these stocks were subsequently disposed of by the Anglo-Federal Bank, who had financed the transactions, through Duncan MacLeod & Co., for an amount—after deduction of the latter's brokerage—of £258,732, which the Special Commissioners fixed as the full market price under sub-s. (2). A considerable body of evidence was taken as to the source of the purchase price of £175,000 which was paid to the original shareholders by Dr. Rabinowicz, but, however relevant that may have been to the now-discarded principle of tainted money, it appears to me to have no relevance to the question under consideration. In my opinion, only one conclusion on the evidence was open to the Special Commissioners, *viz.*, that the purchase of the shares by Dr. Rabinowicz from the original shareholders and their purchase from Dr. Rabinowicz by Mr. Stewart were separate transactions, separately completed. There is no evidence, or suggestion, that the original shareholders at any time were aware of the scheme for disposal of the stocks. There is no evidence that Dr. Rabinowicz represented Mr. Stewart, or that he was aware of, much less a party to, these schemes ; indeed, the evidence leads to a contrary inference, *viz.*, that, the original enquiry by Mr. George Barclay in November and relative meeting in London having led to no result, Mr. Stewart and his associates had perforce to approach Dr. Rabinowicz, on learning that he had forestalled any intention they had of dealing with the original shareholders. I am, therefore, of opinion that the purchase of the shares from the original shareholders by Dr. Rabinowicz was not a connected or associated transaction within the meaning of sub-s. (1) (*b*) of s. 24, and that the original shareholders were wrongly included in the direction. This is clearly another case in which the Special Commissioners proceeded on the tainted money principle.

Accordingly, I am of opinion that question (3) (*a*) should be answered in the negative, and, necessarily, the second head of the question should be also answered in the negative. The remaining questions of law are superseded.

I propose that the appeal should be dismissed with costs, and the interlocutors, which deal separately with each respondent, should be affirmed, with the variation that the second question should be included among the superseded questions.

LORD PORTER : My Lords, as I understand the finding of the Special Commissioners in this case, the purchase by Dr. Rabinowicz was a genuine transaction of sale to one who was interested in the company's business as a going concern and there is no evidence that it was a sale to one who either himself intended to obtain a profit by securing control and selling the stocks at an undervalue to someone who would resell them at a large profit and so avoid excess profits tax, nor that the purchase was made with the intention of selling to those who would make their profit in that way. The sale was not associated with the methods afterwards adopted by Mr. Stewart : there was an intervening transaction.

In these circumstances I agree that the appeal fails.

LORD SIMONDS : My Lords, I also agree.

LORD MORTON OF HENRYTON : My Lords, I also agree.

LORD MACDERMOTT : My Lords, I agree that the appeal fails.

Appeal dismissed with costs.

Solicitors : *Solicitors of Inland Revenue for England and for Scotland* (for the Crown) ; *F. O. S. Leak, Burgess, Battersby & Co.*, agents for *Tindal, Oatts & Roger*, Glasgow, and for *F. O. S. Leak, Burgess & Battersby*, Manchester (for the respondents Barclay and Holt) ; *Linklaters & Paines* (for the respondents Long John Distilleries, Ltd.)

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The questions of law in the Case stated by the Special Commissioners were :—(1) Whether Mr. James Barclay was correctly included in the direction in respect of the financial benefit received by him on the sale of his shares ? (2) Whether our computation of the full market value of the stock and "full tax" was based upon correct legal principles ? (3) Whether there was any evidence to support our finding that the value of the said shares for the purposes of s. 24 (4) (*b*) of the Finance Act, 1943, was £8 ? (4) Assuming the direction to be lawful in so far as it directs a charge upon the original vendor of shares, were the commissioners, in applying s. 24 (1) (ii) and (4) (*b*) of the Finance Act, 1943 (*a*), entitled to apportion preferentially upon the original vendors of shares so much of the "full tax" as was equal to the amount by which they were deemed to have financially benefited, and to treat the balance of the "full tax" as being the limit of the liability of all other persons who obtained financial benefit ? or (*b*) bound to make a trial apportionment of the "full tax" as between (i) the original vendors of shares and (ii) all other persons, in proportion to the respective benefits of these two classes, and thereafter to make a final apportionment, against the original vendors of shares, of a sum no greater than either (i) their amount of the trial apportionment, or (ii) their respective financial benefits ? (5) Whether there was any evidence to support our findings of fact in the cases of those persons against whom we confirmed the direction.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *The Solicitor-General for Scotland* (*Douglas Johnston, K.C.*), *J. F. Gordon Thomson, K.C.* (of the Scottish Bar) and *R. P. Hills* for the Crown.

Sir Cyril Radcliffe, K.C., F. Heyworth Talbot and *T. P. McDonald* (of the Scottish Bar) for the respondent.

LORD THANKERTON : My Lords, the only respondent in this appeal is Mr. James Barclay, who was one of the six original directors, of whom one, Mr. R. H. Kidd, was alternate director for him. He beneficially owned all the shares of the company and was managing director.

The company was incorporated in 1930, and carried on the business of bonded warehouses proprietors, distillers, malsters, blenders, bottlers and dealers in spirits and wines. Its capital is £6,000, divided into 6,000 shares of

£1 each. At Apr. 9, 1942, the company was possessed of whisky stocks amounting to some 26,000 gallons. As the result of an approach by Mr. George Barclay, on behalf of a client whose name he did not disclose, a meeting was held in London on Apr. 9, 1942, to discuss the purchase of the shares of the company, which was attended by the respondent and the secretary of the company, the said Mr. Kidd, on the one side, and Mr. George Barclay and Mr. G. B. Morgan on the other. The price to be paid was agreed at £13 5*s.* per share (£79,500 in all), and an offer addressed to Mr. George Barclay was completed on behalf of the respondent by Mr. Kidd, as a partner of Messrs. Wilson, Stirling & Co., chartered accountants, Glasgow, which was accepted by Mr. George Barclay. Under this agreement £10,000 was to be paid forthwith, and it was paid on the same day by cheque drawn on Mr. George Barclay's account with the British Linen Bank, Lombard Street, London. The balance of the purchase price—£69,500—was paid on May 5, 1942, by cheque on Mr. George Barclay's account with Martins Bank, Lombard Street, London. It was a condition of the offer that the resignation of all the original directors should be accepted concurrently with or on completion of the transaction. This was done on Apr. 10, 1942, and Mr. Stewart's nominees were appointed in their place. By letter dated Mar. 30, 1942, Mr. Stewart had asked Mr. George Barclay to ascertain the best terms on which Alexander McGavin & Co. (Glasgow), Ltd., could be acquired, and had said that he did not wish his name to appear in the transaction as it might affect the price. The Case states that in the purchase of the shares of the company Mr. George Barclay was acting as agent for Mr. Stewart. It further states that Mr. James Barclay did not know that it was intended to market the whole of the company's stock, or from what source the said £79,500 was derived, and that he was not a party to any scheme for avoiding payment of excess profits tax. The subsequent history of the stock followed the now familiar lines. On May 6, 1942, the company sold to Mr. Stewart the entire stock, amounting to 25,861 gallons for £11,251, which the Special Commissioners find to have been less than its full market value, and it was sold by Campbells Distillery, Ltd., on behalf of Mr. Stewart for £93,780. The Special Commissioners computed the full market value of the said 25,861 gallons at May 6, 1942, at £102,700, and fixed the full tax at £81,047.

Upon the evidence before them in relation to the sub-s. (4) (*b*) value of the shares, the Special Commissioners fixed that value at £8 per share, the difference between that figure and the £13 5*s.* per share, the purchase price, bringing out a figure of £31,500 for the 6,000 shares, and they found that the sum of £31,500 "must be apportioned to Mr. James Barclay under proviso (ii) in order to arrive at the amount of the full tax to be borne by him."

On the general question of construction of s. 24 I may refer to the decision in the *Bladnoch* case, and my opinion in that case.

Four questions were in issue before this House, two of which are covered by the decision in the *Bladnoch* case; firstly, the position of original shareholders, who are in ignorance of the scheme of the promoters, and the conflicting decisions of the Court of Session and the Court of Appeal were fully discussed in the *Bladnoch* case, and the decision was against the contentions of the original shareholders. Secondly, it was decided in the *Bladnoch* case that the Special Commissioners' computation of the full market value was not open to challenge, and that decision applies in the present appeal.

The third question falls to be determined on the facts of this case, and that is, whether on the facts before them the Special Commissioners were entitled to find that the transaction for the sale of the shares was a connected or associated transaction within the meaning of sub-s. (1) (*b*). In my opinion, the facts in the present case were amply sufficient to justify their finding. Mr. Stewart, the promoter of the scheme for the disposal of the stocks was the only purchaser of the shares in the present case, by means of which he secured control of the company and its whisky stocks, which was an essential ingredient of his scheme.

The fourth question is whether the Special Commissioners exercised their discretionary power of apportionment under proviso (ii) of sub-s. (1) unjudicially and not in conformity with the statutory basis for its exercise. Counsel for the Crown conceded that the decision in this case must follow the decision in the *Bladnoch* case, and accordingly this question must be answered in the negative, and the Case will go back to the Special Commissioners for their consideration in the same way as in the *Bladnoch* case. No argument was submitted on the fourth question of law in the Stated Case.

I propose that the appeal should be allowed, that the interlocutor of the First Division of the Court of Session dated Jan. 31, 1946, should be reversed, except in regard to expenses, and that the questions of law in the Stated Case
A should be answered as follows—the first question, at this stage, in the negative, in that relevant evidence has not been taken into consideration, and that the proper basis of apportionment has not been observed, the second question in the affirmative, the fourth question in the negative in that the proper basis of apportionment has not been observed, and find the fifth question superseded, *quoad ultra,* find it unnecessary to answer the third and fifth questions. There should be no order as to the costs of this appeal. The Case should be remitted
B to the Special Commissioners to proceed as accords.

LORD PORTER : My Lords, this is another example of a sale of shares by a holder ignorant of a scheme to avoid excess profits tax by selling the stocks of whisky possessed by the company. In accordance with the principles enumerated above that ignorance does not avail Mr. Barclay so as to keep him outside the mischief of the Act.

C Contentions that on the facts stated the sale was not an associated transaction and that the "full market value" was wrongly construed have also been disposed of. But here again the commissioners have acted upon the belief that it is enough that the money by which the price was paid was "tainted" and so far from taking into consideration the value of the shares in a going concern, have found that the maximum sum must be apportioned to Mr. Barclay.

D In these circumstances the case must go back to them for reconsideration.

LORD SIMONDS : My Lords, I agree.

LORD MORTON OF HENRYTON : My Lords, I also agree.

LORD MACDERMOTT : My Lords, it is clear from the terms of the Stated Case that the respondent, an original shareholder, did not know of
E any of the stock transactions. But on the principles which have been laid down by your Lordships in the *Bladnoch* case I agree that this appeal should be allowed and that the matter must go back for reconsideration by the Special Commissioners.

Appeal allowed. No order as to costs of appeal.

Solicitors : *Solicitors of Inland Revenue for England and for Scotland* (for the Crown) ; *F. O. S. Leak, Burgess, Battersby & Co.*, agents for *Tindal,*
F *Oatts & Roger*, Glasgow (for the respondent).

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The questions of law in the Case stated by the Special Commissioners were :—
G (1) Whether on the facts and evidence we were entitled to hold that the original shareholders were persons who obtained (but for s. 24 of the Finance Act, 1943) financial benefits within the meaning of that section on the sale of their shares to Mr. Tucker ? (2) In the event of question (1) being answered in the affirmative, whether on the facts and evidence we were entitled to apportion part of the full tax to the original shareholders in respect of the financial benefits so obtained by them ? (3) In the event of question (2) being
H answered in the affirmative, whether we were entitled as a matter of construction of s. 24 to disregard the contention of the original shareholders that any liability apportioned to them should be postponed to the liability of the other persons found liable ? (4) Whether our computation of the full market value of the stock and "full tax" were based upon correct principles, and whether there was evidence to justify our computations ? (5) Whether there was evidence before us upon which we were entitled to fix the value of the shares for the purposes of s. 24 (4) (*b*) of the Finance Act, 1943, in terms of our findings at £4 per share ? (6) Whether there was evidence before us to justify

our findings in the cases of those persons against whom we confirmed the direction.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *The Solicitor-General for Scotland* (*Douglas Johnston, K.C.*), *J. F. Gordon Thomson* (of the Scottish Bar) and *R. P. Hills* for the Crown.

R. P. Morison, K.C., and *G. E. O. Walker* (both of the Scottish Bar) for the original shareholders.

LORD THANKERTON : My Lords, this appeal raises questions under s. 24 of the Finance Act, 1943, as to the disposal of whisky stocks of the first respondent, D. P. McDonald & Sons, Ltd., to whom I will refer as the McDonald company, and of the second respondent, Fort William Warehousing Co., Ltd., to whom I will refer as the Fort William company. Neither of these respondents appeared in the appeal. The remaining respondents either were, or now represent, the original shareholders in these companies, and appeared in the appeal ; I will refer to these respondents as the original shareholders.

Four questions arose in the appeal against the original shareholders. It was agreed that three of these points, *viz.*, the position of original shareholders, who were unaware of any scheme for disposal of the stocks, the correctness of the Special Commissioners' computation of the full market value under sub-s. (2) of s. 24, and whether the exercise of the discretionary power of apportionment by the Special Commissioners under proviso (ii) was judicial and in conformity with the statutory basis of its exercise, should follow the determination of these matters in the cases of the *Bladnoch Distillery Co., Ltd.* and of *William Longmore & Co., Ltd.*, the judgments in which have now been delivered. The remaining question was whether the Special Commissioners were entitled, on the facts stated in the Case, to find that the transactions for the sale of their shares by the original shareholders were transactions "connected with or in association with" the stock transactions within the meaning of sub-s. (1) (*b*) of s. 24, and I will state the facts, so far as relevant to this question.

The McDonald company was incorporated in 1911. At the material dates in 1942, the authorised capital was £55,000 in shares of £1 each, of which £25,000 had been issued. The business of the McDonald company was that of distillers and bonded warehousemen. The Fort William company was incorporated in 1939, with an authorised capital of £30,000 in shares of £1 each, all of which had been issued, the McDonald company holding 27,950, and the remaining 2,050 being held by shareholders of the McDonald company. The McDonald company was originally a family business. Colonel A. W. McDonald, D.S.O., who was manager of this company, and who died in November, 1939, then held, along with his family, the majority of the shares. A large part of these shares had been acquired by Colonel McDonald only a few months before his death, for which purpose he had borrowed £70,000 from the Bank of Scotland. These shares he had gifted, on their acquisition, to his son and daughters and, under the three years' rule, they fell to be aggregated with the donor's estate in order to determine the rate of duty payable, and the donees were liable for the estate duty on these shares at that rate. The debts due by Colonel McDonald, and the loss of his management, created great difficulty for his trustees. His son, who was the only other director who was a substantial shareholder, was on active service. These difficulties caused the trustees and the family to consider and finally to agree to a sale of the whole holding of shares. After discussion with the minority shareholders, who were unconnected with the McDonald family, it was agreed in June, 1942, that all the shares should be disposed of for the best available price, and that all the shareholders should transfer their shares to Dr. James Watt, W.S., Edinburgh, and Mr. James Shaw Wilson, chartered accountant, Glasgow, the auditor of the company. These transfers were accordingly made and written instructions were addressed to Dr. Watt and Mr. Wilson by all the shareholders, which *inter alia* specified the charges to be made by them, and directed that the price to be obtained, after deduction of these charges, should not been less than £10 per share. The instructions further stated that the shares in the Fort William company belonged wholly to the McDonald company and that the interest in the Fort William company of any shareholder who signed the instructions would pass with the shares of the McDonald company, such shareholder regarding the price receivable for their shares in the McDonald company as covering the value of their shares in the Fort William company. Between the date of these instructions and Jan. 22, 1943, inquiries regarding the purchase of the shares were received from various persons, including Mr. Alexander Tucker, and copies of balance sheets and stock sheets of the company were sent by Mr. Wilson to these inquirers. In November, 1942, Mr. Tucker, having heard of the intended sale of the McDonald company, got into touch with Mr. Wilson, and a meeting was held in Glasgow on Jan. 7, 1943, between Dr. Watt, Mr. Wilson and Mr. Tucker, at which the sale of the shares was discussed, and Mr. Tucker was informed that if he did purchase the shares he would require to give to the vendors an undertaking that he would carry on the companies' businesses, and that, in carrying them on, the companies would in disposing of their stocks of whisky dispose of them in the ordinary course of business at the prices of the items of stock current in the open market at the time of sale, and would take every person to whom he might transfer the shares bound in like manner. Mr. Tucker agreed to sign such an undertaking at the time of his purchase of the shares. He had previously been informed that the purchase price was £375,000, *i.e.*, £15 each. No written bargain was ever made with Mr. Tucker, but he was informed that the shares would be transferred so soon as he was able to settle the transaction for cash. I quote the important paragraph in the Stated Case, as follows :

> On Jan. 22, 1943, Mr. Wilson was informed by the Commercial Bank of Scotland, Glasgow, that Mr. Tucker was ready to purchase the shares of the companies and a meeting was arranged at the Head Office of the Commercial Bank of Scotland. At this meeting there was handed over to Dr. Watt and Mr. Wilson a bank draft by the Commercial Bank of Scotland in their favour for £375,000 in exchange for transfers by them in favour of Mr. Tucker and Mr. William Anderson (Mr. Tucker's nominee) of all the shares of the McDonald company and of all the shares of the Fort William company so far as not held by the McDonald company. At this meeting all the directors of the company resigned and Mr. Tucker and Mr. Anderson were appointed directors.

On purchasing the shares, Mr. Tucker on Jan. 22, 1943, signed an undertaking addressed to Dr. Watt and Mr. Wilson in terms of the undertaking stipulated for at the previous meeting, in which Mr. Tucker described himself as the purchaser of the shares.

It is stated in the Case that the original shareholders, at the time of the sale, had no knowledge of any arrangement whereby the whisky stock was to be sold at less than the full market value, and that they made the sale in good faith on the footing that the business of the companies would be carried on and that the whisky stock would be sold in the ordinary course of business.

On the same day on which he had bought the shares, *viz.*, on Jan. 22, Mr. Tucker sold them to Mr. R. D. McGlone for £500,000 (pursuant to written agreement between them dated Jan. 18, in which Mr. McGlone stipulated "I shall require the said stock to be held at the order of my bankers"), and transfers in his favour were executed accordingly. Mr. Harry Anderton and Mr. W. W. Jamieson were appointed additional directors and Mr. Tucker and Mr. Anderson resigned. On Jan. 22, 1943, Mr. McGlone instructed the Commercial Bank of Scotland, out of a sum of £500,000 placed at his disposal by the Anglo-Federal Banking Corporation, Ltd., of London, to place the sum of £434,000 to the credit of Mr. Tucker, then residing at the Central Hotel, Glasgow, and the said bank received a letter from Mr. Tucker, referring to the £434,000 placed at his disposal by Mr. McGlone, to issue to him a draft for £375,000 in favour of James Watt and James Shaw Wilson, and another draft in his favour for the balance of £59,000, less charges on both drafts. The first of these drafts was the draft already referred to as having been given by Mr. Tucker to Dr. Watt and Mr. Wilson in settlement of the price of the shares purchased by him from the original shareholders. How Mr. McGlone obtained the accommodation from the Anglo-Federal Bank, and the securities on which it was made available, I am not concerned to refer to, as, however relevant these matters might be to the irrelevant suggestion of tainted money, they do not affect the present question, as I see it.

With regard to the disposal of the companies' whisky stocks, it is stated that, on Jan. 22, 1943, after he had acquired the shares of the McDonald company, Mr. McGlone purchased the entire whisky stocks of that company and of the Fort William company for £34,983; these stocks were 63,243.6 gallons in the case of the McDonald company and 63,062.3 gallons in the case of the Fort William company, making a total of 126,306 gallons. On their re-sale between Jan. 27 and Apr. 1, 1943, a sum of £619,515 was realised. Under sub-s. (2) the Special Commissioners decided the full market value was £600,000, and they computed the full tax to be £547,061. A

I should add that Mr. Tucker did not appear and give evidence before the Special Commissioners, but there was produced to them a letter dated Oct. 8, 1943, in answer to a precept from the Inland Revenue Commissioners under sub-s. (9) of s. 24, containing one passage in which Mr. Tucker stated:

> I was not promised any financial assistance nor had I at my command the sum of £375,000, nor prior to Jan. 22, 1943, was any arrangement made for Mr. McGlone to provide me with necessary finance on the day of settlement. What I actually did was that I was playing for time both with the vendors and my prospective subpurchaser, Mr. McGlone, to clinch the sale of the shares of these two companies at an agreed price of £500,000 to him, and whereby I could reap a good profit. If Mr. McGlone had failed to complete his intended purchase from me at the above price at a specific time the whole deal would have dropped as the vendors were getting extremely impatient and expressed their wish to withdraw the shares from the market. B

It should be noted that on Jan. 11, 1943—four days after Mr. Tucker's meeting with Dr. Watt and Mr. Wilson—Mr. McGlone began to arrange for the financing of the transaction of purchase of the shares on the security of the whisky stock of the McDonald and Fort William companies, and his written agreement to take the shares off Mr. Tucker was dated Jan. 18, 1943. In my opinion, the Special Commissioners were entitled, on the evidence, to find that these transactions for purchase of the shares, which were completed on the same day were interdependent and, in substance, constituted one transaction by which Mr. McGlone acquired control of the McDonald and Fort William companies from the original shareholders. On this view, the case closely resembles the *Bladnoch* case, and leads to a similar conclusion. C D

I therefore propose that the appeal should be allowed, that the interlocutor be reversed, except in regard to expenses, and that the questions of law be answered as follows: the first, second and third questions, at this stage, in the negative, in that relevant evidence was not taken into consideration and that the proper basis of apportionment was not observed, the fourth question in the affirmative, and find the sixth question superseded; the fifth question was not argued, and need not be answered. There should be no order as to the costs of the appeal. The Case should be remitted to the Special Commissioners to proceed as accords. E

The appeal against the McDonald company and the Fort William company would appear to have been rendered necessary by an error that has crept into the interlocutor of the First Division in respect of these two companies, dated Jan. 31, 1946, in so far as it answers the first question of law in the Stated Case in the negative. The first question only affects the original shareholders, and does not affect these two companies. The error is placed beyond doubt by the opinion of the Lord President, who says (1946 S.C. 170): F G

> The two companies, the stocks of which were bought and sold by the promoters for the purpose of avoiding excess profits tax, also appeal against the direction, but it seems to me quite clear from the terms of s. 24, sub-s. (1) (*b*) that the commissioners were entitled, and even bound in the circumstances, to make a direction against them.

The two companies raised a subsidiary question about the meaning of "full market value." We have already held in the *Bladnoch* case that a company which voluntarily departs from this normal trading practice and markets its whole stock to enable excess profits tax to be evaded cannot claim the benefit of its pre-transfer methods of trading, and I refer to our opinion in that case. The interlocutor, by its answers to the fourth and sixth questions, rejects both of the contentions of the two companies, and the reference to the first question is erroneous. As our decision in regard to the original shareholders will involve a reconsideration of the whole direction by the Special Commissioners, for the reasons which I have explained in the *Bladnoch* case, there will require to be a remit. H

I therefore propose that the appeal should be allowed, and that, subject to the deletion of the words "the first question in the negative," the interlocutor in respect of these two companies should be affirmed. There should be no order as to the costs of this appeal.

LORD PORTER: My Lords, the respondents in this matter were original shareholders in a family business, the shares in which they desired to sell for legitimate family reasons; amongst them was included a trustee for certain members of the family. The purchaser, a Mr. Tucker, purchased in order to resell and in answer to a precept issued under the section stated that he purchased in order to sell at a profit and only found a re-purchaser at the last moment. Moreover it was a term of his purchase that he should undertake to carry on the business and exact a similar undertaking from anyone to whom he sold the shares. This was the only direct evidence of the inception of the transaction, but Mr. Tucker sold his shares on the same day as he completed their purchase and had arranged that sale four days earlier. Moreover the whole matter of the sale to Mr. Tucker and his resale to the ultimate purchaser was completed at the same meeting and in the presence of all three parties.

In these circumstances the commissioners, in my opinion, were entitled to come to the conclusion that Mr. Tucker not only bought with the intention of reselling to those who had entered into a scheme for avoiding excess profits tax, but had actually so resold before he completed his contract of purchase. It is true that in answer to a precept he wrote alleging that he acted in all innocence, but the commissioners were not obliged to accept this evidence and there is enough in the case to justify their finding.

But here again they seem to have mistaken the principles on which they should have apportioned and the Case must go back for reconsideration.

With regard to the companies I may add that I appreciate what my Lord has said.

LORD SIMONDS: My Lords, I also agree.

LORD MORTON OF HENRYTON: My Lords, I also agree.

LORD MACDERMOTT: My Lords, I agree that the appeal in respect of D. P. McDonald & Sons, Ltd., and Fort William Warehousing Co., Ltd., should be allowed.

As regards the respondents who were original shareholders and not aware of any of the stock transactions, the principles enunciated by your Lordships in the *Bladnoch* case are now binding upon me. I must confess to having experienced considerable difficulty in reaching a conclusion as to what the result of applying those principles to the facts, as they bear upon these respondents, should be; but I am not prepared to differ from the motion which my noble and learned friend on the Woolsack is about to propose.

Appeal allowed. No order as to costs of appeal.

Solicitors: *Solicitors of Inland Revenue for England and for Scotland* (for the Crown); *Peacock & Goddard*, agents for *Frazer, Stodart & Ballinghall*, W.S., Edinburgh, and for *Davidson & Syme*, W.S., Edinburgh (for the original shareholders).

PETER DOUGLAS & CO., LTD.

The questions of law in the Case stated by the Special Commissioners were:—(1) Whether on the facts and evidence any part of the full tax ought to be apportioned to the original vendors of the shares? (2) Whether our computation of the "full tax" was correct? (3) Whether on the evidence we were entitled to retain Mr. D. K. Brown and Mr. Selkirk Wells in the direction?

The Solicitor-General (*Sir Frank Soskice, K.C.*), *The Solicitor-General for Scotland* (*Douglas Johnston, K.C.*), *J. F. Gordon Thomson, K.C.* (of the Scottish Bar) and *R. P. Hills* for the Crown.

Hector M'Kechnie, K.C., and *T. P. McDonald* (both of the Scottish Bar) for the respondents.

LORD THANKERTON : My Lords, this appeal raises questions under s. 24 of the Finance Act, 1943, as to the disposal of the whisky stocks of Peter Douglas & Co., Ltd., to which I will refer as the Douglas company. It was incorporated as a private limited company in 1938, with a share capital of £100 in shares of £1 each. These were issued to the two respondents, 50 shares in each case, and were held by them until their sale on Nov. 1, 1941, as mentioned later. I will refer to the respondents as the original shareholders. Immediately prior to the sale of the shares the Douglas company was possessed of a trading stock of whisky amounting to 6,888.6 gallons, with a book value of £7,471 17*s.* 11*d.* This stock was then pledged to its bankers for an overdraft of about £7,000. Mr. David Keir Brown arranged to purchase the 100 shares in the Douglas company from the original shareholders for £7,500 on the understanding that the Douglas company should have no liabilities save for taxes to the extent of £700. At the same time Mr. Brown, unknown to the original shareholders, arranged that after he had acquired the said shares he would (1) effect a sale of the Douglas company's whisky stock to Princes Investment, Ltd., for £7,500, and resell the said shares to City and Central Investments, Ltd., for £10,750. City and Central Investments, Ltd. and Princes Investments, Ltd., are both finance companies and deal in all types of commodities. The majority of the shares of both companies are held by Mr. Charles Clore who is a director of each. As Mr. Brown was not in a position to complete his purchase of the shares without temporary assistance City and Central Investments, Ltd., arranged an advance of £7,500 to him, with which he opened a bank account and completed his purchase on Nov. 1, 1941, by payment of £3,750 to each of the original shareholders in exchange for transfers in his favour of the 100 shares in the Douglas company, together with a minute electing him a director. The original shareholders retired from the directorate when they transferred their shares, leaving Mr. Brown as sole director. Thereafter, on the same day, by means of a bank draft for £7,500 on behalf of Princes Investments, Ltd., in favour of the Douglas company, which Mr. Brown endorsed as sole director, Mr. Brown had the amount placed to the credit of the Douglas company's account with its bankers. The overdraft on that account being about £5,500, this payment discharged it, and put the account in credit. In exchange the Douglas company's bankers handed over to Mr. Brown as director of the company the delivery orders for the whisky stocks which they held as security. Mr. Brown then sold the whisky stocks of the Douglas company to Princes Investments, Ltd., for £7,500, which was paid by the bank draft above mentioned. After completion of that disposal of the Douglas company's whisky stocks, Mr. Brown carried out on the same day the other part of his previous arrangement by resale of the shares of the company to City and Central Investments, Ltd. In exchange for transfers of 98 shares in favour of City and Central Investments, Ltd., and of one share each in favour of Charles Clore and George Ogilvie Lind, along with a resolution signed by him appointing Mr. Clore and Mr. Lind as directors, Mr. Brown received £10,750, made up by cancellation of his bill of exchange for £7,500 above mentioned and £3,250 cash.

Some time between Nov. 1 and 25, 1941, City and Central Investments purchased from Princes Investments, Ltd., for £17,500 the whisky stocks of the Douglas company which it had acquired and on Nov. 25, 1941, City and Central Investments, Ltd., sold these stocks at arm's length for £29,170. Later, in valuing their investments, City and Central Investments, Ltd., valued the shares held by them in the Douglas company at £350.

The Case states that the original shareholders did not know and had no reason to suspect that the stocks of the Douglas company would be sold at less than the market value or that there would be an evasion of excess profits tax.

Under sub-s. (2) the Special Commissioners fixed the full market value of the stock on Nov. 1, 1941, at £28,470, and the full tax at £20,608. Under sub-s. (4) (*b*), they fixed the value of the shares at £21 per share; the price the original shareholders had received was £75 per share, and the difference between these figures is £54 per share, *i.e.*, £5,400 on 100 shares, which was apportioned to them, the balance of the full tax being apportioned as a joint and several liability of the Douglas company and the other persons concerned.

The first question in issue was as to the position of original shareholders, who were unaware of any scheme for disposal of the whisky stocks at less than the market value or for an evasion of excess profits tax. This matter is fully dealt with in the case of the *Bladnoch Distillery Co., Ltd.*, and the decision in that case clearly covers the present case and is adverse to the contention of the original shareholders. The second question related to the Special Commissioners' computation of the full market value under sub-s. (2) of s. 24, and this point is also covered by the decision in the *Bladnoch* case, under which the Special Commissioners' computation was upheld.

The third question raised by the original shareholders was, as stated in their fourth reason in their Case, that the value of the shares was fixed upon the erroneous assumption that the applicable chargeable accounting period was three months, whereas it should have been twelve months. The Douglas company's normal financial year was twelve months to July 31. In this case the Douglas company ceased to trade after Nov. 1, 1941, and the computation of the full tax under sub-s. (2) of s. 24 was made on the footing of a chargeable accounting period extending from July 31, 1941, to Nov. 1, 1941. That is the period of three months referred to. I did not understand that the original shareholders challenged that computation. When you come to sub-s. (4) (*b*), the Special Commissioners had to determine the difference between two factors, *viz.*, (1) the consideration which the original shareholders in fact obtained for their shares and (2) the price which would have been obtained if the stock of the company had been sold by the company immediately before the transfer in such circumstances that the full tax became payable by or in respect of the company. The original shareholders maintain that, differing from sub-s. (2) the full tax in this case should be on the footing of a twelve months period, on the ground that the computation under sub-s. (2) was on a hypothetical basis. There is more than one answer to this contention. Firstly, the computation of the value of the shares under sub-s. (4) (*b*) is also on a hypothetical basis. Secondly, a chargeable accounting period is a statutory term, and it does not require authority to establish that it refers to a period of trading, the profits of which are the subject of inquiry. Thirdly, sub-s. (8) of s. 24 of the Act of 1943 and s. 22 (*e*) and (*f*) of the Finance Act, 1939, take one back to s. 20 (2) of the Finance Act, 1937, under which it appears to me that, the Douglas company having ceased to carry on business after Nov. 1, 1941, their trading account could not be carried beyond that date, and that the appropriate accounting period fell to be determined by the commissioners under sub-head (*c*) of s. 20 (2).

The fourth question argued before this House related to sub-s. (1) (*b*) of s. 24 and the financial benefit and the connected or associated transactions referred to therein. I may refer to my opinion in the *Bladnoch* case on the general construction of this sub-section. The financial benefit here referred to, in the case of original shareholders, is the deemed benefit enacted by sub-s. (4) (*b*), as distinguished from the benefit in fact, which is proper matter for consideration by the commissioners in exercise of their power of apportionment under proviso (ii). But the question whether the commissioners were entitled, on the facts stated, to find that the transaction for the sale of the shares was a connected or associated transaction within the meaning of the sub-section is a proper one for discussion. I am of opinion that, in this case, there was ample evidence to justify the conclusion of the commissioners. Under the transaction Mr. Brown himself purchased the shares from the original shareholders and thereby acquired the control of the Douglas company, which he promptly used to make the first disposal of the company's entire whisky stock at a price less than the market value; that appears to me to be sufficient to establish the connection or association of the transaction for the sale of the shares with the stock transactions.

This leaves the question whether the Special Commissioners exercised their power of apportionment under proviso (ii) unjudicially and not in conformity with the statutory basis for its exercise, and counsel for the Crown conceded that he was unable, in regard to this question, to distinguish this case from the *Bladnoch* case, in which this question has been answered in the negative.

I propose, therefore, that the appeal should be allowed, that the interlocutor of the First Division of the Court of Session dated Jan. 31, 1946, should be reversed, except in regard to expenses, and that the questions of law should be answered as follows: the first question at this stage, in the negative, in that relevant evidence has not been taken into consideration, and that the proper basis of apportionment has not been observed, and the second question in the affirmative. There should be no order as to the costs of the appeal. The Case should be remitted to the Special Commissioners to proceed as accords.

LORD PORTER: My Lords, this case is concerned with the position of two original shareholders who sold their shares in ignorance of any scheme devised by the purchaser to sell the company's stocks of whisky and avoid excess profits tax. Their position is similar to that of any other shareholders so selling and no fault is to be found with the commissioners' construction of the phrase "full market value" and their computation thereon. Nor can it be said that there was not adequate evidence that the sale was connected with the ultimate disposal of the whisky stocks, the purchaser having bought for the purpose of selling them and having sold them in pursuance of the scheme. But though the respondents fail on these grounds the question still remains whether the commissioners exercised a judicial discretion in apportioning to them the maximum sum permissible under sub-s. (4) (*b*).

In my opinion they did not do so for the same reasons as are to be found in the previous cases. The matter must therefore go back for reconsideration.

I may add that I agree with my Lord in thinking that the chargeable period was rightly computed.

LORD SIMONDS: My Lords, I also agree.

LORD MORTON OF HENRYTON: My Lords, I also agree.

LORD MACDERMOTT: My Lords, in this appeal, also, the respondents who were original shareholders were without knowledge of any of the stock transactions. In consequence of the decision of this House in the *Bladnoch* case, however, I agree that the appeal should be allowed and the matter remitted for reconsideration. In my opinion the chargeable period was correctly computed.

Appeal allowed. No order as to costs of appeal.

Solicitors: *Solicitors of Inland Revenue for England and for Scotland* (for the Crown); *Beveridge & Co.*, agents for *W. & J. Burgess*, W.S., Edinburgh (for the respondents).

J. S. & J. BROWN, LTD.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *The Solicitor-General for Scotland* (*Douglas Johnston, K.C.*), *J. F. Gordon Thomson, K.C.* (of the Scottish Bar), and *R. P. Hills* for the Crown.

L. Hill Watson, K.C. (of the Scottish Bar), and *D. Watson* for the respondent Lannon.

Sir Andrew Clark, K.C., *Mustoe* and *Caplan* for the appellants J. S. & J. Brown, Ltd. and others.

LORD THANKERTON: My Lords, these two appeals raise questions under s. 24 of the Finance Act, 1943, with regard to the disposal of the whisky stocks of J. S. & J. Brown, Ltd., to whom I will refer as the Brown company. I will state the facts so far as material to both appeals.

The Brown company was incorporated as a private company in 1933, to carry on the business of wholesale whisky merchants. Its capital is £10,000, divided into 5,000 six per cent. cumulative preference shares and 5,000 ordinary shares, all of £1 each. All the shares were issued and, until June 2, 1941, were held as follows:—James R. Brown 3,930 preference and 4,900 ordinary, Mrs. Brown 1,070 preference, W. T. Clow 50 ordinary, and George Hannah 50 ordinary. All the shares belonged to Mr. James R. Brown beneficially. Until June 2, 1941, the directors were Mr. Brown and Mr. Clow. As at the same date the Brown company owned a whisky stock amounting to 33,695 gallons and also a stock of wines and other liquors. Early in 1941, owing to ill-health, Mr. Brown instructed his accountants, Messrs. Dempster, Brechin & Waddell, chartered accountants, Glasgow, to endeavour to sell the business. Mr. Hugh

Brechin is sole partner of that firm, and had always been the company's auditor. In the spring of 1941 it came to the knowledge of Mr. C. J. Oppenheim that a business, owning whisky stocks, which business turned out later to be that of the Brown company, was for sale by Messrs. Dempster, Brechin & Waddell. Mr. Oppenheim approached Mr. Lannon, the respondent in the first appeal, a financial broker, and asked whether he could find a purchaser, and gave him information regarding the Brown company and its stocks of whisky, which had been obtained from Mr. Brechin. The matter was mentioned to Mr. Jesse Brown, who in turn brought the matter to the notice of Mr. Jay Pomeroy, a respondent in the second appeal. Mr. Pomeroy told Mr. Lannon that he was interested in the deal, but that he had only about £4,000, and asked Mr. Lannon whether he could arrange an advance up to £30,000 or £35,000. Mr. Lannon arranged for Messrs. Frank Fehr & Co. to make an advance against delivery orders for whisky stocks but the advance was not made. On May 21, 1941, Mr. Pomeroy, purporting to act as the accredited representative of Surplus Sales, Ltd., without prior negotiation, entered into a contract with Messrs. Dempster, Brechin & Waddell, as agents for Mr. James R. Brown, to buy the whole share capital of the Brown company for £39,000. The contract was confirmed in writing. Mr. Pomeroy made a deposit of £4,000, completion was to take place not later than June 15, and the vendor was to deposit all warrants for whisky stored in bond against completion, but reserved the right to call on about 900 gallons of whisky at about 24*s*. per gallon to enable them to supply the requirements of some of their existing customers, and there was provision for the purchasers taking over certain liabilities. About May 24, 1941, it was agreed orally between Mr. Pomeroy, who stated he was acting for a company called Pomis, Ltd., and Mr. James Barclay, managing director of Highland Bonding Co., Ltd., whisky brokers, Glasgow (who had arranged with Mr. William Walker, managing director of William Walker & Co., Ltd., that their two companies should enter into a joint adventure for the purchase of the Brown company's stocks), that the Highland Bonding Co., Ltd., and William Walker & Co., Ltd., would purchase the whisky stocks of the Brown company, less the 900 gallons to be acquired by Mr. James R. Brown, for £60,000. As it was Mr. Pomeroy's desire to be in a position to deal with the whisky stocks of the Brown company whenever he was in a position to control the company and to have such stocks transferred to Surplus Sales, Ltd., he arranged with Mr. James R. Brown that the latter would, before he ceased to be a director of the Brown company on June 2, 1941, transfer the delivery orders for the Brown company's whisky stocks into the name of the Commercial Bank of Scotland to be held by it for Surplus Sales, Ltd. Mr. Brown did as he was requested, but he did not know at what price Surplus Sales, Ltd. was to acquire the stocks nor did he know what Surplus Sales, Ltd. was going to do with the said stocks when it acquired them. On June 2, 1941, Mr. Pomeroy, having previously arranged, decided that the said stocks of the Brown company should be acquired cheaply by Surplus Sales, Ltd., and then acquired from that company by Pomis, Ltd., at a profit to the former of from 15 per cent. to 20 per cent., caused an invoice which, after certain adjustments, was for 31,764 gallons of whisky to be issued on that date to Highland Bonding Co., Ltd., at a selling price of £60,000. On the same day, in exchange for the delivery orders for the said whisky stocks, the Highland Bonding Co., Ltd. gave Mr. Pomeroy a bearer cheque for £60,000, which was cashed by him, the returned cheque being endorsed "per pro. Pomis, Ltd. Jay Pomeroy." Out of this £60,000 Mr. Pomeroy on the same day paid over to the shareholders of the Brown company the sum of £35,000, which, with the deposit of £4,000 paid on May 21, 1941, made up the purchase price of the said shares. On receipt of the said £35,000 Mr. Brown and Mr. Clow resigned as directors, and Mr. Brechin and Mrs. Margaret Honey, an appellant in the second appeal, were appointed in their place. In November, 1941, Mr. Brechin resigned, and Mrs. Florence Mackenzie, also an appellant in the second appeal, was appointed a director in his place. Ultimately all the shares in the Brown company were transferred into the names of Mrs. Mackenzie for 5,000 preference shares and 4,950 ordinary shares, and Mrs. Honey for 50 ordinary shares. The shares were held by these ladies on behalf of Surplus Sales, Ltd., in which company they were beneficial shareholders as aftermentioned. The report of the Brown company's auditors on the books and accounts of the company for the year ended Mar. 12, 1942, showed that the bulk whisky on hand at May 21, 1941, was disposed of to the extent of (*a*) 32,784.26 gallons to Surplus Sales, Ltd. at an overhead price of 6*s*. per gallon (about £9,835), and (*b*) 911 gallons to Mr. James R. Brown at a price of 24*s*. per gallon, in terms of agreement for sale of the shares of the company. It also showed that the balance of bond and store stock of wines on hand at Mar. 12, 1941, was subsequently sold to Pomis, Ltd. at a price of £6,000. These two sales of whisky together amounted to 33,695 gallons.

The Special Commissioners, under sub-s. (2) of s. 24, computed the full market value of the 33,695 gallons and the stocks of wine, as at June 2, 1941, to be £74,050, and fixed the full tax at £59,890. In the direction, they apportioned £9,000 to the original shareholder, Mr. James R. Brown, under proviso (ii) of sub-s. (i), and under proviso (i) they apportioned £700 to Mrs. Mackenzie, £300 to Mrs. Honey and £150 to Mr. C. J. Oppenheim; they apportioned the balance of the full tax (£49,740) as a joint and several liability to Mr. Lannon, respondent in the first appeal, Mr. Jesse Brown and the following appellants in the second appeal, the Brown company, Mr. Pomeroy, Surplus Sales, Ltd., Pomis, Ltd., and the Russian Opera and Ballet Company. As already mentioned, Mrs. Mackenzie and Mrs. Honey are also appellants in the second appeal.

The First Appeal.

Some time after June 2, 1941, Mr. Lannon learned that Mr. Pomeroy had completed the transaction of the purchase of the shares of the Brown company without taking advantage of the advance arranged by Mr. Lannon with Frank Fehr & Co. Mr. Lannon threatened to commence legal proceedings to recover commission from Mr. Pomeroy, who waved him aside saying: "I will be sending you a little present in due course." On June 23, 1941, Mr. Lannon received from Mr. Pomeroy a cheque for £1,250 drawn by Pomis, Ltd. Two days later he received another cheque for the same amount drawn by the Brown company. Mr. Pomeroy explained that the commission should have been paid by the Brown company and not by Pomis, Ltd., and the second cheque was to regularise his books. A few months later Mr. Oppenheim approached Mr. Lannon, who gave him £150 out of the £1,250 he had received. On the appeal to the Court of Session, it was held by the learned judges of the First Division that there was no evidence to show that Mr. Lannon's actings had any connection with the stock transactions and that he did not obtain a financial benefit within the meaning of sub-s. (1) (*b*).

My Lords, I agree with that decision, and I may add that I am unable to distinguish Mr. Lannon's present case from the decision in the case of the *Bladnoch Distillery Co., Ltd.*, in reference to Mr. Lannon.

I therefore propose that the appeal should be dismissed with costs, and that the interlocutor in respect of Mr. Lannon which is appealed against, should be affirmed.

The Second Appeal.

Counsel for the appellants sought to submit a series of contentions directed to the conditions precedent to the issue of a direction by the commissioners set out in the first paragraph of sub-s. (1) of s. 24, but your Lordships held that he was not entitled to be heard on these matters in respect that the questions of law in the Stated Case could not be said to cover any such contentions. Your Lordships gave a similar ruling in the case of the *Bladnoch Distillery Co., Ltd.*, and I may refer to my opinion in that case.

The next contention for the appellants concerned the computation of the full market value and the consequent determination of the full tax under sub-s. (2). This contention had two branches, the first of which raised the question of the proper construction of the words "in the ordinary course of business" occurring in the sub-section. This has already been decided against the construction maintained by these appellants in the decision in the *Bladnoch* case, in which the same contention was submitted. The other branch of this contention set out to challenge the Special Commissioners' finding as to full market value, and counsel submitted a typewritten table setting out what were said to be findings as to the components which made up the total figure arrived at, and thereby bringing out a total figure of £72,532 as against the Special Commissioners' total of £74,050. The appellants' total includes £2,095 as the value of 1,020 gallons retained by Pomis, Ltd. As the appellants themselves have suggested this figure is a clerical error in the body of the Case, and the correct figure is £2,590, which makes the appellants' total £73,027. But A the appellants did not observe that this figure is the value fixed by the respondents, the Commissioners of Inland Revenue, and is stated as that in the body of the Case, in the passage referred to. There is no mention of the value of the 1,020 gallons fixed by the Special Commissioners, and the appellants have no ground for their challenge of the Special Commissioners' computation of the full market value at £74,050. This contention also fails.

The appellants Mrs. Mackenzie and Mrs. Honey maintained that there was B not evidence to justify the finding of the Special Commissioners that they, or either of them, had obtained any financial benefit as the result of any of the stock transactions or any associated transactions within the meaning of sub-s. (1) (*b*). It will be sufficient to add to the facts I have already stated the following facts. At all material times, these two ladies were the directors of Surplus Sales, Ltd. and of Pomis, Ltd. Between themselves they owned C beneficially all the shares—100 in each case—of these two companies. Mr. Pomeroy, though holding no shares in either of these two companies, was, as he himself put it, the brains of the two companies and controlled them, and directed and dictated their policy. The accounts of the Brown company for the year to Mar. 12, 1942, showed that the directors' fees of £700 and £300 had been credited in that year to Mrs. Florence Mackenzie and Mrs. Margaret Honey respectively. These ladies did not give evidence before the Special D Commissioners, but Mr. Pomeroy claimed—and the Special Commissioners were satisfied—that they acted under his control.

I agree with the opinion of LORD MONCRIEFF, who said:

> As regards the individual appellants Mrs. Mackenzie, and Mrs. Honey, it seems to me that their liability is inescapable in view of Mr. Walker's (their counsel) admissions as affecting the companies of which they were directors, and which he also represents in this appeal. These companies, being Surplus Sales, Ltd., and Pomis, E Ltd., of which these ladies held the whole shares and in which they were the only directors, were admitted by Mr. Walker to have been rightly included in the direction as having been actively engaged in the operations which resulted in the whisky deal. It seems difficult, in these circumstances, to acquit from association with that deal the ladies who controlled the companies; and it is difficult to suggest, as was suggested, that they did not take a financial benefit from the transaction, merely because that benefit reached them by an indirect and tortuous road through the gratuitous transfer F to them of the whole of the shares in Messrs. J. S. & J. Brown, Ltd. Once that company had been divested of its stock of whisky as narrated in the case, the whole of its shares were gratuitously passed to these two ladies. Not only were the shares passed to them, but they were appointed or appointed themselves directors and became creditors against the company, which was not entirely without assets, for the directors' fees to which your Lordship has referred. If that gratuitous transfer of shares was associated with the activities of the ladies and the companies which they controlled in the transaction of sale and resale, then clearly the financial benefit they received G was such as qualified them to be included in the direction. I can only say that as no other consideration for that transfer of shares is suggested other than their admitted activities in the particular transaction which attracts the tax, it was manifestly within the right of the Commissioners to infer upon the facts before them that the financial benefit which these appellants had received was one which they had taken in consequence of their activities in relation to the deal in whisky which had been operated by the companies they controlled.

H I will only add that, in my opinion, Mr. Walker's admissions were also inescapable. I am therefore of opinion that this second appeal fails also, and I propose that the appeal should be dismissed with costs, and that the interlocutor of the First Division of the Court of Session in respect of these appellants should be affirmed.

LORD PORTER: My Lords, the first matter which your Lordships have to decide in this case is whether Mr. David Lannon, who arranged a loan of which advantage was never taken, had engaged in an associated transaction or obtained a financial benefit as that expression is used in the Act. The judges of the First Division of the Court of Session thought not and I agree with them, notwithstanding that Mr. Lannon received commission for his abortive work. The position is identical with the same respondent's action in the *Bladnoch* case.

As to the second appeal, the meaning of full market value has already been determined and I agree that the appellants have not made out a case for disputing the figures.

As to Mrs. Mackenzie and Mrs. Honey, like Lord Moncrieff, I see no ground for differing in law from the principles adopted by the commissioners in arriving at their finding. They had ample evidence for concluding that these two ladies received financial benefit.

LORD SIMONDS : My Lords, I agree.

LORD MORTON OF HENRYTON : My Lords, I also agree.

LORD MACDERMOTT : My Lords, I agree that the appeal of the Crown against David Lannon should be dismissed.

I would also dismiss the appeals of J. S. & J. Brown, Ltd., Jay Pomeroy, Surplus Sales, Ltd., Pomis, Ltd., Russian Opera and Ballet Company, Mrs. Mackenzie and Mrs. Honey on the ground that the Special Commissioners had sufficient material on which to found the conclusions they reached concerning these appellants.

Appeals dismissed with costs.

Solicitors : *Solicitors of Inland Revenue for England and for Scotland* (for the Crown) ; *Roche, Son & Neale*, agents for *D. G. M'Gregor*, W.S., Edinburgh (for the respondent Lannon) ; *H. Oppenheimer, Nathan & Vandyk*, agents for *Shepherd & Wedderburn*, Edinburgh (for the appellants, J. S. & J. Brown, Ltd. and others).

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Sir Andrew Clark, K.C., *Mustoe* and *Caplan* for the appellants.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *the Solicitor-General for Scotland* (*Douglas Johnston, K.C.*), *J. F. Gordon Thomson, K.C.* (of the Scottish Bar) and *R. P. Hills* for the Crown.

LORD THANKERTON : My Lords, this appeal raises questions under s. 24 of the Finance Act, 1943, as to the disposal of the whisky stocks of the appellant Henry Simpson & Co., Ltd., to whom I will refer as the Simpson company. The appeal by the Crown against Mr. H. C. Gray in relation to the disposal of these whisky stocks was not proceeded with by the Crown, and has been dismissed.

The appellants in this appeal other than the first appellant, which replaced the Brown company, are the same parties as were appellants in the appeal in relation to the disposal of the stocks of J. S. & J. Brown, Ltd. Counsel, on behalf of the appellants, stated that, except that in this appeal the transactions related to the sale of shares in the Simpson company and the disposals of the whisky stocks of the Simpson company, instead of the shares and whisky stocks of J. S. & J. Brown, Ltd., the facts in both appeals were in substance the same, and his contentions in this appeal were the same as in the former appeal. It is therefore unnecessary to examine the facts in this appeal, and the judgment in this appeal must follow the judgment in the appeal by these same appellants in relation to J. S. & J. Brown, Ltd., and falls to be dismissed with costs, the interlocutor of the First Division of the Court of Session in respect of the present appellants being confirmed.

LORD PORTER : My Lords, this case contains two branches. (1) An appeal by the Crown against Mr. H. C. Gray which was not proceeded with and has been dismissed. (2) An appeal by the same subjects who were appellants in the matter of J. S. & J. Brown, Ltd.

As to this second branch the facts in the two cases are similar and accordingly these appellants must fail in this appeal as they failed in that.

LORD SIMONDS : My Lords, I also agree.

LORD MORTON OF HENRYTON : My Lords, I also agree.

LORD MACDERMOTT : My Lords, I cannot distinguish the case of the appellants in this appeal from that of the appellants in the similar appeal relating to J. S. & J. Brown, Ltd. I would therefore dismiss the appeal.

Appeal dismissed with costs.

Solicitors : *H. Oppenheimer, Nathan & Vandyk,* agents for *Shepherd & Wedderburn,* W.S., Edinburgh (for the appellants) ; *Solicitors of Inland Revenue for England and for Scotland* (for the Crown).

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The questions of law in the Case stated by the Special Commissioners were : (1) Whether on the evidence before us we were entitled to determine that the full market value of the stocks of whisky was £198,297 ? (2) Whether on the evidence before us we were entitled to compute the full tax at £189,614 ? (3) Whether on the evidence before us we were entitled to find that the value of the said shares for the purposes of s. 24 (4) (*b*) of the Finance Act, 1943, was £3 13*s.* per share ? (4) Whether on the facts and evidence any part of the full tax ought to be apportioned to the original vendors of the shares ? (5) Whether the sums received by Selkirk Wells and Abraham Kritz respectively represent financial benefits within the meaning of s. 24 ? (6) Whether on the facts found we were entitled to confirm the direction against the appellant Mr. Gray.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *The Solicitor-General for Scotland* (*Douglas Johnston, K.C.*), *J. F. Gordon Thomson, K.C.* (of the Scottish Bar) and *R. P. Hills* for the Crown.

L. Watson Hill, K.C. (of the Scottish Bar) and *D. Watson* for the respondents, H. C. Gray and others.

Sir Andrew Clark, K.C., Mustoe and *Caplan* for the appellants, James McVey, Ltd., and others.

LORD THANKERTON : My Lords, these two appeals arise out of the same Case Stated by the Special Commissioners, and raise questions under s. 24 of the Finance Act, 1943, as to the disposal of the whisky stocks of James McVey, Ltd. It will be convenient to narrate the material facts in the Stated Case so far as relevant to both appeals, and then to deal separately with the questions at issue in each appeal.

The McVey company was incorporated in 1937, with a capital of £10,000 divided into 10,000 shares of £1 each, and, as at Feb. 4, 1942, its issued capital was £6,003, held as to 6,002 shares by Mr. J. C. McVey and as to one share by his mother. Mr. McVey and his mother were the directors of the company, which carried on the business of whisky merchants, and at the above date held a stock of whisky amounting to 42,828 gallons and a stock of wines. In or about July, 1941, the first respondent in the first appeal, Mr. H. C. Gray, was negotiating with Mr. McVey for the purchase of the entire shareholding of the McVey company, which he intended to re-sell at a profit to a purchaser to be found by a commission agent, Mr. Selkirk Wells, the second respondent in the same appeal. A dispute having arisen between Mr. Gray and Mr. McVey, the negotiations fell through. At the beginning of 1942 Mr. Wells informed Mr. Abraham Kritz, another commission agent, whose trustee in bankruptcy is the third respondent in the first appeal, but has not appeared, that the shares of the McVey company might be purchased and gave him some particulars about the company. Mr. Kritz introduced the matter to Mr. Jay Pomeroy who is the second appellant in the second appeal (who controlled J. S. & J. Brown, Ltd., a company involved in another similar whisky transaction), and who agreed in writing on behalf of Surplus Sales, Ltd., and Pomis, Ltd., to pay £15,000 to Mr. Kritz as a commission for the introduction. Mr. Pomeroy also personally guaranteed the payment of the commission. J. S. & J. Brown, Ltd., Surplus Sales, Ltd., and Pomis, Ltd., are respectively the third, fourth and sixth appellants in the second appeal. About the same time Mr. Gray requested Mr. D. K. Brown (who received no payment and was not included in the direction) to enter into negotiations in his (Brown's) name for the purchase of all the shares in the McVey company, and he agreed with Mr. Wells to pay him one-third of any profit which might be made on the re-sale of the shares to a purchaser found by Mr. Wells. Mr. Brown who had been the actual purchaser and seller of the shares of Peter Douglas, Ltd. (the subject of an earlier appeal) agreed to Mr. Gray's request, and in this case allowed his name to be used on Mr. Gray's behalf without reward. On Feb. 3, 1942, the original shareholders of the shares of the McVey company agreed to sell their entire holding to Mr. Brown for a sum which after certain adjustments amounted to £134,317 2*s*. 6*d*., and a deposit of £10,000 was paid to or on behalf of the original shareholders. The deposit was provided by or on behalf of J. S. & J. Brown, Ltd., who may be referred to as the Brown company, and who were the ultimate purchasers of the shares. At or about the same time Mr. Pomeroy agreed with Mr. Gray that the Brown company would purchase the said shares from Mr. Gray (through Mr. Brown) for £10,000 more than Mr. Gray (through Mr. Brown) was to pay for them. In order to provide the moneys necessary to purchase the said shares Mr. Pomeroy, about Feb. 21, 1942, negotiated a loan of £130,000 from Messrs. Kleinwort, Sons & Co., a firm of merchant bankers in London, to the Brown company against the security of the whisky stocks of the McVey company, which stocks Mr. Pomeroy intended to transfer from the McVey company to the Brown company. Messrs. Kleinwort agreed to make this advance. The settlement of the transactions was as follows : On Feb. 24, 1942, a meeting was held in Glasgow, at which there were present the manager of Messrs. Kleinwort, Mr. Pomeroy, Mr. McVey and his accountant, Mr. Stewart. It having been previously decided by Mr. Pomeroy that the Brown company should acquire the whole whisky and wine stocks of the McVey company at prices less than their full market value as soon as he had control of all the shares of the McVey company, Mr. Stewart handed to the manager of Messrs. Kleinwort the delivery orders and warehouse receipts covering 40,908 gallons of whisky, being part of the 42,828 gallons which belonged to the McVey company. After examining the documents, the latter stated that he was satisfied as to the security for the said loan of £130,000 to the Brown company. Mr. Pomeroy asked the manager of Messrs. Kleinwort to make the cheque for £130,000 payable to Mr. McVey. On the latter asking for written authority, Mr. Pomeroy wrote out a letter of authority and handed it to him. This was written on a blank sheet of paper, which contained the signatures of Mrs. Mackenzie and Mrs. Honey, the directors of the Brown company. The £130,000 was then paid to Mr. McVey in part payment of the price at which he and his mother were selling their shares to Mr. Brown (for Mr. Gray). On the same day Mr. McVey received the balance of the price from Mr. Pomeroy, less a small adjustment, and he endorsed in favour of Mr. Gray's solicitors the deposit of £10,000 already referred to. In exchange for the said price, Mr. McVey handed over transfers covering all the shares in the McVey company with the consent of Mr. Brown in favour of Mrs. Mackenzie for 3,002 shares and in favour of Mrs. Honey for 3,001 shares. These shares were held by these ladies on behalf of the Brown company, and they held between them all the shares in the Brown company for Surplus Sales, Ltd. By arrangement with Mr. Pomeroy, Messrs. Kleinwort, over a period of some months, sold 32,214 gallons of the whisky pledged to it as aforesaid, for sums totalling £140,164, and this sum was used to pay off the said advance and commission and interest, as the period of the advance had at the request of the Brown company been extended beyond the original months. After the advance was repaid the balance of the pledged stock amounting to 8,694 gallons was returned by Messrs. Kleinwort to the Brown company. This balance, together with the further 1,920 gallons the remainder of the 42,828 gallons acquired from the McVey company by the Brown company and also the wine stocks of the McVey company which had also been acquired by it, were sold subsequently by Mr. Pomeroy's directions for full market prices.

Under sub-s. (2) of s. 24, the Special Commissioners fixed the full market value of the whisky and wine stocks of the McVey company as at Feb. 4, 1942, at £198,297, and the full tax at £189,614. As the original shareholders did not appeal against the direction by the Special Commissioners, no question arises under proviso (ii) of sub-s. (1) or sub-s. (4). I will now deal with the two appeals separately :—

The First Appeal.

Abraham Kritz, who is now bankrupt, is called as a respondent in this appeal, the interlocutor of the First Division of the Court of Session relating to him being separate from that relating to the respondents Gray and Selkirk Wells. The First Division held that Mr. Kritz had not obtained a financial benefit within the meaning of sub-s. (1) (*b*) and answered the fifth question of law, so far as it applied to him, in the negative. Neither Mr. Kritz nor his trustee in bankruptcy appeared in the appeal.

The £15,000 commission paid to Mr. Kritz was obtained from the companies A directly concerned in the disposal of the whisky stocks and there can be no doubt that the transaction for payment of the commission was an associated transaction, and that Mr. Kritz obtained a financial benefit within the meaning of sub-s. (1) (*b*). It follows that the fifth question should be answered in the affirmative, but the Case should be remitted to the Special Commissioners for reconsideration of their exercise of the power of apportionment, for the reasons which I am about to give in regard to the respondents Gray and Selkirk B Wells, and I propose that the appeal should be allowed, and that the interlocutor of the First Division, so far as affecting Mr. Kritz, should be varied so as to answer the fifth question in the affirmative, and the sixth question as applying to Mr. Kritz at this stage in the negative in that the proper basis of apportionment has not been observed, and that, subject to such variation, the interlocutor should be affirmed. There should be no order as to the costs of the appeal. The Case should be remitted to the Special Commissioners C to proceed as accords.

The Special Commissioners found that the respondents Gray and Selkirk Wells had obtained financial benefits within the meaning of sub-s. (1) (*b*) and apportioned to them, under proviso (i) the balance of the full tax, which after the apportionment to the original shareholders amounted to £77,207, as a joint and several liability, along with Mr. Kritz and the present appellants in the D second appeal. The additional facts stated as regards these respondents are as follows :—

In June, 1941, Mr. Gray was in negotiation for the purchase of the shares of Henry Simpson & Co., Ltd. (a company whose sole shareholder was the said Mr. J. C. McVey and which owned large stocks of whisky) with a view to re-selling them at a profit. Before he had completed these negotiations Mr. Pomeroy forestalled him by agreeing to buy Mr. McVey's shares on behalf of Surplus E Sales, Ltd. As a solatium for being forestalled Mr. Pomeroy paid him £750 out of the funds of one of the companies under his control, *viz.*, the Brown company. In the present transaction Mr. Gray's profit, being the difference between his buying and selling price of the shares of the McVey company was £10,000. After certain adjustments regarding shortage of stocks, etc., he was left with £8,275. Out of this he paid his solicitors £1,100, and he divided the balance of £7,175 between himself and Mr. Selkirk Wells in the proportion of £4,785 to himself F and £2,390 to Mr. Wells as his share of the profit for negotiating the re-sale of the shares.

On the general construction of s. 24 I refer to my opinion in the case relating to the *Bladnoch Distillery Co., Ltd.*, in which judgment has been delivered.

It was conceded, on behalf of the respondents, that the transaction under which Mr. Gray received the sum of £8,275 was a connected or associated G transaction within the meaning of sub-s. (1) (*b*), but it was maintained by the respondents that they obtained no financial benefit within that sub-section. In the *Bladnoch* case I expressed the opinion that the stock transactions and any associated transactions form a bundle of transactions and that, if the particular associated transaction is within the bundle and financial benefit is obtained from that particular transaction, it is a financial benefit obtained from the bundle within the meaning of the sub-section. Mr. Gray's benefit was part H of the transactions whereby Mr. Pomeroy acquired control of the Brown company, and is admitted to be an associated transaction. It follows, in my opinion, that Mr. Gray obtained a financial benefit within the meaning of the sub-section. As regards Mr. Selkirk Wells, I am of opinion that, on the evidence, the Special Commissioners were entitled to hold that he shared in the profit of the transaction, and to find that he obtained a financial benefit within the meaning of the sub-section.

The remaining contention for the respondents was that the Special Commissioners had failed to exercise their discretionary power under proviso (i) of sub-s. (1), and should have given them a separate apportionment under proviso (i). I am unable to find anything in the Stated Case to support the view that the Special Commissioners failed to consider proviso (i): in fact, they exercised their discretionary power under that proviso in apportioning the balance of the full tax as a joint and several liability, and, while there may be no sufficient grounds for holding that they exercised it unjudicially in this case, it is clear to me that the Special Commissioners have not kept in view the statutory basis of the power of apportionment under proviso (i) of sub-s. (1), as to which I may refer to my opinion in the *Bladnoch* case. In this case they have applied the now discredited "tainted money" principle. There is a finding that Mr. Gray, with whom Mr. Selkirk shared the profits of the transactions, was purchasing the shares with a view to a re-sale at a profit; there is no finding that either of them was aware of the scheme for disposal of the stocks at a price less than the full market value or for evasion of excess profits tax, a relevant matter for consideration in exercise of the said power of apportionment. The exercise of the power of apportionment by the Special Commissioners, as matters stand, was not a proper exercise of the power, and the Special Commissioners must reconsider the question, in the light of these judgments.

I should add that these respondents did not maintain that the Special Commissioners' computations of full market value and the full tax were incorrect: these contentions had been rejected by the First Division.

I therefore propose that the appeal should be allowed that the interlocutor of the First Division of the Court of Session in respect of these respondents dated Jan. 31, 1946, should be reversed except in regard to expenses, and that the questions of law in the case should be answered as follows:—the first and second questions in the affirmative, the fifth question, so far as applying to the respondent Selkirk Wells, in the affirmative, and the sixth question, as applying to the respondent Selkirk Wells as well as the respondent Gray, at this stage, in the negative in that the proper basis of apportionment has not been observed; find it unnecessary to answer the third and fourth questions, as they were not argued. There should be no order as to the costs of this appeal. The case should be remitted to the Special Commissioners to proceed as accords.

The Second Appeal.

Five of the appellants were represented by counsel at the hearing, *viz.*, the McVey company, Mr. Pomeroy, the Brown company, Surplus Sales, Ltd., and Pomis, Ltd. I understood that it was agreed that the remaining appellant, the Russian Opera and Ballet company, was a name under which Mr. Pomeroy carried on business.

Counsel for the appellants accepted that the ruling given by your Lordships in the second appeal relating to J. S. & J. Brown, Ltd., excluding any question as to the conditions precedent to the making of a direction specified in the first paragraph of sub-s. (1), also applied in this appeal, there being no question of law which could embrace such a contention.

These appellants, other than the appellant J. S. & J. Brown, Ltd., submitted that there was no evidence to justify the finding of the Special Commissioners that they had respectively obtained financial benefits within the meaning of sub-s. (1) (*b*), but there is no question of law in this Case which could embrace this contention, and there is no allusion to such a contention in the opinions of the learned judges of the Court of Session. Your Lordships accordingly ruled that this contention was not open to these appellants.

On the appellants raising the point, counsel for the Crown agreed that the Special Commissioners had erred in their computation of the full tax under sub-s. (2) in treating the McVey company as "not director-controlled" for the period Feb. 5, 1942, to Mar. 31, 1942, and gave an undertaking to have the matter adjusted by the respondents to this appeal.

These appellants also challenged the computation of the full market value by the Special Commissioners under sub-s. (2), but the arguments were the same as have been rejected in the *Bladnoch* case.

I therefore propose that the appeal should be dismissed with costs and that the interlocutor of the First Division of the Court of Session, dated Jan. 31, 1946, so far as it applies to these appellants, should be affirmed.

LORD PORTER : My Lords, the first appeal in this Case is by the Crown against Mr. Kritz, Mr. Gray and Mr. Selkirk Wells. Mr. Kritz received £15,000 for introducing the business to Mr. Jay Pomeroy, the purchaser of the shares in James McVey, Ltd., and central figure in the scheme for selling that company's stocks and avoiding excess profits tax. The commission so earned is similar to that received by the same gentleman in the case of *Thomas Barr, Ltd.* and I agree in thinking that it is a financial benefit resulting from an associated transaction. But the exercise of the duty of apportionment in this as in other cases requires reconsideration and the Case should go back to be dealt with on the same lines as those of Mr. Gray and Mr. Selkirk Wells. Mr. Gray received in all some £8,275, in substance as a solatium for standing out of Mr. Pomeroy's way and enabling him to carry out one of the schemes for tax avoidance. It was one of a series of transactions all aiming at and bringing into existence the necessary conditions for a successful completion of the scheme and indeed took the form of a sale to Mr. Gray followed by a re-sale from him to Mr. Pomeroy or his nominees. In these circumstances there was evidence from which the commissioners could find that it was an associated transaction and resulted in a financial benefit to Mr. Gray which he shared with Mr. Selkirk Wells.

But neither of these gentlemen is found to have known of or intentionally assisted in the scheme, and it is expressly found that Mr. Gray purchased with the intention of re-selling the shares at a profit. Yet the commissioners have apportioned upon both gentlemen a joint and several liability for the residue of tax after imposing a first portion on the original shareholders and in so doing appear to have regarded the sum received as "tainted money."

My Lords, the source of the money is, in my view, immaterial, the only question is whether it is received under an associated transaction. If it were not for their misapprehension on this point the commissioners, in the case of ignorant participants, might well think that at most they should have an individual liability only imposed on them for the sum by which they benefited, and the Case should, therefore, go back for reconsideration.

The second appeal raises no point of principle and subject to the agreed modification should be dismissed.

LORD SIMONDS : My Lords, I also agree.

LORD MORTON OF HENRYTON : My Lords, I agree that the respondents, H. C. Gray, Selkirk Wells and Abraham Kritz, come within sub-s. (1) (*b*) of s. 24 of the Finance Act, 1943. I also agree, though with considerable doubt, that this Case should be remitted to the Special Commissioners. These three respondents do not come within proviso (ii) to the sub-section, and, applying the principles stated by my noble and learned friend LORD THANKERTON in the *Bladnoch* case, I can find no "conditions provided by the statute for the exercise of the discretionary power" with which the Special Commissioners have failed to comply. There are, however, certain indications that they did not exercise their discretion under proviso (i) judicially when they included these three persons in a group made jointly and severally liable for the payment of so large a sum and for this reason I concur in the motion proposed.

LORD MACDERMOTT : My Lords, though the respondent Gray must be regarded as unaware of the stock transactions, the statement of the LORD PRESIDENT that he was expressly admitted to be in the same position as the "innocent" shareholders in other cases not having been challenged, he cannot now escape from the direction on that account having regard to the decision in the *Bladnoch* case. I accordingly agree that the appeal of the Crown should be allowed as proposed in respect of Gray as well as the other respondents.

I would dismiss the appeals of James McVey & Co., Ltd., Jay Pomeroy, J. S. & J. Brown, Ltd., Surplus Sales, Ltd., Russian Opera and Ballet Co., and Pomis, Ltd. (subject to a small adjustment in the amount of the charge as agreed at the hearing) on the ground that the Special Commissioners had sufficient material on which to found the conclusions they reached concerning these appellants.

First appeal allowed. No order as to costs. Second appeal dismissed with costs.

Solicitors : *Solicitors of Inland Revenue for England and for Scotland* (for the Crown) ; *Herbert Smith & Co.*, agents for *Davidson & Syme*, W.S. Edinburgh (for the respondents, H. C. Gray and another); *H. Oppenheimer, Nathan & Vandyk*, agents for *Shepherd & Wedderburn*, W.S., Edinburgh (for the appellants, James McVey, Ltd., and others.)

THOMAS BARR, LTD.

The questions of law in the Case stated by the Special Commissioners were: (1) Have the original shareholders on the facts hereinbefore set forth received a financial benefit as a result of the transactions? (2) If so, has their financial benefit been rightly apportioned to them in the said direction? (3) On the evidence before us were we entitled to fix the full market value of the stock of the company at £231,327 and did we adopt a correct principle in arriving at that figure? (4) Has the company been correctly treated as not "director controlled" for the period Feb. 16 to Mar 31, 1942, in the computation of "the full tax"? (5) On the facts were we entitled to find that Mr. Abraham Kritz received a financial benefit as a result of the transactions within the meaning of s. 24 of the Finance Act, 1943? (6) On the evidence before us were we entitled to refuse to apportion the liability of Mr. King under proviso (i) of s. 24 (1) of the Finance Act, 1943? (7) Was there evidence on which we were entitled to find that the company had disposed of its stocks to Surplus Sales, Ltd., or Pomis, Ltd., at less than the full market value thereof? (8) Whether on the evidence before us we were entitled to find that the persons enumerated [other than the original shareholders] had received financial benefits as a result of the transactions and whether we were entitled to confirm the direction against them?

The Solicitor-General (*Sir Frank Soskice, K.C.*), *the Solicitor-General for Scotland* (*Douglas Johnston, K.C.*), *J. F. Gordon Thomson, K.C.* (of the Scottish Bar), and *R. P. Hills* for the Crown.

Hector M'Kechnie, K.C., and *T. P. McDonald* (both of the Scottish Bar) for the respondents, Barr and others.

H. W. Guthrie, K.C., and *J. B. W. Christie* (both of the Scottish Bar) for the respondent, King.

Sir Andrew Clark, K.C., Mustoe and *Caplan* for the appellants, Jay Pomeroy and others.

LORD THANKERTON: My Lords, these two appeals raise questions under s. 24 of the Finance Act, 1943, as to the disposal of the whisky stocks of Thomas Barr, Ltd. I will first state the facts so far as material to both appeals, and then deal with the two appeals separately. These appeals arise on Cases Stated for the opinion of the Court of Session under s. 149 of the Income Tax Act, 1918.

Thomas Barr, Ltd., to which I will refer as the Barr company, was incorporated in 1938, and carried on business as wholesale wine and spirit merchants. Its capital was £20,000, in shares of £1 each, of which 15,000 shares have been issued. Prior to Feb. 16, 1942, the first five respondents in the first appeal held these shares, and I will refer to them as the original shareholders. The original directors were Mr. James Barr, Mr. Thomas U. Barr, Miss Irene Barr and Mr. A. S. Brown, the first four respondents; Mr. A. S. Brown is a chartered accountant, and a partner of the firm of MacEwing Brown & Co., Glasgow. For health and other reasons the Barr family were anxious to sell the business and negotiations with that object were in fact conducted by Mr. A. S. Brown at the end of 1941. These negotiations, however, fell through. In the view that an increase of Mr. A. S. Brown's holding of 100 shares might make negotiations easier, Mr. James Barr sold 95 shares to him at £1 per share. For the same reason Mr. James Barr sold to Mr. I. S. Wright 300 shares for £1 each. Mr. Wright is a solicitor and a partner in the firm of Marshall & MacLachlan, Glasgow. The Special Commissioners were satisfied that, so far as the Barr family were concerned, the sale of the shares as hereinafter described, was a *bona fide* retirement from business. By a letter dated Feb. 16, 1942, addressed to Messrs. MacEwing Brown & Co., who acted for the original shareholders, Mr. Alexander King offered to purchase the whole of the shares of the Barr company for £9 6*s.* 8*d.* per share, namely, £140,000. It was a condition of the offer that evidence of the company's title to the stocks of whisky, which amounted as at Jan. 31, 1942, to 50,018 original proof gallons in bond, should be submitted to Mr. King within seven days. This offer was accepted by MacEwing Brown & Co. on Feb. 16, 1942. On Feb. 13, 1942, Bidwell & Partners, Ltd., made a written offer to Messrs. Marshall & MacLachlan, who were acting for Mr. King, to purchase for £158,750, that is to say, for £10 11*s.* 8*d.* per share, A all the shares in a company whose description was that of the Barr company, and that on the same terms and conditions as those in Mr. King's offer to purchase from the original shareholders. This offer was accepted by Messrs. Marshall & MacLachlan on behalf of Mr. King on Feb. 16, 1942, the acceptance disclosing the name of the Barr company. This contract, however, was cancelled by agreement on Feb. 18, 1942, on the narrative that Mr. King had received an offer for a larger price. The sum of £8,725 was paid to Bidwell & Partners B on Mar. 2, 1942. By letter dated Feb. 18, 1942, addressed to Messrs. Marshall & MacLachlan, J. S. & J. Brown, Ltd., offered to purchase from Mr. King the said 15,000 shares of the Barr company for £167,562, that is £11 3*s.* 5*d.* per share. The letter was signed by Mrs. F. Mackenzie as a director of J. S. & J. Brown, Ltd. It was a condition of the offer that Mr. King should submit within two days of its acceptance evidence of the Barr company's title to stocks C of whisky to the extent of 50,018 original proof gallons. This offer was accepted by Messrs. Marshall & MacLachlan, on behalf of Mr. King, on the same day, Feb. 18, 1942, and on that day Mr. Jay Pomeroy who directed and controlled the policy of J. S. & J. Brown, Ltd., paid to Messrs. Marshall & MacLachlan the deposit of £10,000 agreed on, and the latter, on behalf of Mr. King, in turn paid the £10,000 to Messrs. MacEwing Brown & Co., as agents for the original shareholders. Mr. King's object in purchasing the shares of the Barr company D was to re-sell the shares at profit to himself. He took no part in the subsequent disposal of the whisky stocks of the Barr company. The offer by J. S. & J. Brown originated by Mr. Abraham Kritz, a respondent in the first appeal, having brought to the notice of Mr. Pomeroy that the Barr company's shares were for sale, it was agreed that a commission of £17,500 was to be paid to Mr. Kritz for the introduction, before Mr. Kritz would disclose the name of the company. This was undertaken in a writing, dated Feb. 16, 1942, signed by E Mrs. Mackenzie as director of and on behalf of three companies, *viz.*, J. S. & J. Brown, Ltd., Surplus Sales, Ltd., and Pomis, Ltd. Mr. Pomeroy added his personal guarantee. On Feb. 28, 1942, a meeting was held at the office of the Clydesdale Bank, Messrs. Marshall & MacLachlan's bankers. At this meeting £157,562 10*s.* was paid by Mr. Pomeroy to Mr. King's solicitor in payment (together with the deposit of £10,000 previously paid) of the shares F of the Barr company being bought by J. S. & J. Brown, Ltd., from Mr. King. Out of this, Mr. King's solicitor paid to the agents for the original shareholders the selling price of their shares to Mr. King. In exchange there were given to Mr. Pomeroy transfers of all the shares in the Barr company by the original shareholders to Mr. King, and transfers by Mr. King of all the said shares in favour of Mrs. Florence Mackenzie as to 7,500 shares and in favour of Mrs. Margaret Honey as to the remaining 7,500 shares. At the same time in exchange G for delivery orders covering all the whisky stocks of the Barr company amounting as aforesaid to 50,018 gallons the Highland Bonding Co., Ltd. (who, as I shall relate shortly, had agreed to purchase the whole stock), made a payment of £157,000 to Mr. Pomeroy. Immediately the original shareholders were paid for their shares the original directors resigned and Mrs. Mackenzie and Mrs. Honey were appointed directors of the Barr company in their place. The shares of the Barr company transferred to these two ladies were held by H them on behalf of J. S & J. Brown, Ltd. Between them they also held all the shares of J. S & J. Brown, Ltd., for Surplus Sales, Ltd., of which company they between them held all the issued shares beneficially.

With regard to the disposal of the Barr company's stock, I will have to deal with this matter in more detail later, but, for the moment, it is enough to say that the Special Commissioners find that the whisky stocks were in turn acquired by Surplus Sales, Ltd., and then by Pomis, Ltd., at prices less than the full market value. They were then sold by Pomis, Ltd., to the Highland Bonding Co., Ltd., for £231,326 15*s.* 6*d.*, under an offer by the latter, which was accepted by Pomis, Ltd., by a letter dated Feb. 23, 1942. The price was paid in instalments, the second instalment of £157,000 being paid, as already mentioned, at the meeting on Feb. 28, 1942, by a cheque payable to the Commercial Bank of Scotland, with instructions to prepare a bank draft payable to the order of Mr. Pomeroy. The whole price was discharged later by instalments for the balance, the last instalment being paid on Mar. 7, 1942, by a cheque in favour of Pomis, Ltd.

Under sub-s. (2) of s. 24, the Special Commissioners held the price of £231,326 15*s*. 6*d*. paid by the Highland Bonding Co., Ltd., as being at full market prices, and fixed the full market value at £231,327. They computed the full tax at £219,983. Under sub-s. (4) (*b*) they fixed the value of the Barr company's shares at £2 14*s*. per share, making a total of £40,500. This amount being deducted from the amount which the original shareholders had received for their shares, *viz*., £140,000 (£9 6*s*. 8*d*. per share), left £99,500 as the amount of the deemed financial benefit under sub-s. (4) (*b*), which they stated must be apportioned to the original shareholders, as the amount of the full tax to be borne by them. The balance of the full tax, amounting to £120,483, was apportioned as a joint and several liability among ten persons, including Alexander King, the respondent in the first appeal, Abraham Kritz, who has not appeared in the first appeal, and the six appellants in the second appeal.

The First Appeal.

The respondents in this appeal are the original shareholders, Alexander King and the trustee in bankruptcy of Abraham Kritz. Mr. Kritz was adjudicated bankrupt on Aug. 13, 1947, and his trustee in bankruptcy was thereafter added by order of revivor, but he did not appear in the appeal against him. On Dec. 4, 1945, the First Division of the Court of Session allowed notes to be received, in identical terms, for the original shareholders and Mr. King, objecting to the inclusion in the Case of findings of fact which were said to be apparently based on evidence led in other cases or outwith the presence of the presenters of the notes, and asking that the Case should be remitted to the Special Commissioners with a direction to delete these findings, or, alternatively, that questions of law should be included in the Case regarding the power of the Special Commissioners to have regard to the said evidence. After a hearing, these notes were refused by interlocutors dated Dec. 11, 1945. These respondents did not cross-appeal against these interlocutors, but it was accepted by both parties at the hearing before this House that a passage in the Case, which I will quote, was a paraphrase of Mr. Pomeroy's evidence, as the Special Commissioners understood it, and that the actual evidence was as narrated in the opinion of the Lord President, to which I will refer.

The passage in the Case is as follows :

> Owing to the fact that Surplus Sales, Ltd., and Pomis, Ltd., have not kept proper accounts, it has not been possible to discover the exact prices at which the said whisky stocks were in turn acquired by these companies before being sold to the Highland Bonding Co., Ltd. Mr. Pomeroy stated in his evidence to us that both Surplus Sales, Ltd. and Pomis, Ltd., made profits out of the disposal of the Barr company's stocks which would have been impossible unless such stocks were obtained by them respectively at less than their full market value of £231,327 as hereinafter mentioned.

The Lord President, after referring to the subject matter of the notes, said :

> We have heard arguments upon this both from the appellants and from learned counsel for the Inland Revenue, who have stated exactly what took place and they have the notes of evidence before them which enables them to give an accurate statement. In the present case Mr. Pomeroy was concerned, as he was in several other cases, particularly one called James McVey, Ltd., and in *McVey's* case he gave evidence that he had dealt with the stocks of the McVey Company in a certain way, involving the disposal of those stocks at full market value after he had acquired them at less than the full market value. When he was giving evidence in the present case he was asked by the representative of the Inland Revenue whether in this case he had dealt with the stocks in the same way as in the *McVey* case, and he answered that question " Yes." It is possible that the counsel for the appellants might have objected to the question and got a ruling that the question must be put in another form, if they did not know what the dealings in the *McVey* case with the whisky stock had been. However, they did not do that nor did they cross-examine Mr. Pomeroy on what he meant when he answered the question put to him by the Solicitor of Inland

Revenue. The Special Commissioners, of course, knew what the dealing with the stock in the *McVey* case had been and they, in the absence of any cross-examination or any objection to the form of the question, although the proceedings were not as regular as they might have been, were, I think, entitled to proceed upon what they thus knew.

LORD MONCRIEFF did not quite agree with this view, describing Mr. Pomeroy's actual evidence in this case as " meaningless," but the court was unanimous in refusing the notes on a legal ground with which we are not concerned, in the absence of a cross-appeal. I am unable to agree with LORD MONCRIEFF'S description of the evidence, and I prefer the view of the LORD PRESIDENT. The *McVey* case was heard on Mar. 15 and 16, 1944, and this case was heard on Mar. 17, 1944, and, if counsel for these respondents did not consider the affirmative answer of Mr. Pomeroy clear enough, though he must have known that its meaning was fully within the knowledge of the Special Commissioners, as well as of the Solicitor of Inland Revenue, who put the question, his duty was to have informed himself by cross-examination, in case he might desire to probe the matter further. In my view, on this evidence, taken along with the many other facts held proved in the case, the Special Commissioners were entitled to find that the disposal of the Barr company's whisky stocks by the Barr company to Surplus Sales, Ltd., and by the latter company to Pomis, Ltd., were at prices less than the full market value, and I reject the contrary contention submitted by the original shareholders and Mr. King.

The original shareholders maintained the contentions as to the position of original shareholders, who are unaware of any scheme for disposal of the Barr company's stocks at less than the full market value or for evasion of excess profits tax, and as to the computation of full market value under sub-s. (2), which have been rejected by your Lordships in the case of the *Bladnoch Distillery Co., Ltd.*, and I refer to the judgment in that case.

The next contention of the original shareholders was that there was not evidence to justify the finding of the Special Commissioners that the transaction for sale of their shares was " effected in connection with or in association with " the stock transactions within the meaning of sub-s. (1) (*b*). I am unable to distinguish the facts of this case from the facts in the *Bladnoch* case, in which it was held that the Special Commissioners were so entitled. The completion of the sale of the shares to Mr. King and their resale to J. S. & J. Brown, Ltd., took place at the same meeting, as also did the instalment payment for the sale of the whisky stock in exchange for delivery orders covering the stocks of whisky.

On the question whether the Special Commissioners had exercised their power of apportionment under proviso (ii) of sub-s. (1), unjudicially or not in conformity with its statutory basis, counsel for the appellants stated that he was unable to distinguish this case from the *Bladnoch* case, and I may refer to the opinions in that case, and my opinion in the appeal by the Crown against Gray and Selkirk Wells in relation to James McVey, Ltd. The same decision will be applied in the present case.

The original shareholders submitted that in their computation of the full tax the Special Commissioners had wrongly treated the company as not " director controlled " for the period from Feb. 16 to Mar. 31. This was conceded by counsel for the appellants, who undertook to have the matter adjusted on remission of the Case to the Special Commissioners, and the fourth question of law may be answered in the affimative of consent.

Accordingly, I propose that in this appeal, so far as directed against the original shareholders, the appeal should be allowed, that the interlocutor of the First Division of the Court of Session dated Jan. 31, 1946, in respect of the original shareholders should be reversed except in regard to expenses, and that, at this stage, the questions of law in the Case should be answered as follows : the first question in the affirmative, so far as it relates to a deemed financial benefit under s. 24 (4) (*b*)—*quoad ultra* find it superseded, the second question in the negative in that relevant evidence has not been taken into consideration and that the proper basis of apportionment has not been observed, the third question in the affirmative, the fourth question, of consent, in the negative, and the seventh question in the affirmative, find the eighth question superseded. There should be no order as to the costs of the appeal. The Case will be remitted to the Special Commissioners to proceed as accords.

I turn now to the case against the respondent King. The question of his note to the First Division has already been dealt with by me, and I have already disposed of the question whether there was evidence to justify the Special Commissioners in their finding that the Barr company had disposed of its whisky stocks to Surplus Sales, Ltd., and that the latter had disposed of them to Pomis, Ltd., at less than the full market value, and I have expressed the opinion that the seventh question of law should be answered in the affirmative. The third question as to the computation of full market value also falls to be answered in the affirmative, in view of the decision in the *Bladnoch* case.

The First Division decided in favour of Mr. King on the ground that he was in the same position as "innocent" original shareholders, and this ground has been rejected in the *Bladnoch* case, and that decision applies to this case.

As to the question whether Mr. King obtained a financial benefit as the result of the stock transactions and any associated transactions, I have already expressed the opinion that the Special Commissioners were entitled to find that the sale of their shares by the original shareholders was an associated transaction within the meaning of sub-s. (1) (*b*), and I may refer to my opinion in the *Bladnoch* case on the proper construction of that sub-section. In my opinion, it necessarily follows that Mr. King's purchase and re-sale of the shares was part of the composite transaction by which J. S. & J. Brown, Ltd., acquired control of the Barr company, and that the financial benefit which he obtained was the result of that composite transaction, and therefore resulted from the bundle of transactions, as explained in my opinion in the *Bladnoch* case.

There remains the question whether the Special Commissioners exercised their power of apportionment under proviso (i) of sub-s. (1) unjudicially or not in conformity with the statutory basis of the power of apportionment. The Special Commissioners knew the amount of the benefit obtained by Mr. King and Mr. King contended before them that that sum should be apportioned to him as a several liability under proviso (i). It must also be remembered that, under sub-s. (3), as between persons jointly and severally liable, their respective liabilities are provided for. While it may be difficult to find that the Special Commissioners have acted unjudicially, I am satisfied that they have not kept in view the statutory basis of the power of apportionment, which was determined in the *Bladnoch* case. I may refer to my opinion in that case. My comments on the "tainted" money principle equally apply in this case. In this respect, Mr. King is in a similar position to that of the original shareholders, in so much as he did not know of any scheme for disposal of the stocks or evasion of excess profits tax, a relevant matter in considering the exercise of the power of apportionment, and his apportionment should equally be reconsidered by the Special Commissioners.

I propose that the appeal should be allowed, that the interlocutor of the First Division dated Feb. 5, 1946, in respect of the respondent Alexander King should be reversed except in regard to expenses, and that the questions of law in the Stated Case should be answered as follows: the third question in the affirmative, the fourth question of consent in the negative, the sixth and the eighth question so far as the latter applies to Mr. King at this stage in the negative in that the proper basis of apportionment has not been observed, and the seventh question in the affirmative. There should be no order as to the costs of this appeal. The Case should be remitted to the Special Commissioners to proceed as accords.

As regards the respondent the trustee in bankruptcy of Mr. Kritz, the views that I have expressed as to the position of the original shareholders and Mr. King, differing from those held by the learned judges of the First Division, appear to lead necessarily to the conclusion that the written transaction under which Mr. Kritz got the commission of £17,000 was an associated transaction, as it was signed by the three companies who were concerned in the disposal of the stocks of whisky. Accordingly, the same course should be taken as in the case of the respondent King, and I propose that the appeal should be allowed and that the interlocutor of the First Division in respect of Mr. Kritz being in terms identical to that in respect of the respondent King, an order in similar terms should be made in the case of this respondent.

The Second Appeal.

The six appellants in this appeal are Mr. Pomeroy, J. S. & J. Brown, Ltd., Surplus Sales, Ltd., the Barr company, Russian Opera & Ballet Company and Pomis, Ltd.

Counsel for these appellants accepted the ruling given by your Lordships in the second appeal in relation to J. S & J. Brown, Ltd., excluding any question as to the condition precedent to the making of a direction specified in the first paragraph of sub-s. (1) of s. 24, as equally applying to this appeal, except in A regard to the specific question asked in the seventh question of law in the present case, as to the evidence of sales at less than the full market value. That question, as already indicated above, falls to be answered in the affirmative, and these appellants accordingly fail in this contention.

Counsel for these appellants submitted a contention that there was not evidence to justify the finding of the Special Commissioners that these appellants B had obtained financial benefits within the meaning of sub-s. (1) (*b*), but he admitted that his argument depended on a negative answer to the seventh question of law. It therefore fails.

These appellants also submitted an argument on the computation of the full tax under sub-s. (2), but this has already been decided contrary to his contention in the *Bladnoch* case, and this contention also fails.

The concession of the Crown in the first appeal as to the fourth question C of law equally applies in this appeal.

Accordingly, I propose that this appeal should be dismissed with costs, and that the interlocutor of the First Division of the Court of Session in respect of these appellants dated Jan. 31, 1946, should be affirmed with the variation that the fourth question, of consent, should be answered in the negative.

LORD PORTER : My Lords, in the first appeal a question arose as to D whether there was evidence in that case establishing the fact of a sale of stocks otherwise than for its full market value and its re-sale at a profit. No doubt the proof was given not by a direct statement but by reference to what had been said in another case, but the statement made was plainly understood by the commissioners who had just heard the other case and it was neither objected to nor elucidated by counsel for the appellants. Legislation by reference is to-day a commonplace and I do not see that one can rule out proof by E reference though one may dislike it.

As has been determined in the *Bladnoch* case, the ignorance of the original shareholders is no answer to the Crown's claim, but the Special Commissioners have in terms found that the sale by them was a genuine retirement from business and have not found that they, or Mr. King who purchased from them, were either participants in or aware of any scheme to avoid excess profits tax. Indeed so far as Mr. King was concerned it was conceded that the case must be decided F on the footing that he was an ignorant and innocent seller. In these circumstances I should myself have found it difficult to say that the original sale was a connected transaction. But the majority of your Lordships think otherwise, finding sufficient association in the fact that completion of the sale to Mr. King and the re-sale took place at the same meeting and formed part of a conjoint transaction and I am not prepared to differ. Accepting this view, I never- G theless think that for the reasons given in previous cases the apportionment cannot be supported. As to Mr. Kritz, the same considerations apply as applied in the *McVey* case. Moreover in the present case his commission was guaranteed by those interested in carrying out the scheme. In these circumstances a similar order should be made so far as he is concerned in each of the two cases.

In my view the case against Mr. King is a stronger one ; he at least sold direct to the Pomeroy group, but here again the commissioners appear to have applied H the " tainted money " principle and accordingly to have held themselves obliged to apportion as a joint and several liability to Mr. King the residue of the tax lost after earlier apportionments to the original shareholders. As has been stated in the preceding cases there was no obligation to do this and the Case should go back for reconsideration in the light of the observation in the *Bladnoch* case, though Mr. King's liability is not necessarily a several one since he comes under sub-s. (4) (*a*), not sub-s. (4) (*b*).

As to the second appeal, I agree with my Lord that the result is decided by the principles already laid down and it must be dismissed.

LORD SIMONDS : My Lords, I also agree.

LORD MORTON OF HENRYTON : My Lords, I also agree.

LORD MACDERMOTT : My Lords, while I agree that the appeal of the Crown against the respondents King and Kritz should be allowed, I find myself unable, on the facts, to distinguish the position of the original shareholders in any material respect from that of the successful respondents in the case of the *Glasgow Bonding Co., Ltd.* I would therefore dismiss the appeal as regards them.

I would dismiss the appeals of Jay Pomeroy, J. S. & J. Brown, Ltd., Surplus Sales, Ltd., Thomas Barr, Ltd., Russian Opera & Ballet Co., and Pomis, Ltd. (subject to an adjustment in the amount of the charge as agreed at the hearing) on the ground that the Special Commissioners had sufficient material on which to found the decisions they reached with respect to these appellants.

First appeal allowed. No order as to costs of appeal. Second appeal dismissed with costs.

Solicitors : *Solicitors of Inland Revenue for England and for Scotland* (for the Crown) ; *Beveridge & Co.*, agents for *W. & J. Burness*, W.S. Edinburgh (for the respondents, Barr and others) ; *Thomas Cooper & Co.*, agents for *Boyd, Jameson & Young, W.S.*, Edinburgh (for the respondent, King) ; *H. Oppenheimer, Nathan & Vandyk*, agents for *Shepherd & Wedderburn*, W.S., Edinburgh (for the appellants, Jay Pomeroy and others.)

W. H. HOLT & SONS (CHORLTON-CUM-HARDY), LTD.

Sir Cyril Radcliffe, K.C., and *F. Heyworth Talbot* for the appellant.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. F. Gordon Thomson, K.C.* (of the Scottish Bar), *J. H. Stamp* and *R. P. Hills* for the Crown.

LORD THANKERTON stated the facts * and continued : My Lords, on the general construction of s. 24, I refer to my opinion in the case relating to the Bladnoch Distillery Co., Ltd. The five matters in issue in this appeal are all covered by the decision in the *Bladnoch* case. The first contention was as to the position of original shareholders, such as the appellant, who were unaware of any scheme for evasion of excess profits tax ; it was held that such want of knowledge would not preclude the commissioners from considering whether the transaction for sale of their shares was in fact an associated transaction within the meaning of sub-s. (1) (*b*). The second contention was whether sub-s. (4) was only quantitative ; it was held in the *Bladnoch* case not to be so limited. The appellant, in the third place, maintained that there were no sufficient facts to justify the Special Commissioners' finding that the transaction for the sale of the appellant's shares was an associated transaction within the meaning of sub-s. (1) (*b*), but his counsel conceded that, if the decision on his first contention was against the appellant, he could not maintain this contention, which accordingly fails. The appellant's fourth contention was as to the Special Commissioners' computation of the full market value under sub-s. (2), and was identical with a contention which has been rejected in the *Bladnoch* case. The appellant's remaining contention was that the Special Commissioners had failed to exercise their power of apportionment under proviso (ii) of sub-s. (1) judicially or in conformity with its statutory basis. This contention is covered by the decision in the *Bladnoch* case, in which the same contention was upheld. I may refer to my opinion in that case, which includes a reference to this appeal. Accordingly, I propose that this appeal should be allowed, that the orders of the Court of Appeal and of the King's Bench Division should be set aside and that the Case be remitted to the Special Commissioners to reconsider their apportionment to the appellant under proviso (ii) of sub-s. (1) of s. 24 of the Finance Act, 1943, and, for that purpose, to hear any relevant evidence, and make a fresh determination therein. There should be no order as to costs here or below.

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* See [1947] 1 All E.R. 148 *et seq.*

LORD PORTER : My Lords, the issues involved in this case have all been fully discussed and have been already determined. I need only say that I agree in the conclusions arrived at and proposal made to the House by the noble Lord on the Woolsack.

LORD SIMONDS : My Lords, I agree, and my noble and learned friend LORD MORTON OF HENRYTON has asked me to say that he also agrees.

A

LORD MACDERMOTT : My Lords, the appellant was beneficial owner of all the shares of the company in question and may be regarded as the sole original shareholder. The Stated Case finds that he was aware "during the early discussions relating to the purchase of his shares that the purchasers contemplated a sale by the Holt company of a large block of its stock of whisky presumably to provide the greater part of the finance to carry through the B deal . . ." On the principles laid down in the *Bladnoch* case the appellant was, on the facts, properly retained in the direction by the Special Commissioners. In view of the finding just mentioned, I may, perhaps, be allowed to add that the construction of s. 24 which I favoured in that case would have produced the same result.

I would accordingly hold the appellant chargeable. I agree with your Lordships that the matter should be remitted to the Special Commissioners for C reconsideration of the apportionment made by them under proviso (ii) of sub-s. (1) of s. 24. Because of the appellant's knowledge I would have some difficulty in taking that view if the only point were that the Special Commissioners had adopted the sub-s. (4) (*b*) measure of benefit. Apart from that, however, they have (as was apparently their practice) fixed the apportionment on the appellant as a first step, leaving the balance of the full tax for the company and those D who had gained the other financial benefits, irrespective of whether or not the aggregate benefits exceeded the full tax. I think this shows a departure from the general intention of the statute regarding the discretion as described in the *Bladnoch* case and justifies the remission.

Appeal allowed. No order as to costs in House of Lords or below.

Solicitors : *F. O. S. Leake, Burgess, Battersby & Co.*, agents for *F. O. S. Leake,* E *Burgess & Battersby*, Manchester (for the appellant) ; *Solicitor of Inland Revenue* (for the Crown).

WILLIAM LONGMORE & CO., LTD. (SECOND CASE)

F The questions of law in the Case stated by the Special Commissioners were : (1) Whether on the evidence before us we were entitled to fix the full market value of the stocks at £151,054 ? (2) Whether on the evidence before us we were entitled to compute the full tax at £123,036 ? (3) Whether on the evidence before us we were entitled to find that the persons enumerated [other than the original shareholders] had received financial benefits as a result of the transactions and whether we were entitled to confirm the direction against them ?

G

Sir Andrew Clark, K.C., Mustoe and *Caplan* for the appellants, William Longmore & Co., Ltd., and others.

Geoffrey Howard for the appellants, Garfield and another.

T. G. Roche for the appellant, Kritz.

The Solicitor-General (Sir Frank Soskice, K.C.), the Solicitor-General for Scotland (Douglas Johnston, K.C.), J. F. Gordon Thomson, K.C. (of the Scottish H Bar) and *R. P. Hills* for the Crown.

LORD THANKERTON : My Lords, these three appeals raise questions under s. 24 of the Finance Act, 1943, as to the disposal of the whisky stocks of William Longmore & Co., Ltd., to which I will refer as the Longmore company. We have already decided an appeal by the Crown in relation to an earlier disposal of the Longmore company's stocks, in connection with which Mr. J. D. Stewart in May, 1942, acquired some 98 per cent. of the company's shares, which gave him the control of the company. The shares so acquired were registered in the name of various persons who held them on Mr. Stewart's behalf. Thereafter Mr. Stewart himself bought from the company its entire whisky stock of 177,896 gallons, but later re-sold to the company 28,956 gallons at the price he had paid for them. In these appeals we are concerned with a sale by Mr. Stewart of his holding in the Longmore company, and a sale by the Longmore company in December, 1942, of its then remaining whisky stocks amounting to about 33,054 gallons. While the three appeals are separate, they arise out of the same Stated Case, and, in the first instance, I will state the facts material to all three appeals.

On June 30, 1942, Mr. Stewart agreed to sell for £17,500 to the first appellant in the second appeal, Mr. D. K. Garfield, his holding of 34,475 shares of the Longmore company, being 98 per cent. of the share capital, for £17,000. A deposit of £1,750 was made by Mr. Garfield. Early in November, 1942, Mr. Garfield agreed to sell the said 34,475 shares to the appellant in the third appeal, Mrs. Ada Kritz, for £118,000 on the terms of a letter of offer by Mrs. Kritz dated Nov. 10, 1942. The terms of the agreement were, *inter alia,* that the price should be £118,000 subject to adjustment in the event of certain deficiencies in debtors, cash, etc. ; that the minimum quantity of whisky was 32,476 gallons ; the vendor was to undertake certain specified liabilities ; a deposit of £5,000 was to be paid forthwith to Mr. Garfield's solicitors as stakeholders, and a further £5,000 as deposit and part of the purchase price ; Mr. Garfield was to deliver against the payment of the balance of the purchase price valid transfers for the shares along with the share certificate, and delivery warrants for the stocks ; the directors, secretary and auditors of the Longmore company were to resign, if so required, on completion of the transaction, and, before resignation, the directors were to procure the appointment of such new directors as Mrs. Kritz might nominate. Mrs. Kritz had already arranged to sell for £130,000 the said shares to Mrs. Sonia Pomeroy, who was acting as agent for her husband, Mr. Jay Pomeroy, the fourth appellant in the first appeal. The terms of this sale are contained in a letter dated Nov. 3, 1942, and are similar to the terms in the said letter of Nov. 10, 1942. An undertaking was given to Mrs. Kritz by J. S. & J. Brown, Ltd., the second appellants in the first appeal, Pomis, Ltd., James McVey, Ltd., and Mr. Pomeroy, the fourth appellant in the first appeal, that Mrs. Pomeroy would carry out the terms of her contract. J. S. & J. Brown, Ltd., is a company, the shareholding of which had been acquired by Surplus Sales, Ltd. (a company under the control and direction of Mr. Pomeroy) in May, 1941. Pomis, Ltd., is a company under the direction and control of Mr. Pomeroy. James McVey, Ltd., is a company, the shareholding of which had been acquired by J. S & J. Brown, Ltd., in February, 1942. Mr. Pomeroy was the person who in fact controlled and directed the operation of J. S. & J. Brown, Ltd., Surplus Sales, Ltd., Pomis, Ltd., and James McVey, Ltd. Evidence which they accepted was given to the Special Commissioners that Surplus Sales, Ltd., participated in this transaction as well as Pomis, Ltd., and had acted as guarantor for Mrs. Kritz over price. Mrs. Pomeroy was acting for Mr. Pomeroy in purchasing the said shares from Mrs. Kritz, as he was laid up in a nursing home. She received no financial benefit in connection with the transaction. J. S. & J. Brown, Ltd., supplied Mrs. Pomeroy with £10,000 to pay the stipulated deposit. On or about Dec. 15, 1942, the shares of the Longmore company held for Mr. Stewart were transferred to Mrs. Sarah Patricia Hurst by the persons who held them for Mr. Stewart, at the request of Mr. Pomeroy, in exchange for the balance of £130,000, the price to be paid for them in terms of Mrs. Pomeroy's agreement. It seems clear that £130,000 was paid by Mr. Pomeroy to Mrs. Kritz, that £118,000 was paid to Mr. Garfield out of which he paid to Mr. Stewart on Dec. 21, 1942, the balance of his purchase price £15,750, and placed the rest of the £118,000 in his bank account. Mr. K. Wincour and Mrs. Hurst were appointed directors of the Longmore company in place of Mr. Stoker and Mr. Noble, who were the directors originally nominated by Mr. Stewart. The shares held by Mrs. Hurst were held by her as nominee of Mr. Pomeroy, who was himself the nominee of J. S. & J. Brown, Ltd. Mrs. Hurst resigned her directorship on Apr. 22, 1943, and Mr. Pomeroy was elected in her place. Mr. Pomeroy now holds the shares of the Longmore company as nominee for J. S. & J. Brown, Ltd. On Dec. 21, 1942, on instructions from Mr. Pomeroy, 33,054 gallons of whisky, its then remaining stock, were sold by the Longmore company to J. S. & J. Brown, Ltd., for £14,676 8*s.* 5*d.*, a price which was less than their full market value. These stocks so acquired by them were subsequently disposed of over a period commencing about Dec. 15, 1942, by J. S. & J. Brown, Ltd., for £162,270.

Under sub-s. (2) of s. 24, the Special Commissioners held that the full market value of the 33,504 gallons of whisky belonging to the Longmore company was £151,054, and computed the full tax at £123,036. The Special Commissioners directed that the whole of the full tax should be a joint and several liability of ten persons, which included the four appellants in the first appeal, *viz.*, the Longmore company, J. S. & J. Brown, Ltd., Russian Opera & Ballet Co., and Mr. Pomeroy, the appellants in the second appeal, Mr. Garfield and Mr. Jones, and the appellant Mrs. Kritz in the third appeal.

The First Appeal

These appellants submitted the same argument as to the principles on which the Special Commissioners computed the full market value on the same grounds as in all the previous appeals relating to other companies, and which has been rejected in the case relating to the Bladnoch Distillery, Ltd., to which reference may be made. The contention fails.

In the second place, these appellants submitted an argument as to the calculations by which the computation of the full tax was made. Your Lordships held that it was not open to the appellants, as it had not previously been raised.

The third contention was made on behalf of the appellants Mr. Pomeroy and the Russian Opera and Ballet Co. to the effect that there was no evidence that these appellants had obtained a financial benefit within the meaning of sub-s. (1) (*b*), and its decision depended on a loan of £25,000 by the Longmore company to Mr. Pomeroy, made on Feb. 16, 1943, at 5 per cent. interest, which was charged and paid, most of the loan having been repaid before Sept. 30, 1943. This loan was for the purposes of Mr. Pomeroy's theatrical ventures, which he carried on under the name of the Russian Opera and Ballet Co. At this time, as already stated, Mrs. Hurst held the shares of the Longmore company as nominee of Mr. Pomeroy, who was himself the nominee of J. S. & J. Brown, Ltd., which Mr. Pomeroy directed and controlled. Mrs. Hurst was one of the two directors of the Longmore company, but she resigned on Apr. 22, 1943, because she objected to this loan, and Mr. Pomeroy took her place. There can be no doubt that temporary accommodation may constitute a financial benefit, and I have no difficulty in holding that the Special Commissioners were entitled, on the facts before them, including the dominating position of Mr. Pomeroy, to hold that he and the Russian Opera & Ballet Co. obtained a financial benefit within the meaning of sub-s. (1) (*b*) of s. 24.

I therefore propose that this appeal should be dismissed with costs, and that the interlocutor of the First Division of the Court of Session dated Jan. 31, 1946, in respect of these appellants should be affirmed.

The Second Appeal

I have already stated Mr. Garfield's receipt on Dec. 15, 1942, of £118,000 from Mrs. Kritz, the price at which she had purchased the shares of the Longmore company from him, his payment to Mr. Stewart of £15,750, the balance of the price payable by him as purchaser of the shares from Mr. Stewart, and that Mr. Garfield placed the remainder of the £118,000 (£102,250) in his own bank account. On Dec. 21, 1942, sums amounting to £11,150 from Mr. Garfield's bank account were paid into the account of Mr. W. H. Jones, the second appellant in this appeal.

It seems clear that in this case, as in others, the Special Commissioners applied the "tainted money" principle, which was disposed of in the case relating to the Bladnoch Distillery Co., Ltd., to which I may refer.

On appeal the First Division of the Court of Session affirmed the direction as regards both these appellants, Lord Moncrieff dissenting as regarded the appellant Jones. The main ground of judgment was based on the evidence in the *Longmore* (No. 1) case, which has just been decided by your Lordships, and the relationship thereby shown to have existed between Mr. J. D. Stewart and the present appellants, from which the learned judges of the First Division inferred that the successive transactions in the present case were not genuine transactions.

My Lords, I am of opinion that it was not legitimate for the court to so utilise the evidence in the earlier case, especially when there is no reference to the matter in the present Stated Case, and no such view appears to have been presented to the Special Commissioners, nor does it appear to have occurred to them. The only way in which the Special Commissioners relied on these earlier matters, apart from their bearing on how Mr. Stewart came to be holder of the shares, and the history of the whisky stocks of the Longmore company, was in regard to Mr. Stewart's inclusion in the present direction, which they decided against, and the interrelation of the various companies controlled by Mr. Pomeroy, and certain other parties, but there is no reference in that connection to either of these appellants. That evidence related to the position of these appellants at the time of the earlier and different transactions, and, by itself, is not sufficient evidence of their position and relation to a different set of transactions at a different time.

Accordingly, I feel bound to make a fresh approach to the matter, and to deal separately with the two appellants.

In the first place, I am of opinion that there was evidence on which the Special Commissioners were entitled to hold, as they did, that the purchase and re-sale of the shares by the appellant Garfield were part of a composite transaction by which J. S. & J. Brown, Ltd., through Mr. and Mrs. Pomeroy, acquired control of the Longmore company. Mr. Garfield did not give evidence. The evidence as to the contemporaneous completion of the successive sales of the shares justifies this view. For the reasons expressed in my opinion in the *Bladnoch* case, I am also of opinion that the Special Commissioners were entitled to find, on the evidence, that that composite transaction was an associated transaction within the meaning of sub-s. (1) (*b*), and that Mr. Garfield obtained a financial benefit as the result of the bundle of transactions, which included that associated transaction and the stock transactions. But I am clearly of opinion that, as in other cases, the Special Commissioners have not exercised their power of apportionment under proviso (i) of sub-s. (1) in conformity with the statutory basis of that power, for reasons which are fully explained in my opinion in the *Bladnoch* case, in the light of which the Special Commissioners should reconsider the question of an apportionment to Mr. Garfield under proviso (i).

The position of the appellant Jones is somewhat different. The Special Commissioners clearly rested their decision on the "tainted money" principle. In reference to him, the Special Commissioners state, "Mr. Jones did not give evidence before us, and it was not denied on his behalf that he had obtained financial benefits as a result of the transaction." The meaning of this statement is made clear by their later statement that it was not submitted that financial benefits had not been obtained as a result of the transactions by the following: ". . . W. H. Jones . . ." It was stated before the First Division that counsel appeared before the Special Commissioners in support of Mr. Jones' appeal. The commissioners had found that Mr. Jones had obtained a financial benefit within the meaning of the section, and, in my opinion it is not now open to the appellant Jones to found on the absence of evidence in view of his failure to maintain this ground of appeal before the Special Commissioners. His position on this appeal is therefore the same as that of the appellant Garfield.

I propose, therefore, that the appeal should be allowed, that the interlocutor of the First Division of the Court of Session dated Jan. 31, 1946, so far as it applies to these appellants should be reversed, and the questions of law in the Stated Case should be answered as follows:—the first and second questions in the affirmative, and the third question at this stage, in the negative, in that the proper basis of apportionment has not been observed. There should be no order as to costs here or below. The Case should be remitted to the Special Commissioners to proceed as accords.

The Third Appeal

The appellant Mrs. Kritz bought the shares of the Longmore company from Mr. Garfield for £118,000 and re-sold them to Mrs. Pomeroy, as I have already stated. I need only add that Mrs. Kritz apparently suggested that she was acting for her husband in the transactions, but led no evidence to that effect, and the Special Commissioners were entitled to proceed on the documents, which showed Mrs. Kritz as the contracting party, in the transactions, who received the profit from them. The position of Mrs. Kritz, in my opinion, cannot be differentiated from that of Mr. Garfield and Mr. Jones in the second appeal, and I refer to my opinion therein. I propose that the order should A be in terms similar to that in the case of Mr. Garfield and Mr. Jones.

LORD PORTER : My Lords, the only fresh point raised in the first of these appeals is as to whether the obtaining of a loan can amount to a "financial benefit" within the meaning of the Act. I see no reason to limit the meaning of those words where they are found in the section. Undoubtedly a loan can be a financial benefit, and I am, therefore, of opinion that a loan can come B within the ambit of this Act. In the second appeal I think there was evidence that the various transactions were interrelated and formed part of one composite whole. It follows that the commissioners were justified in finding that the transaction was an associated one, but here again the apportionment to Mr. Garfield has not been calculated on the basis directed by the Act and should go back for reconsideration.

The evidence against Mr. Jones was that he received £11,150 from Mr. Gar- C field's bank account into which money obtained from the carrying out of the scheme had been paid and it was not contended before the commissioners that he had not received a financial benefit, but it is clear that the commissioners' apportionment was dependent on their view that the receipt of "tainted money" imposed a liability. He therefore stands in the same position as Mr. Garfield and his case must be reconsidered.

I also agree that the appeal of Mrs. Kritz should be dealt with on the same D basis as that of Mr. Garfield and Mr. Jones.

LORD SIMONDS : My Lords, I agree.

LORD MORTON OF HENRYTON (read by LORD SIMONDS) : My Lords, I concur in the motion proposed. My reason for concurring, in the case of the appellants Garfield, Jones and Mrs. Kritz, is the same as that which led E me to concur in the case of *Inland Revenue Comrs.* v. *Gray, Wells and another.*

LORD MACDERMOTT : My Lords, on the facts and findings I think the Special Commissioners were justified in retaining all these appellants in the direction. With regard to the appellants Garfield, Jones and Kritz, I am not clear that it can be said in this case that the proper basis of apportionment has not been observed. But subject to that I concur in the motion to be F proposed by my noble and learned friend on the Woolsack.

First appeal dismissed with costs. Second and third appeals allowed. No order as to costs of appeal.

Solicitors : *Herbert Oppenheimer, Nathan & Vandyk,* agents for *Shepherd & Wedderburn,* W.S., Edinburgh (for the appellants, William Longmore & Co., Ltd., and others) ; *D. B. Levinson & Shane,* agents for *Balfour & Manson* G *W.S.*, Edinburgh (for the appellants, D. K. Garfield and another) ; *D. B. Levinson & Shane,* agents for *Shepherd & Wedderburn,* W.S., Edinburgh (for the appellant, Kritz) ; *Solicitors of Inland Revenue for England and for Scotland* (for the Crown).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WILTSHIRE COUNTY VALUATION COMMITTEE *v.* MARLBOROUGH AND RAMSBURY RATING AUTHORITY.

SAME *v.* BOYCE.

[Court of Appeal (Scott, Asquith and Evershed, L.JJ.), February 23, 24, March 15, 1948.]

Rates and Rating—Exemption—Lands belonging to a vicarage—Exemption from parochial taxes under Inclosure Act—Exemption from general rate imposed by Rating and Valuation Act, 1925*—Rating and Valuation Act,* 1925 (*c.* 90), *s.* 2 (1), (2), (3), *s.* 64 (1) (*b*).

By the (local) Ramsbury Inclosure Act, 1777, it was provided that all the lands belonging to the vicarage of Ramsbury " shall be and for ever remain free from and discharged of all parochial taxes and duties whatsoever so long as the vicar for the time being " should perform the offices of the church for certain of the poor parishioners " without fee or reward." The question arose whether this exemption operated to exempt lands of the vicarage from the general rate levied under the Rating and Valuation Act, 1925, s. 2, and, if so, whether the exemption applied to land which had been let on a lease for 999 years to the rural district council.

Held : a special exemption, expressed to be perpetual and granted by a local and personal Act to the owner of a particular piece of land, could not be abrogated or impaired by a subsequent statute unless it was addressed in plain language to land : *generalia specialibus non derogant* ; there was no such special cancellation or abrogation in the Act of 1925, but, on the contrary, s. 64 (1) (*b*) preserved " any exemption from or privilege in respect of rating conferred by any local Act " on the occupiers of a particular hereditament ; and the exemption conferred by the Act of 1777 still held good with regard to all the land belonging to the vicarage, including that let on the 999 years' lease.

Decision of the Divisional Court ([1947] 1 All E.R. 820), *affirmed.*

[As to Special Exemptions from Payment of Rates, see HALSBURY, Hailsham Edn., Vol. 27, p. 382, para. 819 ; for the Rating and Valuation Act, 1925, see HALSBURY'S STATUTES, Vol. 14, p. 617.]

Cases referred to :

(1) *Whenman* v. *Clark*, [1916] 1 K.B. 94 ; 85 L.J.K.B. 424 ; 114 L.T. 116 ; 80 J.P. 128 ; 38 Digest 456, *218*.

(2) *R.* v. *London Gas Light Co.*, (1828), 8 B. & C. 54 ; 2 Man. & Ry. K.B. 12 ; 1 Man. & Ry. M.C. 263 ; 6 L.J.O.S.M.C. 113 ; 38 Digest 476, *353*.

(3) *London Corpn.* v. *Netherlands Steamboat Co.*, [1906] A.C. 263 ; 75 L.J.K.B. 771 ; 93 L.T. 566 ; 69 J.P. 443 ; *affg.*, S.C., *sub nom.*, *Netherlands Steamboat Co.* v. *London Corpn.*, (1904), 68 J.P. 377 ; 38 Digest 467, *296*.

(4) *Sion College* v. *London Corpn.*, [1901] 1 K.B. 617 ; 70 L.J.K.B. 369 ; 84 L.T. 133 ; 65 J.P. 324 ; 38 Digest 475, *349*.

Appeals by the Wiltshire County Valuation Committee from orders of the Divisional Court (Lord Goddard, C.J., Atkinson and Oliver, JJ.) made on Apr. 30, 1947, and reported [1947] 1 All E.R. 820. The Divisional Court held that an exemption from " parochial taxes " granted to the vicar for the time being of Ramsbury by the Ramsbury Inclosure Act, 1777, applied to the general rate imposed by the Rating and Valuation Act, 1925, s. 2. The Court of Appeal now affirmed that decision. The facts appear in the judgment of the court.

Harold Williams, K.C., and *Squibb* for the Valuation Committee.

Dare for Miss Boyce (a tenant).

Blanco-White, K.C., and *McGougan* for the Rural District Rating Authority and Mr. Orchard (a sub-tenant).

Cur. adv. vult.

Mar. 15. **SCOTT, L.J.**, read the following judgment of the court. This appeal raises the question whether an exemption in a local and personal Act of 1777 conferred on the vicar of Ramsbury in Wiltshire by which all :

> . . . lands which shall belong to the vicarage shall be and for ever remain free from and discharged of all parochial taxes and duties whatsoever so long as the vicar for the time being . . .

shall do and perform all the offices of the church for certain of the poor parishioners "without fee or reward," still holds good. It is common ground, first, that the vicar owned the fee simple of certain lands which, but for that exemption, would have attracted payment by him, as occupier, of the poor rate, and, secondly, that there was no failure by the vicar to perform the statutory condition. The question in issue is whether the general rate imposed by the Rating and Valuation Act, 1925, s. 2 (2), in lieu of the poor rate has destroyed
A the exemption granted by the Act of 1777. It is, we think, the first time since that Act came into force that this issue of interpretation has been raised. We will, therefore, discuss it as a pure question of construction, although several decisions of this court and the House of Lords in earlier years have been cited to us.

The two hereditaments on which the question is raised are occupied respectively by Miss Boyce and by Mr. Orchard, the former under a yearly tenancy from the
B vicar, the latter by Mr. Orchard as a sub-tenant of the respondent council in the first appeal, who are lessees of the land in his occupation with other land leased to it under a lease for 999 years by the vicar. The land occupied by Miss Boyce forms part of the ancient estates of the vicar owned by him from before the passing of the Act of 1777. The land in lease from the vicar to the district council was awarded to him by an award pursuant to the enclosure terms of
C the Act of 1777. The benefit of its exemption attached to both types of the vicar's land. On Mar. 6, 1946, the local assessment committee under s. 17 of the Act of 1925 rejected a proposal of the valuation committee to put both the hereditaments into the valuation list with figures for the gross and rateable values. From that decision the valuation committee appealed to quarter sessions, but it was then agreed, as there was no dispute on the facts, to go to the Divisional Court by Special Case. The Divisional Court dismissed the
D appeal, holding that the ancient exemption still attached. Hence the appeal by the valuation committee to us.

The question depends on the proper interpretation of the Act of 1925 in the light of the supersession by it of the old "poor-rate" and the substitution of the new "general rate." The first step, therefore, is to see what the poor rate was. In essence it was a piece of administrative machinery for collecting money, at first limited in use to the purposes defined in the statute of Elizabeth,
E but progressively used in the intervening period down to the Act of 1925 for obtaining the necessary funds from the occupiers of land for numerous heads of expenditure on local administration. The mechanism continued to be based on the parish, but the purpose was for expenditure throughout a much wider area. When the Act of 1925 put all (or most) of the particular purposes for which money had to be collected under the one "umbrella" of the "general rate," there was no change in the legal substance of the pecuniary liability so imposed.
F The old poor rate was always a local tax or duty and not a national tax or duty. The enlargement of the area of collection from the parish to the district and county in rural England made no change of substance. The poor rate was a parochial tax in the sense that it was collected over that unit of area, but the word "parochial," in my opinion, owed its adoption to the mere statutory accident that the parish was the unit of area over which it was from the first
G exigible. It was with equal propriety called a parochial duty. As the heads of public expenditure became more numerous the poor rate became wider in its scope—so much so that when the Act of 1925 adopted the word "general" in place of the word "poor," Parliament made no change in the heterogeneous character of the imposition on occupiers, but only enlarged the ambit of the area for its administrative convenience of easier collection. The previous indirect practice of the authorities concerned in the other heads of local expendi-
H ture getting their money through the poor rate machinery by means of precepts on the poor rate authorities was made direct. One bite at the cherry instead of two!

It follows from those considerations that a special privilege or exemption, expressed to be perpetual, and granted by a local and personal Act, like that of 1777, to the owner of a particular piece of land, could not be abrogated or impaired by a subsequent statute unless it was addressed in plain language to land, for *generalia specialibus non derogant.* We can find no such "special" cancellation or abrogation in the Act of 1925. Sub-sections (1), (2) and (3) of s. 2 are quite general. On the contrary, we think the Act in terms says that it preserves intact any such exemption and even a privilege falling short of exemption. Section 64 (1) provides:

> Subject as otherwise expressly provided in this Act, nothing therein contained shall affect— . . . (*b*) any exemption from or privilege in respect of rating conferred by any local act or order on the occupiers of hereditaments in any particular part of a rating area or on the occupiers of any particular hereditaments.

So far from the rest of the section "providing otherwise" sub-s. (2) has, we think, the effect of maintaining existing exemptions. We heard argument for the valuation committee which was put forward on the footing that the "scheme" permitted by sub-s. (2) was a condition of the continuance of the exemption, but we do not so read it. The only purpose of the authorised scheme is "to secure the *continued operation* of any *such* privilege or exemption," *i.e.*, that mentioned in sub-s. (1) (*b*). Even the proviso at the end of sub-s. (2) points to that construction. Section 69 (2) confirms it almost expressly. Indeed, the language of the first paragraph of that sub-section can be regarded only as a positive enactment that the exemption in question granted by the Act of 1777 shall be construed by the court as a reference to the general rate under the Act of 1925. It is to be noted that the Act of 1777 is not amongst those repealed by sched. III to the Act of 1925.

An argument was addressed to us by counsel for the valuation committee that because the general rate is levied over a county or a district under the present system of local government, it cannot be said to be "parochial." We do not agree. The administrative convenience, for which the wider area was adopted, did not prevent the rates collected from all the parishes on the area being still parochial. The word is, in our opinion, used in contradistinction to imposts imposed by Parliament. Similarly, the words "taxation" or "tax" are not limited to Parliamentary imposts collected by the Exchequer. The poor rate of Elizabeth was called "taxation." Finally, it was said that the vicar had forfeited the right to exemption because when he granted the leases for 999 years the land ceased to "belong" to him, within the meaning of the Act of 1777. We do not agree. He remained the freeholder, and that is, we think, by itself enough, but, in addition, all mines were reserved and the covenants gave him most of the continuous control of an owner who has granted a lease for, say, 5 years, and he has a right of re-entry on any breach. The object of the old Act was to provide income for the vicar by freeing the land for ever from the burden from all parochial taxes and duties whatsoever. He now gets a better income in consequence. We think he is entitled to go on getting it. For these reasons we think the two appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors: *Radcliffe & Co.*, agents for *P. A. Selbourne Stringer*, clerk to the Wiltshire County Council Valuation Committee (for the Valuation Committee); *Wallace, Pyman & Co.*, agents for *Phelps & Lawrence*, Ramsbury (for Miss Boyce); *Ernest Bevir & Son*, agents for *H. Bevir & Son*, Wootton Bassett (for Ramsbury Rural District Rating Authority and Mr. Orchard.)

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Distinguished. HARRISON *v.* HOPKINS. [1949] 2 All E.R. 597. *Applied.* WETHERALL & CO., LTD. *v.* STONE. [1950] 2 All E.R. 1209.

McINTYRE AND ANOTHER *v.* HARDCASTLE.

[COURT OF APPEAL (Tucker and Somervell, L.JJ., and Roxburgh, J.), March 17, 18, 1948.]

Landlord and Tenant—Rent restriction—Recovery of possession—Claim by two joint owners—Dwelling-house required for occupation as residence for only one owner—Alternative accommodation—Accommodation for furniture—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), *s.* 3 (1), (3), *sched.* I, *para.* (*h*) (i).

The two plaintiffs, who were joint legal and beneficial owners of a dwelling-house to which the Rent Restrictions Acts applied, sought possession of the house from the tenant (i) under s. 3 (1) (*a*) and sched. I, para. (*h*) (i), of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, on the ground that one of them required the house for occupation as a residence for herself, and (ii), alternatively, on the ground that they had offered to the tenant suitable alternative accommodation, under s. 3 (1) (*b*) and (3) of the Act :—

HELD : where there were two or more joint beneficial owners, possession of a dwelling-house could be obtained under s. 3 (1) (*a*) and sched. I, para. (*h*) (i), of the Act of 1933 only if the dwelling-house was required for occupation as a residence for both or all of them, and, accordingly, the claim failed.

Dicta of ASQUITH, L.J., in *Baker* v. *Lewis* ([1946] 2 All E.R. 595 ; 175 L.T. 492 ; [1947] K.B. 193), *applied.*

Observations on the extent to which, in considering whether alternative accommodation offered to a tenant was suitable within the meaning of s. 3 (1) (*b*) and (3) of the Act, the court should base its decision on the question whether or not the tenant would have to store part of his furniture.

[AS TO ORDERS FOR POSSESSION WHEN PREMISES REQUIRED BY LANDLORD FOR OWN OCCUPATION, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 396 ; and FOR CASES, see DIGEST, Vol. 31, p. 580, Nos. *7283-7291.*

AS TO ALTERNATIVE ACCOMMODATION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 332, 333, para. 398 ; and FOR CASES, see DIGEST, Vol. 31, pp. 582-584, Nos. *7311-7330.*]

Cases referred to :

(1) *Baker* v. *Lewis*, [1946] 2 All E.R. 592 ; [1947] K.B. 186 ; [1947] L.J.R. 468 ; 175 L.T. 490.

(2) *Owen* v. *Overy*, (1946), unreported.

(3) *Sharpe* v. *Nicholls*, [1945] 2 All E.R. 55 ; [1945] K.B. 382 ; 114 L.J.K.B. 409 ; 172 L.T. 363 ; 2nd Digest Supp.

APPEAL by the landlords from an order of His Honour JUDGE J. H. D. HURST, at Wallingford County Court, dated May 19, 1947.

The landlords, who were joint legal and beneficial owners of a dwelling-house within the Rent Restrictions Acts, claimed possession of the house from the tenant under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) (*a*), and sched. I, para. (*h*) (i), and, alternatively, under s. 3 (1) (*b*) and (3). The county court judge held that they were not entitled to possession under s. 3 (1) (*a*) and sched. I, para. (*h*) (i), as the house was required for occupation as a residence by only one, and not both, of the two joint owners. He also dismissed the claim under s. 3 (1) (*b*) and (3) on the ground that the alternative accommodation offered to the tenant was not suitable within the meaning of sub-s. (3), because the tenant would have inadequate room for his furniture and belongings if he accepted the offer. On an appeal by the landlords from this decision, the Court of Appeal upheld the judgment of the county court judge on the first point, but held that he had misdirected himself in regard to the suitability of alternative accommodation, and the case was remitted to him for a fresh trial confined solely to the landlords' claim under s. 3 (1) (*b*) and (3). The facts appear in the judgment of TUCKER, L.J.

Ackner for the landlords.

Samuel-Gibbon for the tenant.

TUCKER, L.J. : This is an appeal from a decision of His Honour JUDGE J. H. D. HURST whereby he refused to make an order for possession which was claimed by the landlords against the tenant in respect of premises within the scope of the Rent Restrictions Acts and known as The Cottage, Benson, in the county of Oxford. The plaintiffs in the action were Mrs. McIntyre and Mrs. Godden, who were joint owners, legally and beneficially entitled to this property. The tenancy of the defendant had duly determined and the landlords claimed possession in two alternative ways, the primary claim being made under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) (*a*) and sched. I, para. (*h*).

Section 3 (1) is as follows :

> No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(*a*) the court has power so to do under the provisions set out in sched. I to this Act ; or (*b*) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect.

Schedule I provides :

> A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (*h*) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after [a certain date]) for occupation as a residence for (i) himself ; or (ii) any son or daughter of his over 18 years of age ; or (iii) his father or mother : Provided that an order or judgment shall not be made or given on any ground specified in para. (*h*) of the foregoing provisions of this schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it.

The alternative claim was under s. 3 (1) (*b*) and (3) of the Act of 1933. Section 3 (3) is as follows :

> Where no such certificate as aforesaid [*i.e.*, a certificate that the housing authority will provide suitable alternative accommodation for the tenant] is produced to the court, accommodation shall be deemed to be suitable if it consists either—(*a*) of a dwelling-house to which the principal Acts apply ; or (*b*) of premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply, and is, in the opinion of the court, reasonably suitable to the needs of the tenant and his family as regards proximity to place of work, and either—(i) similar as regards rental and extent to the accommodation afforded by dwelling-houses provided in the neighbourhood by any housing authority for persons whose needs as regards extent are, in the opinion of the court, similar to those of the tenant and his family ; or (ii) otherwise reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character.

In respect of the claim under sched. I, para. (*h*), a point of law presented itself for the determination of the county court judge. It having been held by this court in *Baker* v. *Lewis* (1) that, by reason of the provisions of the Interpretation Act, 1889, s. 1, the word " landlord " in the opening sentence of para. (*h*) includes the plural where there is more than one landlord, the question arose whether the landlords, when they are more than one in number, have to prove that the dwelling-house is required for occupation as a residence for all of them or for only any one or more, because, in this case, it was only one of the landlords who desired to reside in the house. The point was taken that the landlords had not brought themselves within the provisions of para. (*h*) of sched. I, because, to come within it, they had to show that the dwelling-house was required for occupation as a residence by both of them. This question now arises for decision for the first time, but it was referred to in *dicta* in *Baker* v. *Lewis* (1). In that case SOMERVELL, L.J., in giving his judgment, wished to keep open this question and said ([1946] 2 All E.R. 595) :

> . . . I am not in any way implying or suggesting that para. (*h*) is only applicable in the case of joint owners where they are . . . desiring the dwelling-house for occupation as a residence for all of their number.

He went on to say that he was inclined to the view that it had a wider application and would cover the case where A., B. and C., being joint owners, put forward a claim for possession on the ground that the residence was required for occupation as a residence by A. ASQUITH, L.J., in giving his judgment, referred to the observations of SOMERVELL, L.J., and continued as follows (*ibid.*) :

> This court has decided in *Owen* v. *Overy* (2) that " landlord " in para. (*h*) of sched. I to the Act of 1933 covers two or more joint beneficial owners, and in *Sharpe* v. *Nicholls* (3) that it does not cover two or more bare personal representatives. Where there are two or more joint beneficial owners, (i), (ii) and (iii) of (*h*) should, I think, be read as follows : in (i) for " himself " read " themselves," in (ii) for " any son or daughter of his " read " any son or daughter of theirs," and in (iii) read " their father or mother." Where, read in this way, neither (i), (ii) nor (iii) has any application, such beneficial owners would fail, for instance, if they proceed under (ii) and are not a married couple with a child, or if they proceed under (iii) and have not got a parent in common ; but they would fail in that case not because there are several of them or because they are not a " landlord " within the opening words of the section, but because they could

not bring themselves within the language of (i), (ii) or (iii), construed in the way I suggest.

This authority was cited to the county court judge and, having referred to those passages, he said :

> Both of these opinions were *obiter* to that decision . . . I take the view of ASQUITH, L.J., and hold that the present plaintiffs fail to come within sub-s. (*h*) on which they rely.

All kinds of difficulties have been suggested as likely to follow whichever interpretation is accepted by us. I do not think that the legislature contemplated this situation at all when this paragraph was framed, and, therefore, I feel driven to interpret it merely in the light of the actual language used. Looking at it in that way, I feel convinced that the interpretation put on it by ASQUITH, L.J., was the correct one and I do not desire to attempt to put into better language that which he so clearly expressed in the judgment which I have just read. For those reasons, I think that the county court judge came to a right decision on this matter. We have been referred to the proviso to para. (*h*), and it was suggested that the word " landlord " must be given a somewhat different interpretation in the proviso from that which it bears in the opening words of para. (*h*), and it was said that that strengthens the case for the landlords in asking us to read words into para. (*h*) (i), (ii) and (iii) which precede the proviso, but I do not think that it is necessary to give the word " landlord " in the proviso any different meaning from that which it bears in the opening words of the paragraph. It is quite true, as I think, that (*a*) the hardship and (*b*) the accommodation which has to be available are hardship and availability primarily considered with reference to the person who was going to occupy the premises, but I think the words " available for the landlord " mean available for the persons who are landlords and who require the premises for occupation by any one of the persons previously named. I do not think the reference to the proviso really helps us in interpreting the words which appear in (i), (ii) and (iii).

In case he should be held to be wrong in law, the judge then considered the question of reasonableness and relative hardship on the tenant and on the landlord, and he stated that, if he had taken a different view of the law, he would have made an order for possession because he thought the tenant had not shown that greater hardship would result on him if the order were made than if it were refused, and, further, that it was reasonable to make the order. [HIS LORDSHIP then dealt with the decision of the county court judge on the alternative claim under s. 3 (1) (*b*) and (3) of the Act. The county court judge had refused to make the order for possession, indicating as the reason for his refusal that he considered that the alternative accommodation offered to the tenant was not suitable within the meaning of sub-s. (3). He expressed the view that it was not suitable in extent because the tenant would have to compress his furniture and belongings into an inadequate space if he accepted the offer. HIS LORDSHIP held that the county court judge had misdirected himself in the view he had taken with regard to the furniture, and that the case should go back for a fresh trial, confined solely to the plaintiffs' claim under s. 3 (1) (*b*) and (3) of the Act. HIS LORDSHIP added that he was not prepared to say that the existence of furniture could never be taken into consideration when a question under s. 3 (3) was being considered.]

SOMERVELL, L.J., and **ROXBURGH, J.,** concurred.

Samuel-Gibbon : My friend and I are in some doubt as to the exact effect of your Lordships' order when the matter comes up for re-hearing. Is the county court judge to take your Lordships' decision as being that the consideration of furniture is altogether irrelevant and must not be taken into account, or is he entitled to take it into account, but not to regard it as sufficient by itself ? How is the judge to direct his mind with regard to that matter ?

TUCKER, L.J. : What I intended to indicate was that in this particular case I thought that the judge had taken into consideration the question of what I call surplus furniture, furniture which would otherwise have to be stored, no evidence having been given as to the special requirements of the tenant with regard to any particular items of furniture. I was not intending to express any view one way or another, nor do I think it desirable, in the present state of the case, to express any view, whether in all cases furniture *per se* must necessarily always be excluded in considering suitable alternative accommodation under s. 3 (1) (*b*) and (3) of the Act of 1933. That such matters are proper to be taken into consideration under the question of reasonableness is common ground.

Appeal allowed with costs, the case to go back to the county court judge for a fresh trial, confined solely to the plaintiffs' claim under s. 3 (1) (*b*) *and* (3) *of the Act of* 1933. *Costs of the first trial to be in the discretion of the judge at the second trial.*

Solicitors: *Wedlake, Letts & Birds* (for the landlords); *Curwen, Carter & Evans* (for the tenant).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

Re CHALCRAFT (*deceased*). CHALCRAFT *v.* GILES AND ANOTHER.

[Probate, Divorce and Admiralty Division (Willmer, J.), March 8, 11, 16, 1948.]

Wills—Signature—Sufficiency—Testator enfeebled—Surname incomplete—Attestation—Mental presence of testatrix—Wills Act, 1837 (*c.* 26), *s.* 9.

The deceased, Ellen Chalcraft, an elderly woman suffering from cancer, executed a will, dated July 29, 1946, and died on Dec. 30, 1946. A short time before her death she had given instructions for the sale of her house for £700, out of which £500 was to be paid to her married daughter, Mrs. West, and her husband, to enable them to purchase a house. In return for this sum it was intended that Mr. West should enter into a deed of covenant to maintain the deceased and her other daughter, Helen, for the rest of their lives. On Dec. 30, 1946, when death was imminent, a strong dose of morphia was administered to the deceased, the effect of which was gradually to induce drowsiness and, as a result, indirectly to affect her mental faculties. The daughter, Helen, in the presence of other members of the family and of two attesting witnesses, then prepared a document, on a writing pad, in the following terms: "96 Osborne Road, Acton. I wish my house to be sold and £500 made over to Mr. C. F. West for purchase of 33 Stilecroft Gardens." This was shown to the deceased who, when asked whether that was all and whether it gave effect to her wishes, nodded assent. The daughter, Helen, then put the pad before the deceased and, supporting her on the bed in which she was propped up, said: "If you can't sign your name put a cross." The deceased took the pen which was handed to her and began to sign her name, but when she had got as far as "E. Chal" her signature came to an end and was never completed. The document was then passed to the attesting witnesses and was immediately signed by them, and from that time onwards the deceased was never really conscious. The plaintiff propounded the document as a codicil to the will of July 29, 1946, and the defendants contended that the document was not a testamentary document. The court having found that the proper inference from the facts proved was that when she was invited to sign the document the deceased knew and approved of its contents and that the document was intended to be a testamentary document and not a disposition *inter vivos*,

Held: (i) as it appeared from the evidence that what the deceased wrote was intended by her to be the best she could do by way of writing her name, it was a signature which satisfied the requirements of the Wills Act, 1837.

In the goods of Maddock (1874) (L.R. 3 P. & D. 169; 30 L.T. 696), *distinguished.*

(ii) as it appeared that the attestation was completed before the deceased became incapable of understanding what was going on, the will had been attested, not only in the physical, but also in the mental, presence of the deceased.

[As to Methods of Signature by Testator, see HALSBURY, Hailsham Edn., Vol. 34, p. 56, para. 68; and for Cases, see DIGEST, Vol. 44, pp. 249, 250, Nos. *752-769.*]

Cases referred to :

(1) *In the goods of Maddock*, (1874), L.R. 3 P. & D. 169 ; 43 L.J.P. & M. 29 ; 30 L.T. 696 ; 38 J.P. 631 ; 44 Digest 272, *1037*.

(2) *In the goods of Blewitt*, (1880), 5 P.D. 116 ; 49 L.J.P. 31 ; 42 L.T. 329 ; 44 J.P. 768 ; 44 Digest 309, *1414*.

(3) *Hindmarsh* v. *Charlton*, (1861), 8 H.L. Cas. 160 ; 4 L.T. 125 ; 25 J.P. 339 H.L. ; *affg.*, S.C. *sub nom.*, *Charlton* v. *Hindmarsh*, (1859), 1 Sw. & Tr. 433 ; 44 Digest 261, *882*.

A (4) *In the goods of Kieran*, [1933] I.R. 222.

(5) *Right* v. *Price*, (1779), 1 Doug. K.B. 241 ; 44 Digest 270, *1001*.

(6) *In the goods of Killick*, (1864), 3 Sw. & Tr. 578 ; *sub nom.*, *In the goods of Kellick*, 34 L.J.P.M. & A. 2 ; 28 J.P. 760 ; 44 Digest 259, *853*.

PROBATE ACTION.

The facts and decision of the court appear in the headnote.

B *Marshall-Reynolds* for the plaintiff (Helen Chalcraft, executrix of the will).

Tolstoy for the defendants (Doris Ellen Giles and Rosa Rance, daughters of the testatrix, and Alfred George Chalcraft, son of testatrix and an executor of the will).

WILLMER, J., stated the facts and continued : It is established by authority that in circumstances such as these the onus is on the party propounding the C document as a testamentary document to satisfy the court of the righteousness of the transaction, and that the deceased did really know and approve of the contents thereof. Secondly, the plaintiff must satisfy me that the document was intended by the deceased to be a testamentary document and not merely a document making a disposition *inter vivos*. Thirdly, it is for the plaintiff to satisfy me that what the deceased wrote was intended to be her signature. I D say that because there is no evidence that after writing what she did write the deceased signified or acknowledged that what she had written was intended as her mark. I must accept what she wrote as her signature or nothing, and it is for the plaintiff to satisfy me that what the deceased wrote was intended to be her signature, and is a sufficient signature to satisfy the statutory provisions. Lastly, the plaintiff must satisfy me that, assuming the document was duly executed by the deceased, it was, in fact, attested by the witnesses in the presence E of the deceased, not merely her physical presence but her mental presence.

By way of preliminary, I think I should say this. I am quite satisfied that the deceased for as long as she remained conscious always wished Mr. and Mrs. West to have £500, and that up to the critical time following the injection of morphia the deceased was of full testamentary capacity. The real question is whether what was done was completed before the drug had time to overtake the deceased and deprive her of her mental faculties. I am also satisfied that F at the time when she was invited to sign this document the deceased knew and approved of its contents, and that the document was intended to be a testamentary document and not a disposition *inter vivos*.

The next point is whether what the deceased wrote can be accepted as her signature within the provisions of the Wills Act, 1837. As I have said, there is no question of it being acknowledged as her mark. Reliance was placed G by counsel for the defendants on three cases in relation to this point. He referred, first, to *In the goods of Maddock* (1). That was a case where the signature in question was that of a witness, not of a testator, the particular witness being old and infirm. As a result he was unable to complete his signature legibly, and desisted having only written a part of his christian name, and no surname at all. It was held that, in those circumstances, there was no proper attestation of the will. The next case relied on by the defendants H was *In the goods of Blewitt* (2). The question there was whether initials placed alongside certain interlineations in a will were acceptable as a signature. It was held that they were. In the course of his judgment in that case SIR JAMES HANNEN, P., cited the language of members of the House of Lords in the earlier case of *Hindmarsh* v. *Charlton* (3), which, he said (5 P.D. 117), " seems equally applicable to the testator's signature as to the witnesses' subscription." Then, quoting from LORD CAMPBELL, L.C., in *Hindmarsh* v. *Charlton* (3) (8 H.L. Cas. 167), he goes on : " I will lay down this as to my notion of the law that to make a valid subscription of a witness there must either be the name or some mark

which is intended to represent the name." In the same case LORD CHELMSFORD says (5 H.L. Cas. 171): "The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials, or by writing a name in full." What is said on behalf of the defendants in this case is that this is not a case of a mark, it is not a case of initials, and it is not a case of writing the name in full. Instead of that it is the initial followed by half the surname. The third case to which I was referred was an Irish case, *In the goods of Kieran* (4). That was a case in which the facts are much more similar to A
those of the present case. It was a case of a testator, very ill in bed, who tried to write his name but did not succeed in doing more than write two more or less indecipherable initials. The similarity with this case ceases after that, because in that case a solicitor was present, and he then asked the testator whether what the testator had written could be accepted as his mark, and the testator accepted what he had written as his mark. It was so endorsed on the will by the solicitor, and was so attested by the witnesses. It was decided that B
although the mark did not take the usual form of a cross, nevertheless it was a mark acknowledged by the testator as his own in the presence of witnesses and, therefore, sufficient to amount to a signature under the Act. But HANNA, J., in that case does, I think, go a little wider than was necessary for the decision of the case in giving his reasons. I think it valuable to read the last few sentences of his judgment. He says this ([1933] I.R. 229): C

> What is the test that I am to apply? It is, in my opinion, whether I am satisfied that the two scrawls were placed there by the testator as a personal act or acknowledged as such by him, *animo testandi*, to verify the making of the will as his own act. If a testator cannot, or does not, sign his name, or place legible initials on the will, but, on the other hand, places on it or acknowledges something upon it as his mark, in my opinion the court should not be concerned as to the particular character or shape of the mark. It may be the time-honoured cross, that has been referred to, or it may D
> be some other character. I am satisfied on the evidence here that not only did the testator commence to make his signature *animo testandi* but continued in the same state of mind until the termination of the execution of his will, and accordingly I admit this will to probate.

What is said for the defendants on this difficult point is that, if a testator sets out with the intention of signing his name, but never succeeds in completing a signature and never develops any intention to execute the document in any E
other way, then it is not a signature. He can, if he chooses to and if he forms the intention of doing so, execute the document by putting his initials on it, and he can, if he wishes to do so, and forms the intention of doing so, execute a document by making his mark and acknowledging his mark in the presence of witnesses, but what is said is that, if he starts out with the intention of doing any one of these things, and never departs from that intention, but yet never completes that which he sets out to do, then there can in law be no execution F
of the document. If what was said about witnesses is to apply to testators, *In the goods of Maddock* (1) certainly seems to go a long way towards establishing that proposition. The Irish case to which I have referred does not help very much, partly because it did ultimately turn on the testator's acknowledgment of his mark, and partly because of the rather wider grounds on which the learned judge put his judgment in the last few sentences. Indeed, if one took those G
last few sentences by themselves, it could, I think, be read as an authority to the contrary of what has been contended on behalf of the defendants. It seems to me that there must necessarily be some question of degree involved. I put in argument the case of the man who signs his name (a practice which we all know very well) by making the first few letters of his signature fairly distinct, and the last few letters of his signature completely indecipherable. Supposing, for the sake of argument, in this case the deceased instead of stopping at the H
"l" in "Chalcraft" had followed it by a few, or even one, indecipherable line. What would be the effect then? Would that be a completed signature? One ought, I think, to give a broad interpretation to the words used by LORD CAMPBELL, L.C., in *Hindmarsh* v. *Charlton* (3) in the passage which I have read. There must either be the name or some mark which is intended to represent the name. In my opinion, I must have regard to all the facts of this case—the fact that this lady was in an extremely weak condition and was lying, if not quite on her back, very nearly on her back, in a position in which it must

have been very difficult to write at all. I must ask myself the question whether on all the facts I can draw the inference that what she wrote was intended by her to be the best that she could do by way of writing her name. If I come to that conclusion, then I think I ought to accept this writing of "E. Chal" as being in law the signature of the deceased. Bearing in mind all the circumstances of the case—the weakness of the deceased, the difficulty of writing in that position—I come to the conclusion that this mark "E. Chal" on this
A document does amount, in all the circumstances, to a signature on the part of the deceased. *In the goods of Maddock* (1) is, in my opinion, distinguishable, because in that case there was no question of writing any surname at all; the writing stopped short at a part only of the christian name. Here we have something a good deal better than that, and, in all the circumstances, I am satisfied that I ought to accept it as the signature of the deceased.

That leaves one more question for me to decide. Assuming that the document
B was duly signed, was it duly attested in the presence of the deceased? I was referred in this connection to two cases, *viz.*, *Right* v. *Price* (5), and *In the goods of Killick* (6), which establish the proposition that a will to be valid must be attested not only in the physical, but also in the mental presence of the deceased. In *Right* v. *Price* (5) the evidence showed that the deceased had been insensible for two days at the time when the document was attested, *i.e.*, he had signed
C it, and then two days later, when he was in a state of insensibility, the witnesses, who had been present and seen the signature, proceeded to attest it. It was held that, although they were physically in the presence of the deceased, they were not mentally in his presence, because he was in a state of insensibility. That, of course, is a much stronger case than the present one. If the deceased in this case had reached a state of insensibility, it was only by a margin of time measured in seconds, and not, as in *Right* v. *Price* (5), by a margin of time
D measured in days. The principle, however, clearly remains the same. If the deceased was, in fact, in a state of insensibility at the time when the document was attested, then it was not an attestation within the provisions of the Wills Act, 1837. *In the goods of Killick* (6) was a case where the deceased was ill in bed in one room, and the attestation took place with the witnesses in another room. The witnesses did not see the deceased sign. The deceased could, by raising herself in bed, have seen the witnesses sign, but there was no evidence
E that she did so. It was held in that case on the first ground that there was no proper execution of the will. It was not actually necessary to decide the second point, although the learned judge did express the view that the case failed on that ground also. SIR J. P. WILDE said (3 Sw. & Tr. 580) that great latitude ought to be given to the meaning of the word "presence" used in s. 9 of the Wills Act, 1837. He also said (*ibid.*, 579): "The court has every desire to
F give a reasonable latitude to the exigencies of the statute . . . There is a natural tendency in the mind of the court to uphold a testamentary document, when it is clear that it was signed by the deceased with the intention of giving it validity." As I see it, that means that once the court is satisfied—as I am in this case—that the document was intended to be a testamentary document, and has been properly signed by the deceased, it will allow a certain degree of latitude with regard to the attestation by the witnesses. That involves some
G latitude in the interpretation of what is meant by "in the presence of witnesses."

This case really comes down, in these circumstances, to a question of what inference I draw from all the evidence. As I have put to counsel for the plaintiff in argument, one possible inference is that up to the time when the deceased signed she was in a state of good mental capacity, but that when she was half way through the signature and broke off abruptly she was then overtaken by something in the nature of a mental blackout, from which she never recovered.
H If that were the true inference to draw from the facts, then I think it would be quite clear that the subsequent attestation by the witnesses was not an attestation carried out in the presence of the deceased, because on that hypothesis she would have been in such a state that she was completely incapable of understanding what was going on. It seems to me, however, that to draw that inference would be inconsistent with the evidence which I have received from the doctor. As I understand it, the doctor expected the effect of the drug which she had administered to be swift, in the sense that it would be only a matter of minutes before she expected it to operate, but she did not expect

the drug to operate in a flash, or to produce a sudden blackout such as I have described. The process, though swift, would be a gradual process inducing drowsiness and relief from pain, which would in turn induce sleep on the part of the patient, the object being that, having got the patient asleep, she would then sleep for the closing stages of her life and, therefore, not be affected by the great pain. That operation, or expected operation, of the drug seems to me to be inconsistent with a sudden departure of the mental faculties of the deceased. In my opinion the proper inference to draw is that throughout all these critical minutes the deceased was losing her faculties through being overcome by drowsiness, but losing them gradually. Having regard to the fact that the document was attested immediately after the deceased had written what she wrote, I think the true inference to draw from all the facts is that up to the conclusion of the attestation the deceased was still mentally present to a sufficient degree to bring the case within the Wills Act, 1837, s. 9.

That, I think, is sufficient to dispose of the whole case. I confess that I have throughout regarded it as an extremely difficult case, and one which is very near the borderline on more than one of the disputed issues, but, for the reasons which I have given, I am satisfied that on all the points with which I have dealt the plaintiff has sufficiently discharged the onus of proof, and, therefore, I come to the conclusion that this document is a valid codicil, validly executed and attested. In those circumstances, it is my duty to pronounce in favour of both the will of July 29, 1946, and also the codicil of Dec. 30, 1946.

Probate granted of will and codicil. Costs out of the estate.

Solicitors: *Fairchild Greig & Co.* (for the plaintiff); *Elliot & Macvie* (for the defendants).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

Applied. Fred Long and Sons, Ltd. *v.* Burgess. [1949] 2 All E.R. 484.
Distinguished. Harrison *v.* Hopkins. [1949] 2 All E.R. 597.
Overruled. Moodie *v.* Hosegood. [1951] 2 All E.R. 582.

SMITH & ANOTHER *v.* MATHER & ANOTHER.

[Court of Appeal (Tucker, Somervell and Cohen, L.JJ.), March 19, 1948.]

Landlord and Tenant—Rent restriction—Possession—Death of tenant—Contractual tenancy—Son and daughter residing in house at time of tenant's death—Vesting of tenancy in the probate judge—Notice to probate judge to quit—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 12 (1) (*g*).

The plaintiffs let to Mrs. M. a dwelling-house within the Rent Restrictions Acts of which they were joint owners. In October, 1946, while the contractual tenancy still subsisted, Mrs. M. died intestate. No letters of administration were taken out, and the plaintiffs served a notice to quit on the President of the Probate, Divorce and Admiralty Division of the High Court in whom Mrs. M.'s estate had vested under the Administration of Estates Act, 1925, s. 9. A son and a daughter of Mrs. M., who were residing with her at the date of her death, claimed to be entitled to succeed to the tenancy by virtue of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*g*). In an action by the plaintiffs against the son and daughter for possession,

Held: on the death of Mrs. M., the tenancy had vested in the President of the Probate, Divorce and Admiralty Division, to whom notice to quit had been properly and effectively given, and it was inconsistent with such vesting that there should be a statutory tenancy in the defendants, who were, therefore, not entitled to succeed to the tenancy under s. 12 (1) (*g*), in which provision the word "tenant" should be restricted to cases in which there was no right of tenancy which could devolve under a will or on intestacy.

Thynne v. *Salmon* ([1948] 1 All E.R. 49), *applied.*

Dictum of MacKinnon, L.J., in *Summers* v. *Donohue* ([1945] 1 All E.R. 599, 600; 172 L.T. 310, 311; [1945] K.B. 379, 380), *dissented from.*

[As to Statutory Tenants, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401; and for Cases, see DIGEST, Vol. 31, pp. 562, 563, 575, 576, Nos. *7097-7107, 7226-7255.*]

Cases referred to :

(1) *Summers* v. *Donohue*, [1945] 1 All E.R. 599 ; [1945] K.B. 376 ; 114 L.J.K.B. 401 ; 172 L.T. 310 ; 2nd Digest Supp.

(2) *Thynne* v. *Salmon*, [1948] 1 All E.R. 49 ; 148 L.J.R. 506.

APPEAL by the landlords from an order of His Honour JUDGE HARRISON, at St. Helen's County Court, on June 11, 1947, refusing an order for possession of a dwelling-house. The Court of Appeal allowed the appeal. The facts appear in the judgment of SOMERVELL, L.J.

Stephen Chapman for the plaintiffs (landlords).

J. M. Davies for the defendants.

TUCKER, L.J. : I will ask SOMERVELL, L.J., to give the first judgment.

SOMERVELL, L.J. : The two plaintiffs are joint owners of the house in question. It was bought in 1938 and let to Mrs. Mather, who was the mother of the two defendants, her son and daughter who were residing with her at the time of her death. No notice to quit was given to her during her life-time or any notice increasing the rent so as to make her a statutory tenant, and it is common ground that at the date of her death the contractual tenancy subsisted. She died intestate in October, 1946. On Dec. 6, 1946, the landlords served a notice to quit on the President of the Probate, Divorce and Admiralty Division under the Administration of Estates Act, 1925, s. 9, which provides :

> Where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the probate judge in the same manner and to the same extent as formerly in the case of personal estate it vested in the ordinary.

By s. 55 : " ' probate judge ' means the President of the Probate, Divorce and Admiralty Division of the High Court." No letters of administration have been taken out. In circumstances such as the present where a contractual tenancy is subsisting when the tenant dies, apart from the Rent Restrictions Acts, there must be a power in the landlord to bring the tenancy to an end by whatever notice is provided for in the agreement, and the proper procedure for doing that in the case of an intestacy is the procedure adopted in this case, namely, serving a notice to quit on the President of the Probate, Divorce and Admiralty Division. After the notice to quit had been served this action for possession was brought in the county court. The claim recited the facts to which I have referred, and in the defence the defendants claim to be entitled to succeed to the tenancy in accordance with the provisions of the Rent Restrictions Act, 1920, s. 12 (1) (*g*). Section 12 (1) provides :

> (*f*) The expressions " landlord," " tenant," " mortgagee," and " mortgagor " include any person from time to time deriving title under the original landlord, tenant, mortgagee, or mortgagor ; (*g*) . . . the expression " tenant " includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court.

The learned judge decided in favour of the defendants. Although there is no real note of the judgment, just above such note as there is appears the quotation of a *dictum* of MACKINNON, L.J., in *Summers* v. *Donohue* (1) to the following effect ([1945] 1 All E.R. 600) :

> If her mother was a contractual tenant with the plaintiff, then clearly the defendant might claim the benefit of the Act pursuant to the definition of " tenant " in s. 12 (1) (*g*) of the Act of 1920, as being, from the death of the contractual tenant, a member of the tenant's family residing with her at the time of her death.

We were told by counsel that the learned judge, in coming to his decision, applied that *dictum*. The *dictum*, however, in its generality is, in my view, inconsistent with a decision of this court, given after the county court judge's decision in the present case, in *Thynne* v. *Salmon* (2). There a tenant had died intestate, and at that time the contractual tenancy was subsisting. Letters of administration were granted to his sister L., who had never resided with him, but another sister, S., was residing with the tenant at the time of his death and had so resided since the beginning of the tenancy. L. did nothing to create a tenancy between herself and the other sister, S. The landlord served a notice to quit on L., and on its expiry applied for possession against S., and it was held ([1948] 1 All E.R. 49) by TUCKER, L.J., and ROXBURGH, J., (BUCKNILL, L.J., dissenting), that para. (*g*) :

. . . did not apply where the tenancy which was vested in a contractual tenant at his death had passed by his will or on his intestacy to some person other than his widow or a member of his family residing with him at the time of his death; and, therefore, S. was not entitled to the protection afforded by para. (*g*).

TUCKER, L.J., in his judgment, pointed out that, if there is a relative who comes within the words of the definition in para. (*g*), assuming "tenant" to cover a contractual tenant, and there is also someone in whom the contractual tenancy has vested under a grant of letters of administration or under a will, there are two tenants, both, presumably, liable to pay the rent and entitled to possession of the house, and so on. That is an impossible position and one which the legislature cannot have contemplated. TUCKER, L.J., said (*ibid.*, 51):

> I think the true view is, that, if possible, an interpretation must be given to this paragraph which will not run counter to all existing legal conceptions. There is no difficulty in finding such an interpretation. The language is clearly applicable where the deceased tenant was at the date of his death a "statutory" tenant. Such a tenant cannot transmit his purely personal right either by assignment or by will. Accordingly, on his death there is nothing which can vest in any one, and but for para. (*g*) his widow or other member of his family residing with him would be trespassers if they remained in occupation of the premises. Whether para. (*g*) may apply in the case of a contractual tenant on whose death no executor or administrator is ever appointed, it is not necessary to decide.

In my view, the reasons which led TUCKER, L.J., to that conclusion on the facts of that case lead to the conclusion in the present case that this appeal must succeed. Counsel for the defendants argued that the two defendants ought to be regarded as becoming statutory tenants as at the date of the mother's death. I think that there is a difficulty about that conception at the outset because it is not suggested that death automatically ends the contractual tenancy. Nobody at that moment can know whether letters of administration may not be taken out, and the landlord who wishes to bring an end to the contractual tenancy which is subsisting at the time of the death must serve a notice to quit in order to bring it to an end. I also think that if, as may happen in other cases, letters of administration are taken out at a later period, then one is in exactly the same position as in *Thynne* v. *Salmon* (2). I think, therefore, that the reasons which led TUCKER, L.J., to his conclusion really lead to the same conclusion in this case. I think there is something to be said for the view that, once one comes to the conclusion, as I do, that the notice to quit served on the President was a valid, effective and proper notice to bring the contractual tenancy to an end, this case is actually covered by *Thynne* v. *Salmon* (2). There was, of course, a dissimilarity in the sense that one cannot say that at any moment there were two tenants liable for the rent because the President of the Probate, Divorce and Admiralty Division clearly was not liable for the rent, but I think the reasoning of the decision to which I have referred leads to the conclusion that this appeal must succeed.

If I may say one word on the construction of s. 12 (1) (*g*), it seems to me that one should restrict the word "tenant" to cases in which there is no right of tenancy which can be left by will or descend on intestacy. That construction leads to no difficulties, whereas, if it is sought to apply the paragraph to a case where there is a contractual tenancy subsisting at the date of the death, difficulties at once arise. Counsel for the defendants referred to the fact that in *Thynne* v. *Salmon* (2) an argument was based on the fact that by s. 1 of the Rent Restrictions Act, 1935, the words "dying intestate" which originally occurred twice in para. (*g*) after the word "tenant" were removed. That argument, no doubt, was considered when *Thynne* v. *Salmon* (2) was decided, and it seems to me that it cannot be raised now on the issue which we have to decide in the light of the decision in that case. I, therefore, think that this appeal must be allowed.

COHEN, L.J.: I agree that the question raised in this case, which was specifically reserved by my brother TUCKER in his judgment in *Thynne* v. *Salmon* (2), is really covered by the reasoning which led him to his conclusion in that case. In the sentence which immediately follows the passage which my brother SOMERVELL read, TUCKER, L.J., says (*ibid.*, 51):

> It is, in my view, sufficient to say that it [para. (g)] cannot apply where the tenancy which is vested in a contractual tenant at his death has passed by will or on an intestacy to

some person other than his widow or member of his family residing with him at the time of his death, but that it clearly does apply where the deceased tenant was a "statutory" tenant unable to transmit his statutory interest.

It is true that my brother TUCKER had not in mind the President of the Probate, Divorce and Admiralty Division when he talked of "some other person." It seems to me that logically there is no distinction for this purpose between the position of the President and that of any other person in whom the tenancy is vested. It is plain that under the Administration of Estates Act, 1925, s. 9, this tenancy vested in the probate judge. It is not necessary to consider how far he incurred any liability in respect thereof. I should think, as my brother SOMERVELL said, he incurred no financial responsibility, but, none the less, it seems to me that the property was vested in him and it is inconsistent with the property vesting in him that there should be a statutory tenancy in the defendants. I also agree with my brother SOMERVELL that the notice which was served on the probate judge was valid. That being so, it seems to me impossible to hold that the defendants can claim protection under the Rent Restrictions Acts. They are clearly not persons entitled within s. 12 (1) (*f*) and equally, in my view, they are not entitled to the benefit of s. 12 (1) (*g*) since the property vested in the President on the death of the mother. For these reasons I agree that the appeal should be allowed.

TUCKER, L.J.: I find it impossible to distinguish this case in principle from the decision of the majority of this court in *Thynne* v. *Salmon* (2), and I agree that the appeal succeeds.

Appeal allowed with costs.

Solicitors: *Neve Beck & Co.*, agents for *J. Frodsham & Sons*, Prescot (for the plaintiffs); *Neve Beck & Co.*, agents for *Joseph Davies*, St. Helens (for the defendants).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Distinguished. MEDITERRANEAN ETC. EXPORT CO., LTD. *v.* FORTRESS FABRICS, LTD. [1948] 2 All E.R. 186.

OWEN *v.* NICHOLL.

[COURT OF APPEAL (Tucker, Somervell and Cohen, L.JJ.), March 19, 1948.]

Arbitration—County court—Reference to registrar—Setting aside award—Misconduct—Admission of evidence not adduced by parties—Knowledge of bankruptcy proceedings of person not party to arbitration — Consultation of registrar by judge—Duty of judge—County Courts Act, 1934 (*c.* 53), *s.* 89.

In proceedings in the county court, in which the sole issue was whether or not the defendant was in partnership with his son, the case, by consent of the parties, under s. 89 of the County Courts Act, 1934, was referred to arbitration by the registrar, who made an award in favour of the plaintiff. The defendant applied to the county court judge to set aside the award on the ground that, in the course of the arbitration, the registrar had wrongfully admitted as evidence the court file of the bankruptcy proceedings of the defendant's son in the same court and, in particular, the evidence given by his son on his public examination. The county court judge adjourned the hearing, consulted the registrar and dismissed the application on the ground that the notes taken at the public examination were not produced before the registrar, the questions he asked the defendant being put from his recollection of what took place at the examination, and no question of the admissibility of the notes therefore arose. The defendant appealed:—

HELD: the use by the registrar of his knowledge of the contents of the file was an introduction in proceedings between parties not concerned in the bankruptcy of evidence not adduced by those parties, and this amounted to misconduct by the arbitrator and the award must be set aside.

Per TUCKER, L.J.: When, in a case of this nature, it becomes necessary for a county court judge to consult the registrar as to what has taken place, it would be desirable, before he gives his actual decision, that the judge should inform the parties of what he has ascertained from the registrar, so as to enable the parties, if necessary, to comment thereon, or, in an extreme case, to tender evidence contrary to what he has been informed or to ask the registrar to make a statement in the presence of the parties as to what took place.

[As to References to Arbitration in County Court Actions, see HALSBURY, Hailsham Edn., Vol. 8, p. 282, para. 574.]

Appeal by the defendant from an order of His Honour Judge Tudor Rees, at Brentford County Court, on May 19, 1947, refusing to set aside an award by the registrar who had admitted evidence not adduced by the parties to the arbitration, *viz.*, his own knowledge of the contents of a file in bankruptcy proceedings in which neither of the parties to the arbitration was concerned. The appeal was allowed and the case sent back for re-trial in another court.

Ashe Lincoln, K.C., and *Stirling Boyd* for the defendant.
Mattar for the plaintiff.

TUCKER, L.J. : This is an appeal from a refusal of His Honour Judge Tudor Rees, sitting at Brentford, to set aside an award of the registrar awarding to the plaintiff the sum of £75 which he had claimed from the defendant. The proceedings started with an action in the High Court claiming £75 in respect of a deposit paid for a consideration which had wholly failed. The proceedings were taken under R.S.C., Ord. 14, leave to defend was obtained, and the action was remitted for trial to the Brentford county court. The sole issue in the proceedings was whether or not the defendant was in partnership with his son, Eric Nicholl. When the case was due for hearing the parties by consent obtained an order referring the claim to arbitration by the registrar under s. 89 of the County Courts Act, 1934, which provides as follows :

> (1) The judge may, with the consent of the parties to any proceedings, order the proceedings to be referred to arbitration (whether with or without other matters within the jurisdiction of the court in dispute between the parties) to such person or persons and in such manner and on such terms as he thinks just and reasonable. (2) No such reference shall be revocable by any party except with the consent of the judge. (3) On any such reference the award of the arbitrator, arbitrators or umpire shall be entered as the judgment in the proceedings and shall be as binding and effectual to all intents as if given by the judge : Provided that the judge may, if he thinks fit, on application made to him at the first court held after the expiration of one week after the entry of the award, set aside the award, or may, with the consent of the parties, revoke the reference or order another reference to be made in the manner aforesaid.

It was under that proviso that application was made to the judge to set aside this award.

The ground of the application appears in one of the documents in the case :

> Take notice that the above named defendant intends to apply to the judge . . . for an order that the award or finding made in this action by the learned registrar . . . be set aside on the ground that the learned registrar wrongfully admitted as evidence in the course of the trial of the issues herein the file of proceedings in the bankruptcy of Eric Nicholl and in particular the evidence given by the bankrupt on his public examination in such proceedings.

On the hearing of the application before the learned judge both parties were represented, and counsel for the defendant complained that during the examination or cross-examination of the defendant on the issue of partnership or no partnership with his son the registrar had sent for the bankruptcy file relating to the son and had consulted it for the purpose of directing questions to the defendant. That complaint was made in the presence of counsel for the plaintiff, and the learned judge, having heard that statement, adjourned the application for a few days, telling the parties to return and bring their witnesses with them in case he decided to re-hear the matter. On the parties attending again the learned judge gave his decision to the effect stated in the notes which we have, *viz.* ;

> The notes taken at the public examination were not produced before the registrar. The questions he put to the defendant were put from his recollection of what took place at the examination, and no question of the admissibility of the notes arises. Application dismissed. Costs " A."

It is clear that in the interval the learned judge must have consulted the registrar and this represents the result of what he was informed.

In effect, the application to the learned judge was an application to set aside an award on the ground of what is technically called misconduct on the part of an arbitrator. In my opinion, it would be misconduct within the meaning of that word as used in relation to arbitrations if the arbitrator introduced into the proceedings evidence other than that adduced by the parties, and it would have been introducing such evidence to put a file relating to the bankruptcy of the son in evidence or to make use of it. There would be many objections to that. One would be that the evidence of what the son had said was no evidence against the father, and also it would be introducing evidence which had not been tendered by either side. I think there would be the same objection if the arbitrator brought about the same result without actually consulting the file but by making use of his knowledge of its contents in the course of proceedings between parties who were not concerned in the bankruptcy. Having read the learned judge's note and having been informed by counsel for the defendant, who was present before the learned registrar and before the learned judge, of what transpired in the previous proceedings, I have come to the conclusion that what took place before the registrar is sufficient to require that his award should be set aside. It was an excusable slip for him to have made. He had been the registrar in the son's bankruptcy and it is very difficult not to allow one's knowledge, acquired in such a capacity, to influence one, but it is very necessary, when a person in the position of a judge finds himself in that situation, that he should be careful to avoid making use of any knowledge which he has acquired in a different capacity. I think, also, that when an unfortunate controversy of this kind arises which necessitates the learned judge consulting the registrar as to what has taken place, it would be desirable that the judge should inform the parties of what he has ascertained from the registrar before he gives his decision so as to enable the parties, if necessary, to comment thereon, or even, I suppose, in an extreme case, to tender evidence contrary to what he has been informed or ask the registrar to make a statement in the presence of the parties about what took place. Neither of those courses was taken in the present case and, in all the circumstances of this rather unusual appeal, I think the registrar's award must be set aside and that there must be a new trial of this action in a different county court.

SOMERVELL, L.J.: I agree.

COHEN, L.J.: I also agree.

Appeal allowed. Retrial ordered. Costs of the first trial and of the appeal to be in the discretion of the judge at the second trial.

Solicitors: *Alwyn Williams & Co.* (for the defendant); *Amery-Parkes & Co.* (for the plaintiff).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Re VISCOUNT ROTHERMERE (*deceased*).

MELLORS BASDEN & CO. *v.* COUTTS & CO.

[CHANCERY DIVISION (Wynn-Parry J.), March 8, 1948.]

Administration—Practice—Payment out of court to creditors—Fund exceeding £1,000—*No order for further consideration—Summons in chambers—Jurisdiction—R.S.C., Ord.* 55, *r.* 2, *sub-r.* (1).

Where, under an order for administration in a creditor's action, the master has made his certificate limited to debts only with the consequence that further consideration is not available, there is jurisdiction on summons in chambers to order distribution among creditors out of a fund in court which exceeds £1,000, as the administration order and the master's certificate may be read together as being an order declaring the rights of the creditors as parties entitled to the fund in court within the meaning of R.S.C., Ord. 55, r. 2, sub-r. (1).

[AS TO PAYMENT OUT OF COURT UNDER R.S.C., ORD. 55, r. 2 (2), see HALSBURY, Hailsham Edn., Vol. 26, p. 110, para. 218; and FOR CASES, see DIGEST, Practice, pp. 722-724, 726, Nos. *3107-3118*, *3126*.]

Cases referred to :
(1) *Re Terry, Terry* v. *Terry*, [1929] 2 Ch. 412 ; 98 L.J.Ch. 436 ; 141 L.T. 536 ; Digest : Practice, 726, *3126*.
(2) *Van Kamp* v. *Bell*, (1818), 3 Mad. 430.
(3) *Re Brandram*, (1883), 25 Ch.D. 366 ; 53 L.J.Ch. 331 ; 49 L.T. 558 ; 43 Digest 812, *2543*.

Chamber Summons.*

An order for administration of the estate of the above-named testator was made at the instance of a creditor on June 13, 1941. The order was in common form directing the usual accounts and inquiries, ordering application of the testator's property in payment of his debts and funeral expenses, with consequential provisions for sale and payment of proceeds into court and adjourning further consideration. During the course of administration the major part of the testator's property was realised and the proceeds were lodged in court pursuant to the order. It was doubtful whether the estate of the testator would be sufficient for payment of his debts. The master, with the leave of the judge and at the request of the parties, made his certificate on Nov. 25, 1947, limited to ascertaining the amounts due to creditors and for funeral expenses. (The latter had, however, already been paid). In view of the length of the delay, which, it was anticipated, would elapse if distribution was deferred until the estate had been fully realised, the plaintiff creditor issued a summons for immediate payment of an interim dividend of 17*s*. 6*d*. in the pound, to the creditors ascertained by the master's certificate, and for taxation and payment of costs up to the date of the summons. The master adjourned the summons to the judge in chambers.

Wilfrid M. Hunt for the plaintiff creditors.
Winterbotham for the defendants (executors).

WYNN-PARRY, J. : The only point that arises for consideration in this case is one of procedure, namely, whether there is jurisdiction to deal with the application in chambers, for it is plain that " the court has no further or other power of making an order of the kind asked for [payment out of court] on an adjourned summons in court than it would have if the summons remained in chambers " : *per* Clauson, J., in *Re Terry* (1) ; and a *fortiori* the converse is equally true. This case is of additional assistance in dealing with an application of the kind I have to consider here, as in an earlier passage of his judgment ([1929] 2 Ch. 415) the learned judge enunciates the angle of approach in the proposition that " the primary practice of the court is to order funds to be paid out of court only upon the hearing—whether the original hearing or the hearing on further consideration—of an action or on a petition, and that if an order for payment of funds out of court is to be made otherwise than on the hearing of the action or on petition, that order will be irregular, unless something is found in the rules which authorises the making of such an order."

Normally, an administration action terminates by an order on further consideration, which order in the case of an insolvent estate may be made in chambers : Ord. 55, r. 2 sub-r. 16 ; and this is the usual practice. Procedure, however, by way of further consideration is not available here, as further consideration is only applicable where the master has made a general certificate answering all the accounts and inquiries directed by the order. If any accounts, etc., are outstanding, the condition on which further consideration was adjourned has not been completely carried out, with the result that any order involving distribution out of funds in court can only be obtained on petition, unless process by summons is permissible : see Daniell's Chancery Practice, vol. I, pp. 1000, 1009 ; *Van Kamp* v. *Bell* (2). Process by summons is permissible if the fund does not exceed £1,000 in value : Ord. 55, r. 2, sub-r. (2) ; or—without limitation of amount—if there has been a judgment or order declaring the rights of the parties : *ibid*., sub-r. (1).

In this case I am invited to say that the order for administration, taken in conjunction with the master's certificate, has the effect of an order declaring rights within the meaning of the sub-rule. I accept the view that rights may be declared either expressly or by implication; also that a declaration is not necessarily to be contained within the four corners of a single document—it may, *e.g.*, arise as a consequence of one or more orders read together—a proposition that emerges from the decision of BACON, V.-C., in *Re Brandram* (3). My attention has been drawn to a statement (for which no authority is quoted) in the 1946-47 edition of the ANNUAL PRACTICE, at p. 1136, that a master's certificate in answer to an inquiry, when binding, is equivalent to an order declaring rights. Without being attracted by the use of the word "equivalent," which I suggest is not a very apt expression for describing something so positive as what the sub-rule specifically refers to as a declaration, and without necessarily subscribing to the accuracy of this statement in all its possible implications, I have come to the conclusion that in the particular circumstances of this case I am entitled to treat the order for administration, coupled with the master's certificate, as together amounting to an order within the meaning of the sub-rule declaring the ascertained creditors of the testator as being the parties entitled to participate in the funds in court, since such funds represent the realised proceeds of sale of the testator's property in respect of which the order directed payment thereout of the testator's debts in a due course of administration.

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* Reported by leave of the judge on a note prepared by Master Mosse and approved by His Lordship.

I will, therefore, make an order for payment of an interim dividend to the creditors named in the master's certificate, but, having regard to the evidence, limited to 15*s*. in the pound, and also for taxation and payment of the costs of the action up to the date of this application. The costs of the defendants, the executors, to be taxed as between solicitor and client; the costs of the plaintiff creditors to be taxed as between solicitor and client and also as between party and party, and to be paid on the party and party basis now with liberty to ask on further consideration for payment of the difference between the two bases of taxation should the estate prove to be insolvent.

Solicitors: *Roney & Co.* (for the plaintiffs); *Radcliffes & Co.* (for the defendants).

R.D.H.O.

HASTINGS & FOLKESTONE GLASSWORKS LTD. *v.* KALSON.

[SUSSEX WINTER ASSIZES (Oliver, J.), March 22, 1948.]

Company—Director—Vacation of office—Conviction of "indictable offence"—Unauthorised dealing in gold—Breach of Defence Regulations—Offence triable summarily or on indictment—Summary conviction.

A company's articles provided that a director "convicted of an indictable offence" should vacate his office and be disqualified from holding the position of co-manager. The defendant, a director and co-manager of the company, pleaded Guilty before a court of summary jurisdiction to a charge of unauthorised dealing in gold contrary to the Defence (Finance) Regulations, 1939, reg. 4, and was convicted and fined. By reg. 5 the offence was punishable under reg. 92 (1) of the Defence (General) Regulations, 1939, which provides that a person contravening or failing to comply with any of the regulations shall "(*a*) on summary conviction, be liable to imprisonment . . . or to a fine . . . or to both . . . or (*b*) on conviction on indictment, be liable to imprisonment . . . or to a fine . . . or to both . . ." The company claimed a declaration that the defendant was disqualified from acting as a director and that his employment as co-manager had determined and an injunction restraining him from purporting to act as a director or as a co-manager:—

HELD: as the offence was dealt with throughout as a summary offence in a court of summary jurisdiction the defendant could not properly be described as having been "convicted of an indictable offence," and, therefore, the declaration and injunction should be refused.

[AS TO REG. 92 (1) OF THE DEFENCE (GENERAL) REGULATIONS, 1939, see HALSBURY'S STATUTES, Vol. 39, p. 1069.]

Action by a company for a declaration that the defendant was disqualified from acting as a director of the company and that his employment as co-manager had determined and for an injunction restraining him from purporting to act as director or co-manager, on the ground that he had been "convicted of an indictable offence." The defendant had been convicted by a court of summary jurisdiction of an offence against the Defence Regulations, which was triable summarily or on indictment. The declaration and injunction were refused.

George Pollock for the company.
Gerald Thesiger for the defendant.

OLIVER, J.: Article 26 of the plaintiff company's articles of association provided that a director "convicted of an indictable offence" should vacate his office. Another article provided that in such an event he should also be disqualified from holding the position of co-manager. The question in this case involves the correct interpretation of the phrase "convicted of an indictable offence."

The defendant, who was a director and co-manager of the company, had sold 150 sovereigns and on Oct. 15, 1947, he was convicted by a court of summary jurisdiction at Bow Street of an offence against reg. 4 of the Defence (Finance) Regulations, 1939, which prohibited unauthorised dealing in gold. He pleaded Guilty, and was fined £200 and ordered to pay £20 costs, and 120 of the sovereigns, which had been recovered, were confiscated. The company asks for a declaration that the defendant is disqualified from acting as a director and that his employment as co-manager of the company has determined and an injunction restraining the defendant from purporting to act as director or co-manager. Counsel for the company says that "convicted of an indictable offence" can only mean "convicted in any court of an offence which could have been made the subject of an indictment." He says that the moment one looks at a provision which says that in any circumstances an offence is indictable, for all purposes and at all times, no matter how, in fact, it is dealt with, if there is a conviction it has to be treated as a conviction of an indictable offence.

The offence in question is punishable under reg. 92 (1) of the Defence (General) Regulations, 1939, which reads as follows:

> If any person contravenes or fails to comply with any of these regulations . . . he shall . . . (*a*) on summary conviction, be liable to imprisonment for a term not exceeding three months or to a fine not exceeding £100, or to both such imprisonment and such fine, or (*b*) on conviction on indictment, be liable to imprisonment for a term not exceeding two years or to a fine not exceeding £500, or to both such imprisonment and such fine.

The offence is, therefore, punishable either before a court of summary jurisdiction or on indictment. Counsel for the company strongly stressed in his argument that in sched. II to the Criminal Justice Act, 1925, one finds words which, if they applied to this case, would be very strongly in his favour. The schedule is headed: "Indictable offences by adults which may be dealt with summarily." That is express statutory authority for justices to deal summarily with certain indictable offences, but that is an entirely different thing from a regulation which, without specifying the particular offence, provides that a breach of the regulations "shall be punishable either on summary conviction or on indictment." That distinction, relied on by counsel for the defendant, is of importance, because, whereas the offences in sched. II to the Act of 1925 are in terms indictable offences, triable and punishable summarily, this is an offence which can be prosecuted in one of two ways, and, if dealt with in one way, is not an indictable offence, or, at any rate, is not so to be treated.

During the argument I expressed considerable doubts as to what the position would have been in this case if the defendant had not pleaded Guilty, there had been a trial, and, summary proceedings having been embarked on, facts had emerged which would have induced the justices to say: "This case is much too serious. We are going to send it for trial." It is doubtful whether up to the point of conviction this could not still have been said to be an indictable offence, because there might have been an indictment in respect of it, but I cannot see how that can be so after a court of summary jurisdiction has adjudicated and convicted. It never had been treated then as an indictable offence. It had proceeded as a summary offence and it was a summary conviction. If, after that conviction, anyone had attempted to take proceedings in respect of the same matter by way of indictment, those proceedings would have been met at once by the complete bar of a plea of *autrefois convict.*

Counsel for the defendant has pointed out that, if the argument put forward by counsel for the company is correct, the failure to put up a small piece of "black-out" and permitting a ray of light to show through a window during the war could have been described as an indictable offence, but that absurdity, in my view, is not conclusive on the question of interpretation. Regulations may have ridiculous results. I have come to the conclusion that the defendant could never properly be described as having been convicted of an indictable offence, because by the time he was convicted the offence had ceased to be indictable. For these reasons, there will be judgment for the defendant, with costs.

Declaration and injunction refused with costs.

Solicitors: *Herington, Willings & Penry-Davey*, Hastings (for the company); *Menneer, Idle & Brackett*, St. Leonard's-on-Sea (for the defendants).

[We are indebted to the courtesy of counsel for the material for this report. *Ed.*]

Re DICKSON.

[COURT OF APPEAL (Scott, Bucknill and Asquith, L.JJ.), February 17, 18, 19, 20, March 24, 1948.]

Local Government—Audit—Surcharge—Powers of district auditor—Fraud by company—Surcharge on managing director—Local Government Act, 1933 (*c.* 51), *s.* 228 (1) (*d*).

A company overstated the time it had spent on work for a local authority, and, as a result, large overpayments were made by the authority. The district auditor estimated the amount of loss to the authority and purported to surcharge therewith, under the Local Government Act, 1933, s. 228 (1) (*d*), the company's managing director owing to whose misconduct the overstatement was alleged to have been made.

HELD: on the true construction of s. 228 (1) (*d*) the district auditor had no power to surcharge anyone who was not a member, officer, or servant of the authority whose accounts were being audited.

Decision of the Divisional Court, sub nom. Re a Decision of a District Auditor ([1947] 2 All E.R. 47), *affirmed.*

[AS TO POWERS AND DUTIES OF AUDITOR, see HALSBURY, Hailsham Edn., Vol. 21, pp. 223,224, para. 415; and FOR CASES, see DIGEST, Vol. 33, pp. 19-21, Nos. *76-86.*]

Cases referred to:

(1) *R.* v. *Roberts*, [1908] 1 K.B. 407; 77 L.J.K.B. 281; 98 L.T. 154; 72 J.P. 81; 33 Digest 40, 217.

(2) *Roberts* v. *Hopwood*, [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; *revsg. S.C. sub nom. R.* v. *Roberts, Ex. p. Scurr*, [1924] 2 K.B. 695; 33 Digest 20, *83*.

(3) *Davies* v. *Cowperthwaite*, [1938] 2 All E.R. 685; 159 L.T. 43; 102 J.P. 405; Digest Supp.

APPEAL by a district auditor from an order of the Divisional Court (LORD GODDARD, C.J., ATKINSON and OLIVER, JJ.), dated May 12, 1947, and reported [1947] 2 All E.R. 47, allowing an appeal under the Local Government Act, 1933, s. 229 (1), against a surcharge made by him on one Dickson. The Court of Appeal dismissed the appeal. The facts appear in the judgment of the court.

Pritt, K.C., and *H. B. Williams, K.C.*, for the district auditor.

J. Scott Henderson, K.C., and *H. G. Garland* for Dickson.

Cur. adv. vult.

Mar. 24. **ASQUITH, L.J.**, read the following judgment of the court. This is an appeal by the district auditor of the London district against a judgment of the Divisional Court whereby that court quashed a surcharge made by the auditor on a Mr. Dickson under the Local Government Act, 1933, s. 228. That Act provides by s. 219:

> The following accounts shall be subject to audit by a district auditor under this part of this Act, that is to say—(*a*) the accounts of every county council . . .

Section 220 provides :

> (1) The Minister [of Health] may, with the consent of the Treasury, appoint such number of district auditors as he thinks necessary for the performance of the duty of auditing the accounts which are for the time being by law subject to audit by district auditors . . .

The appellant was appointed a district auditor, and acted in respect of the accounts of the London County Council under these provisions. Section 223 provides :

> All accounts which are subject to audit by a district auditor shall be made up yearly to Mar. 31, or to such other date as the Minister may . . . direct, and shall be audited as soon as may be thereafter.

Then follow detailed provisions as to the procedure for audit. Mr. Dickson was at all material times managing director of a private limited company, Hortensia Garages Ltd., in which he owned all the shares but one. The company was at all material times party to a contract with the L.C.C. under which the company undertook to perform repairs to certain vehicles damaged in air-raids. The contract, which was made in September, 1939, and continued in operation till Sept. 29, 1943, was a " cost *plus* percentage " contract, under which the remuneration of the company was to be ascertained by adding a percentage (at first of 147% and later of 157½%) to the company's wages bill incurred in respect of the repairs in question, the L.C.C. supplying the necessary materials. It is obvious that a company with such a contract is in a position, if it chooses to be fraudulent, to extract far more than is due to it by overstating the amount of its wages bill. The district auditor conducted an audit or a succession of audits of the L.C.C.'s accounts under the powers conferred on him by the Local Government Act, 1933 (to the relevant provisions of which we have referred already and refer more fully below). The first audit was the ordinary audit for the year ended Mar. 31, 1942. Then followed an " extraordinary audit " (that is, an audit not ending on Mar. 31) for the period Apr. 1, 1942, to Dec. 31, 1943, since merged in the ordinary audit for the years ended Mar. 31, 1943, and Mar. 31, 1944, so that the district auditor had before him all the transactions relating to this contract falling within the three years ended Mar. 31, 1944. As the result of this series of investigations he came to the conclusion that, owing to the misconduct of Dickson, the wages bill of Hortensia Garages Ltd. during the period covered by the contract had been fraudulently inflated to such an extent that the L.C.C. had been induced to pay to the company at least £20,000 more than they owed it. He proceeded to " surcharge " Dickson with this amount under the Local Government Act, 1933, s. 228. Under s. 229, Dickson successfully appealed to the Divisional Court against this surcharge. From the decision of that court the district auditor now appeals. Dickson was, in fact, prosecuted and convicted at the Central Criminal Court in respect of some of the transactions, the subject-matter of the surcharge. This would not, in our view, amount to *res judicata* in respect of any issue in the present proceedings, much less in respect of the only issue on which we propose to decide this appeal. For the purposes of that issue the question of his guilt or innocence is irrelevant.

The sole ground on which the Divisional Court proceeded in quashing the surcharge was the construction which that court placed on the relevant provisions, and especially on s. 228, of the Local Government Act, 1933. If its decision on this point is well founded, no other question arises and the appeal fails. If that decision is wrong, other complex questions arise. We, therefore, deal first with this " point of construction." The provision primarily to be construed is s. 228, which provides :

> (1) It shall be the duty of the district auditor at every audit held by him—(*a*) to disallow every item of account which is contrary to law ; (*b*) to surcharge the amount of any expenditure disallowed upon the person responsible for incurring or authorising the expenditure ; (*c*) to surcharge any sum which has not been duly brought into account upon the person by whom that sum ought to have been brought into account ; (*d*) to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred ; (*e*) to certify the amount due from any person upon whom he has made a surcharge ; (*f*) to certify at the conclusion of the audit his allowance of the accounts, subject to any disallowances or surcharges which he may have made . . .

The provisions as to appeal are made by s. 229 which, so far as relevant to this case, reads : " (1) Any person . . . aggrieved by a . . . surcharge made by a district auditor may . . . appeal to the High Court . . ." In surcharging Dickson, the district auditor was acting on his interpretation of s. 228 (1) (*d*), and the " point of construction " shortly is whether the power to surcharge conferred by sub-s. (1) (*d*) of s. 228 can be exercised in relation to the " negligence or misconduct " exclusively of servants, officers and members (hereinafter called for short collectively " members ") of the local authority the accounts of which the district auditor is auditing, or whether, on the other hand, it can be exercised also in relation to the negligence or misconduct of a class of persons wider than this, and wide enough to include Dickson. Dickson was, it should be noted, not merely not a member of the L.C.C. He was not even a person in contractual relations with that council. He was managing director of, and majority shareholder in, a limited company which was in contractual relations with the L.C.C. That was the full extent of his legal " proximity " to the council.

There are curiously few cases decided on the meaning of s. 228 of the Local Government Act, 1933, and those few shed little or no light on the point of construction involved in this appeal. Section 228 (1) was superimposed on a very similar provision, namely, s. 247 (7) of the Public Health Act, 1875, and on the construction of that section there are at least two important authorities. As the decision of the Divisional Court now under review proceeded in part on a comparison of these two provisions and on a consideration of the cases decided on the earlier one, it will be convenient, first, to set out the terms of that earlier sub-section so far as material. Section 247 of the Act of 1875 provided :

> (7) Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment ; and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person, and shall in every such case certify the amount due from such person ; and on application by any party aggrieved shall state in writing the reasons for his decision in respect of such disallowance or surcharge, and also of any allowance which he may have made.

The cases decided under this subsection were two. The first was *R.* v. *Roberts* (1), in which the Court of Appeal decided by a majority that " persons accounting " within the material provision extended to, but (as we read the decision) not beyond, members of the local authority whose accounts were being audited by the district auditor. FLETCHER MOULTON, L.J., who delivered a dissenting judgment, was of opinion that " persons accounting " did not extend so far, but covered only the " person " " bringing accounts into audit," namely, in that case the local authority itself. In *Roberts* v. *Hopwood* (2) the House of Lords had occasion to consider a similar question under a different limb of the same subsection, and LORD SUMNER ([1925] A.C. 601) expressed the view (in what we suppose must be taken as a *dictum*) that the minority view of FLETCHER MOULTON, L.J., was wrong. At all events, this decision of the House of Lords cannot be treated as questioning in any way the decision of the majority in *R.* v. *Roberts* (1). These were the only material decisions under the Public Health Act, 1875, s. 247 (7).

We proceed to compare the language of the material part of that section with that of the corresponding part of s. 228 of the Act of 1933, which we have already quoted *in extenso*. It will be noted that in the main s. 228 (1) of the Act of 1933 is a mere re-arrangement of s. 247 (7) of the Act of 1875, the provisions contained in the latter in a single sentence being split up into distinct and separately lettered paragraphs and the topics being dealt with in a slightly different order. The words in the 1875 provision corresponding to those which have to be construed in the present case are :

> Any auditor acting in pursuance of this section shall . . . *charge* against *any person accounting* the amount of any deficiency or loss incurred by the negligence or misconduct of that person . . .

The parallel provision in s. 228 (1) of the Act of 1933 reads :

> It shall be the duty of the district auditor . . . (*d*) To *surcharge* the amount of any loss or deficiency upon *any person* by whose negligence or misconduct the loss or deficiency has been incurred.

It will be observed that in this provision (i) " charge " in the earlier Act becomes " surcharge " in the later, and (ii) " any person accounting " becomes simply " any person." It was argued for the district auditor both here and in the Divisional Court that the omission of the word " accounting " was intended to extend liability under this head from members of the local authority to whom it had been held to apply in *R.* v. *Roberts* (1) to a wider class which would include persons in the position of Dickson. What other point, it was asked, could there be in omitting what is on the face of it a qualifying or limiting epithet than to broaden the class involved ? The Divisional Court dealt with this argument in this way ([1947] 2 All E.R. 50) :

> In our view, in all probability the word " accounting " was omitted from the 1933 Act to negative the strict interpretation put on the words by FLETCHER MOULTON, L.J., and to make it clear that the interpretation of the MASTER OF THE ROLLS and FARWELL, L.J., was intended by Parliament. It is unthinkable that Parliament intended by the omission of a single word to make so startling and drastic a change in the law . . .

as to extend liability to persons completely *dehors* the personnel of the local authority.

The Divisional Court, for this reason principally, held that the class of persons affected was not enlarged by the Act of 1933 beyond the class of " members," and that, as Dickson fell outside that class, there was no power to surcharge him. With this conclusion we agree. It is, indeed, " unthinkable," to quote the language of the Divisional Court, that the draftsman of this section had not in mind the wording of the corresponding section of the Public Health Act, the case of *R.* v. *Roberts* (1) decided under it, and the different constructions placed on that provision by the majority and minority of the Court of Appeal. A narrow construction had been placed by the minority on the class of persons affected and the presence of the word " accounting " had been relied on in support of the minority view. Hence that word which had proved ambiguous was dropped. The following further considerations appear to us to support the Divisional Court's conclusion—(A) The change from " charge " to " surcharge." " Surcharge " is a curiously inappropriate expression—more inappropriate than " charge "—for an operation whereby someone, a stranger to the council whose accounts are being audited, is to be compelled to make good the loss which the council has suffered owing to that stranger's negligence or misconduct. The typical (though not the only) use of the term " surcharge," which is not defined in the Act, is that given in the OXFORD ENGLISH DICTIONARY under meaning 1 (*c*) : " A charge made by an auditor upon a public official in respect of an amount improperly paid by him "—a very different thing from a charge or levy made on a member of the outside public who is the wrongful recipient or causative agent of such a payment. True, s. 228 (1) (*d*) must be assumed to add something to the meaning we have suggested as typical, and which finds expression in s. 228 (1) (*a*) and (*b*). What sub-s. (1) (*d*), in our view, adds is this. It extends the class of transactions which may attract a surcharge, not the class of persons subject to the district auditor's surcharging jurisdiction. Its effect is simply that members of the council may not only be compelled to refund (as under sub-s. (1) (*a*) and (*b*)) payments made by them and disallowed as " contrary to law," but may also be compelled to make good loss, etc., suffered by the council owing to their negligence or misconduct as such members, a good instance of which is afforded by one of the very few cases decided since and under the 1933 provision : *Davies* v. *Cowperthwaite* (3). In that case councillors were surcharged with the amount of legal costs incurred by the council as a consequence of the councillors in question acting in opposition to legal advice tendered to them by the clerk to the council, the soundness of which, as legal advice, they did not doubt or challenge. This was adjudged " misconduct " within sub-s. (1) (*d*). (B) " Any person " cannot, on any view, be read literally and without limitation. Loss would be caused to the council if a lorry belonging to it were damaged by being negligently driven into by X, a stranger. No one would suggest, and certainly counsel for the district auditor disclaimed the suggestion in this court and below, that the auditor could in that event " surcharge " X in respect of the loss, although that loss might be reflected in the council's accounts. Nor is it suggested that the auditor could " surcharge " any outside person contracting with the council whose breach of contract, without more, caused the council loss. (In both of these cases, incidentally, the council would have a perfectly good remedy at common law for damages, without any intervention by the district auditor). Unless, therefore, " any person " is impliedly limited to persons who are members of the council (in which expression, we repeat, we include its officers and servants) what limit is to be placed on the expression ? To this question we do not think counsel for the district auditor propounded any satisfying answer. In the court below it was argued that " any person " meant any person who stands " in a relation to the local authority which calls on him for diligence and good conduct on some special ground other than the general duty resting on all members of the community," and in this court that the person must stand to the local authority in a relation out of which the law will spell some special obligation of honesty or disclosure. To read into the paragraph a qualification at once so vague and so complex, would, in our view, be to rewrite it. Even as so re-written, would it apply to Dickson ? It was conceded that the suggested formula would not cover any and all persons having a contract with a local authority. The contention was that it would cover persons having with the local authority a " cost *plus* percentage " contract involving a contractual duty to state accurately the " cost " incurred. Even if this were so, the fact remains that Dickson was not in contractual relations with the council at all. He was, indeed, bound in tort not fraudulently to misrepresent the *quantum* of the cost, nor to procure his company, nor conspire with it, to make such a fraudulent misrepresentation, nor to induce a breach of contract by the company which such a misrepresentation might involve. These are torts, and the obligation not to commit torts is a general duty resting on all members of the " community " within the formula suggested by counsel for the district auditor, which excludes from the expression " any person " and, therefore, from liability to surcharge, a person on whom such a " general duty " and no more, reposes. Moreover, (though this is not conclusive) for all such acts the common law provides the local authority as against such a person with an adequate cause of action in tort for deceit, conspiracy, or procurement of breach of contract as the case may be, without recourse to the machinery of s. 228. Some attempt was made to argue that a merely moral duty owed by an outsider might bring him within the operation of the sub-section, or that Dickson must be treated as the *alter ego* of the company and identified with it, but we found both of these arguments unconvincing.

We would add that neither of the two cases decided under the 1933 provision—*Davies* v. *Cowperthwaite* (3) and *Re Hurle Hobbs, Ex p. Raley* (unreported)—shed any light, direct or indirect, on the only issue we are considering, namely, that of the liability to surcharge of non-members of the local authority. We, therefore, feel bound to dismiss the appeal on the point of construction, which concludes the matter against the district auditor, and we find it unnecessary to decide questions argued at some length before us, questions of great interest as to what, if Dickson had been subject to the surcharge jurisdiction, was the prescribed procedure for the inquiry held by the district auditor, whether that procedure impliedly included certain requirements of natural justice, and whether, with or without such added requirements, it was, in fact, complied with in this case.

Appeal dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.* (for the district auditor) ; *Alfred C. Warwick & Co.* (for Mr. Dickson).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

R. v. WEST. R. v. NORTHCOTT.
R. v. WEITZMAN. R. v. WHITE.

[Court of Criminal Appeal (Lord Goddard, C.J., Humphreys and Singleton, JJ.), March 8, 9, 10, 11, 15, 16, 22, 1948.]

Criminal Law—Conspiracy—Indictment—Three separate conspiracies charged in one count—One count charging several prisoners with conspiring together to contravene, between 1940 *and* 1946, *Orders made under Defence* (*General*) *Regulations,* 1939, *for control of toilet preparations—Material alterations of the law between relevant dates.*

The four appellants, who were all connected with a company dealing in toilet preparations, were charged together, on an indictment containing one count, with conspiracy to contravene the Defence (General) Regulations, 1939, reg. 55, in that between June 6, 1940, and Jan. 21, 1946, they had conspired together to contravene Orders made by the Board of Trade for the control and limitation of the manufacture and supply of toilet preparations by acquiring a quota for the company to manufacture and supply preparations in excess of that to which they were lawfully entitled and by manufacturing and supplying preparations in excess of any quota to which they were entitled. Regulation 55 empowers any competent authority to provide by Order for, *inter alia*, prohibiting the distribution, use and consumption of articles of any description, and, by reg. 92 (1), it is provided that, if a person contravenes any such Order, he shall be guilty of an offence against the regulation under which the Order is made, while reg. 90 provides, *inter alia*, that any person who conspires with any other person to commit an offence against any of the regulations shall be guilty of an offence against that regulation. The first Order alleged to have been contravened was dated June 6, 1940, and during 1940 and 1941 a number of further Orders on the same subject were made, but they did not substantially alter the law. The law was, however, substantially altered by Orders dated Oct. 27, 1941, and Aug. 23, 1943. The prosecution alleged that there had been breaches by the company of each of these three Orders and that the appellants were knowing participants in these breaches. It was contended on behalf of the appellants that there could not be one conspiracy existing at any time which included an agreement to break laws which did not then exist, and that the case for the prosecution must involve three separate conspiracies which should be charged in three separate counts :—

Held : (i) the effect of the indictment was to charge a conspiracy to contravene the law as to control which must mean the existing law, *i.e.*, the law which would be known to the conspirators and was the law of the country at the time the conspiracy was formed. An agreement to disobey any future law which might be made on the same subject and with the same object would not amount to an indictable conspiracy.

Definition of conspiracy in Quinn v. *Leathem* ([1901] A.C. 495, 528 ; 85 L.T. 289, 296) *and in Mulcahy* v. *R.* (1868) (L.R. 3 H.L. 306, 317), *applied.*

(ii) although the Orders of Oct. 27, 1941, and Aug. 23, 1943, had the same object as the Order of June 6, 1940, they each in turn made a radical alteration in the nature of the offence which would be committed by a person disobeying the Order. A person contravening the law on the subject from time to time during the 6 years covered by the indictment would be offending against each of these three Orders in turn, but could not be said to be offending against all three together since they were not all in force at any one time, and, therefore, the indictment was bad in that it charged three separate conspiracies in one count.

Observations of Tindal, C.J., *in O'Connell* v. *R.* (1844) (11 Cl. & Fin. 155, 237), *applied.*

(iii) although a judge was entitled to exercise his discretion in directing an amendment of the indictment without any application by either side for leave to amend, he should invite the parties and, in particular, the defence, to express their views on the matter before deciding to do so.

[AS TO CONSPIRACY, see HALSBURY, Hailsham Edn., Vol. 9, pp. 43-45, para. 43; and FOR CASES, see DIGEST, Vol. 14, pp. 110-114, Nos. *805-822*.]

Cases referred to:

(1) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 14 Digest 112, *814*.

(2) *Mulcahy* v. *R.*, (1868), L.R. 3 H.L. 306; 14 Digest 111, *810*.

(3) *O'Connell* v. *R.*, (1844), 11 Cl. & Fin. 155; 3 L.T.O.S. 429; 14 Digest 119, *892*.

(4) *R.* v. *Boulton*, (1871), 12 Cox, C.C. 87; 14 Digest 122, *930*.

APPEALS against convictions at the Central Criminal Court, before DENNING, J., on the ground (*inter alia*) that the indictment was bad in that it alleged a conspiracy which included an agreement to break laws which did not then exist and that the case for the prosecution involved three separate conspiracies which should have been charged, not in one count, but in three separate counts. The Court of Criminal Appeal allowed the appeals and quashed the convictions. The facts appear in the judgment of the court delivered by HUMPHREYS, J.

Casswell K.C., and *Gillis* for the appellant, J. West.
L. L. Rose for the appellant, A. S. Northcott.
R. F. Levy, K.C., and *Platts Mills* for the appellant, Adrian Weitzman.
A. P. Marshall, K.C., and *M. W. Sheldon* for the appellant, E. P. White.
Hawke and *Seaton* for the Crown.

Cur. adv. vult.

Mar. 22. **HUMPHREYS, J.**, read the following judgment of the court. The four appellants, together with one Westwater, who was acquitted by the jury, and David Weitzman, who was convicted by the jury, but whose conviction was quashed by this court on Mar. 16 for the reasons then given, were indicted at the Central Criminal Court on an indictment which contained one count charging them all with conspiracy between June 6, 1940, and Jan. 21, 1946. They appealed to this court on various grounds, but the view which the court takes on one point of law which was common to all the appeals renders it unnecessary to consider any of the other grounds. The trial occupied 25 days and a very large number of documents was exhibited in the course of it, but the decision at which the court has arrived renders it unnecessary to refer to any of the evidence contained in the seven volumes of transcript of the shorthand notes or to any of the exhibits put in at the trial.

All the appellants in different ways and in varying degrees and at different times were connected with or interested in a company called Newington Supply Co., Ltd., which dealt in various goods, including what are known as toilet preparations. From a very early stage of the war it was found necessary to restrict the supply to the public of those, among many other, goods, and Orders with that object were from time to time made by the Board of Trade in pursuance of the powers vested in that department by the Defence (General) Regulations, 1939, reg. 55. Regulation 55 empowers any competent authority to provide by Order for, *inter alia*, prohibiting the distribution, use and consumption of articles of any description, and, by reg. 92 (1), it is provided that, if any person contravenes any such Order, he shall be guilty of an offence against the regulation under which the Order is made, while reg. 90 provides, *inter alia*, that any person who conspires with any other person to commit an offence against any of the regulations shall be guilty of an offence against that regulation. The nature of the charge sufficiently appears from the indictment which alleged in the statement of offence a conspiracy to contravene reg. 55 of the Defence (General) Regulations, 1939. The particulars of the offence as laid alleged that between June 6, 1940, and Jan. 21, 1946, the accused persons conspired together to contravene Orders made by the Board of Trade for the control and limitation of the manufacture and supply of toilet preparations by acquiring a quota to manufacture and supply toilet preparations in excess of that to which they were lawfully entitled and by manufacturing and supplying toilet preparations in excess of any quota to which they were so entitled. Early in the trial further particulars were, on the direction of the trial judge, DENNING, J., furnished to the appellants. They are headed " Further particulars of overt acts " and are seven in number.

The particular Orders alleged to have been contravened are not mentioned in the indictment, but the case for the prosecution was that the first Order made was the Limitation of Supplies (Miscellaneous) Order, 1940 (S.R. & O., 1940, No. 874) dated June 6, 1940. That Order [by para. 1 (1)] required every person carrying on the business of supplying any class of controlled goods to persons who bought for the purpose of selling them again (a description which would apply to Newington Supply Co.) to make an application to the Board of Trade to be registered in respect of that class of controlled goods in which they dealt. Such an application was duly made by the company in respect, *inter alia*, of class 16 in the schedule to the Order, *i.e.*, perfumery and toilet preparations. The Order further provided, in para. 2 (1):

> Except under the authority of a licence granted by the Board of Trade . . . no person, who at any time during the period beginning with June 6, 1940, and ending with Nov. 30, 1940, is a registered person . . . shall supply during that period a total quantity of that class of controlled goods exceeding in value two-thirds of the value of the total quantity of that class of controlled goods supplied by him during the period beginning with June 1, 1939, and ending with Nov. 30, 1939.

That period was known as the standard period. On the expiration of that Order on Nov. 30, 1940, there came into force another Order [Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940 (S.R. & O., 1940, No. 2031)], dated Nov. 26, 1940, and subsequently still further Orders were made during 1940 and 1941, up to Oct. 27, 1941. Those Orders did not substantially alter the law. The two-thirds mentioned in the first Order was from time to time reduced and alterations in details were found necessary, but substantially the prohibition remained the same throughout that period, *viz.*, a prohibition against any person supplying controlled goods to an amount exceeding the prescribed proportion of the supply made by him during the corresponding standard period. On Oct. 27, 1941, the law was substantially altered by an Order specially dealing with toilet preparations and known as the Limitation of Supplies (Toilet Preparations) (No. 2) Order, 1941 (S.R. & O., 1941, No. 1686). That Order required persons who were manufacturers of controlled goods to be registered in a register to be called "The Toilet Preparations Register" and created a new offence as follows. By para. 2 (1) [except under the authority of a licence granted by the Board of Trade] no person who was registered was permitted to supply at any time during the period of restriction, namely, from Nov. 1, 1941, to May 31, 1942, any controlled goods in the manufacture of which he had carried on a process if the total quantity of such goods supplied by him during the period would thereby exceed his quota, which was put at 15 per cent. of the value of the total quantity of such controlled goods supplied by him during the standard period. As a result of that Order that which had been unlawful, *viz.*, the supply of controlled goods to any extent by a person who was a mere supplier, *i.e.*, a wholesale trader and not a manufacturer, was rendered lawful if he could get the goods, but the manufacture of such goods was struck at by the prohibition on the manufacturer from supplying goods which he had manufactured to more than the prescribed amount. The company duly became entered on this new register, and, so far as it was a manufacturer, was bound to comply with the terms of this new and different Order. Finally, by the Toilet Preparations (No. 3) Order, 1943, (S.R. & O., 1943, No. 1213), dated Aug. 23, 1943, the whole system of control both as to manufacture and supply was altered, and the alteration cannot be better expressed than in the language of the explanatory notes attached to and forming part of the Order itself, which state:

> Under this Order the quota control imposed by the previous Orders is replaced by a system of individual licensing for registered manufacturers, who, after Sept. 1, 1943, may only manufacture, or supply toilet preparations of their own manufacture, under the authority of a licence granted by the Board of Trade.

A mere recital of those Orders makes it plain that a supplier intent on contravening the law on this subject from time to time over the period of six years covered by this indictment will of necessity offend against each of the three Orders referred to in turn. At no time could he be said to be offending against all three together, since they were not all in force at any one time. There was a formidable mass of evidence given by the prosecution tending to show that false returns signed by certain of the then accused persons were from time to time made to the Board of Trade on behalf of the company, and it was made clear that the case against the accused involved breaches by the company, in which the accused were alleged to be knowing participants, of all three Orders. At the close of the case for the Crown, submissions were made by counsel on behalf of all the appellants strongly urging the judge to stop the whole case and to rule that there was no case to go to the jury on the ground that there could not possibly be one conspiracy existing in 1940 which included an agreement to break the laws which did not exist at that date and were not even in the contemplation of the government department until later years, and that the case for the prosecution must involve three separate conspiracies which ought, of course, to be charged in three separate counts. Counsel for the Crown did not contest the proposition of law that, if the evidence of necessity involved three separate conspiracies, there ought to have been three separate counts, one dealing with each conspiracy, but he contended that the evidence showed that there was one conspiracy to defeat the law as to control, and, therefore, to defeat all the Orders made with that object. The judge, in accordance with the practice, did not deliver any reasoned judgment on those submissions, but he overruled all the objections made and the case proceeded.

It should be stated here, though it is not the ground on which this court is proceeding, that the judge directed that the indictment should be amended by deleting all the words from " by acquiring " to the end, and by substituting the words " by causing the Newington Supply Co., Ltd. to supply goods in excess of what it was lawfully entitled to supply." No application for leave to amend had been made by either side. The judge was, in our opinion, entitled to exercise his discretion in directing the amendment, but he clearly should have invited the parties, and, in particular, the defence, to express their views on the matter before deciding to do so. That opportunity was not given. In fact, the Crown did not desire any amendment and the defence would have strongly objected to the amendment if they had been given the opportunity of doing so. It was, indeed, made one of the grounds of appeal to this court. The amendment made, however, did not affect the ground on which this court has decided that these convictions must be quashed.

In our opinion, the objection made by counsel on the indictment was sound in law. The indictment must, in our view, be regarded as charging a conspiracy to do an unlawful act, that is, to contravene the law as to control. That means, in our opinion, the existing law, the law which would be known to the conspirators and which at the time when the conspiracy was formed and came into being was the law of the country. The definition of conspiracy to be found in the speech of LORD BRAMPTON ([1901] A.C. 528) in the House of Lords in *Quinn* v. *Leathem* (1) is as follows:

> A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person.

LORD BRAMPTON continued by quoting with approval the language of WILLES, J., (L.R. 3 H.L. 317) in *Mulcahy* v. *R.* (2) in delivering the unanimous opinion of himself and four other judges whose opinion had been asked for by the House of Lords:

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is in act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means.

The argument of counsel for the Crown in this court was to the effect that the indictment rightly charged a conspiracy to contravene the existing law, *i.e.*, the law as laid down in the Order of June 6, 1940, and further charged an indictable conspiracy by alleging an agreement to disobey any future law which might be made on the same subject and with the same object. Apart from the fact that there was no evidence at all to substantiate such a charge, we hold that such an agreement as suggested by counsel would not amount to an indictable conspiracy. At the most, it would amount to an expression of intention to commit in the future, should occasion arise, acts which might by then have become unlawful. That offends, in our view, against the precise words, as well as the meaning, of the definition of conspiracy to be found in *Mulcahy's* case (2). Counsel for the Crown also suggested that the law, to break which was the object of the alleged conspiracy, did not really change throughout the years, since the law was always a law in some way or other restricting supplies of goods of that particular class. We are not saying that any mere alteration in detail in the language of the Order would result necessarily in a fresh agreement or conspiracy to break the law. For instance, when at the end of 1940 the two-thirds quota allowed by the Order of June 6, 1940, was reduced, it would not be right, in our view, to say that the law was substantially altered. Nor do we think that the law was altered when the Order of June 6, 1940, was replaced later in that year by an Order in substantially the same terms, but, as we have pointed out, the alteration made in the law by the Order of October 27, 1941, was a radical alteration of the nature of the offence which would be committed by a person disobeying the Order and so also was the alteration made by the Order of Aug. 23, 1943, although it is true to say that both of those Orders had the same object as the original Order of June 6, 1940. These were not merely alterations in detail; they were changes in the law. It is for those reasons that we hold that the indictment in this case charged, and necessarily charged, three separate conspiracies rolled into one count, and it is elementary law that no more than one offence may be charged in any one count of an indictment.

Having arrived at that conclusion, we have had to consider carefully the effect of it on these four convictions. Two observations fall to be made on the facts of the case. First, the case was of a nature bound to excite prejudice in the minds of a jury against the accused. Brothers, whose family name indicated an alien origin, were alleged to have been concerned in a trading company which had failed in peace time but had prospered in war time, the prosperity being due, as alleged, to the creation of false documents and fictitious entries in books resulting in their obtaining permission to sell a far greater quantity of controlled goods than they were lawfully entitled to, to the prejudice of others trading in similar goods. Perhaps there never has been a case in which meticulous care was more clearly called for to ensure that the guilt of any person convicted should be brought home to him by clear evidence directed against himself, and by that only. The second observation on the facts of the case is that it appears to us probable, in the case of Ellis White and, to a lesser extent, in the case of West, that they were, in fact, hampered in their defence and prejudiced by their inclusion in this vague and general form of charge extending over a period of years. The real vice, however, of this form of indictment, combining in one count what we hold to be three conspiracies, is akin to that pointed out by TINDAL, C.J. (11 Cl. & Fin. 237) in giving the opinion of the judges requested by the House of Lords in *O'Connell* v. *R.* (3). A count in an indictment for conspiracy charged several defendants with conspiring together to do several illegal acts. The jury found some of them guilty of conspiring with some of the other defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts. The finding was held bad, TINDAL, C.J., observing that each count of conspiracy charged one unlawful agreement against all the defendants named in that count and it was not competent for the jury to find as they had done, their verdict amounting to a finding of several conspiracies on a count which charged only one. So, in the present case each of the appellants was precluded by the form of the indictment from obtaining an acquittal on such part, if any, of the three unlawful agreements as the prosecution had failed to establish against him. It is a matter of less importance, but it is worthy of note, that the presiding judge, in assessing the sentence, is also deprived of the assistance to be derived from the verdict of a jury as to the *quantum* of blame to be attached, in the opinion of the jury, to each of several defendants. Counsel for the Crown stated that it was found impossible in this case to allocate to any particular period the supply in excess of the quota which it was desired to charge. That may have been a good reason for dropping that form of charge. The same difficulty may often arise where it is desired to prosecute a servant for embezzlement. The remedy, however, is not to allege a general deficiency in his accounts, but to look for some other form of specific charge. If none can be found, that would be the best reason for saying that the servant, while short in his accounts, could not be proved to have stolen his master's money. The most serious aspect of the present case was the creation of false documents brought into being and used to deceive the Board of Trade. The law of this country is not so futile that such conduct, if proved, cannot be criminally punished without recourse to a vaguely worded general charge of conspiracy extending over six years. There is a growing tendency to charge persons with criminal conspiracy rather than with the specific offences which the evidence shows them to have committed. It is not to be encouraged. The stringent observations of COCKBURN, C.J. (12 Cox, C.C. 93) in *R.* v. *Boulton* (4) are in danger of being overlooked, but, if the law of criminal conspiracy is to be invoked, then each count of the indictment should be so framed as to enable the jury to put their fingers on any specific part of the conspiracy as to which they are satisfied that the particular defendant is proved to have been implicated and to convict him of that offence only. It is an essential feature of the criminal law that an accused person should be able to tell from the indictment the precise nature of the charge or charges against him so as to be in a position to put forward his defence and to direct his evidence to meet them. All these convictions are quashed and the appellants are discharged. *Appeals allowed.*

Solicitors : *Samuel Coleman* (for the appellant, West) ; *M. & H. Shanson* (for the appellant, Weitzman) ; *Registrar of Court of Criminal Appeal* (for the appellants, White and Northcott ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

Re DORGAN (*deceased*), DORGAN *v.* POLLEY AND OTHERS.

[CHANCERY DIVISION (Harman, J.), March 19, 23, 1948.]

Family Provision—Time for application—Application made more than six months from date on which representation first taken out—Order making provision for maintenance of "another dependant"—No dependant already being maintained in pursuance of Act—Inheritance (Family Provision) Act, 1938 (*c.* 45), *ss.* 2 (1), 4 (1) (*b*).

The Inheritance (Family Provision) Act, 1938, s. 2 provides: "(1) Except as provided by s. 4 of this Act, an order under this Act shall not be made save on an application made within 6 months from the date on which representation . . . is first taken out." By s. 4: "(1) On an application made at a date after the expiration of the period specified in s. 2 of this Act, the court may make such an order as is hereinafter mentioned . . . (*b*) an order for making provision for the maintenance of another dependant of the testator." In August, 1911, the testatrix married the plaintiff. There was no issue of this marriage, but the testatrix had had 7 children by a former marriage. On Oct. 7, 1942, the testatrix died, leaving the plaintiff and 6 of her children her surviving. By her will made in July, 1940, probate of which was granted on Dec. 7, 1942, she gave various pecuniary legacies and bequeathed the residue of her estate to her executor on trust to apply the income to maintain her crippled daughter, H., and thereafter to divide the corpus between certain other daughters. Her estate was sworn at £7,268, with net personalty £5,725. She made no provision in her will for the plaintiff, who was said to have no means save an old age pension. In October, 1943, more than 6 months after the grant of probate, the plaintiff issued a summons under the Act of 1938 which was not brought before the court until some 4 years later. On behalf of the plaintiff it was submitted that on the true construction of s. 4 (1) (*b*) the court had jurisdiction to entertain an application under the Act at any time, providing there was a dependant, within the meaning of s. 1 of the Act, in receipt of income under the will.

HELD : Section 4 (1) (*b*) merely enabled the court to make, after the expiration of 6 months from the date when representation was first granted, an order in favour of a further dependant where there was already a dependant who was being maintained in pursuance of the Act, and, as in this case no dependant was being so maintained, the court had no jurisdiction to make an order in favour of the plaintiff.

[AS TO PROTECTION OF TESTATOR'S FAMILY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 439-445, paras. 486-505 ; and FOR CASES, see DIGEST Supp.]

ADJOURNED SUMMONS by which the plaintiff applied under the Inheritance (Family Provision) Act, 1938, for provision to be made for his support out of his deceased wife's estate, from participation in which he had been excluded by his wife's will. HARMAN, J., dismissed the application. The facts appear in the judgment.

R. L. Stone for the plaintiff.

R. Gwyn Rees (*F. G. King* with him) for the executors and two other defendants, daughters of the testatrix.

L. R. Norris for the defendant, Doris Hutchins (a daughter who also represented other daughters).

HARMAN, J.: Sarah Anne Dorgan, the testatrix, died on Oct. 7, 1942, leaving an estate sworn at £7,268 1*s.* 5*d.*, with net personalty of £5,725 2*s.* 4*d.* She left a will, made in July, 1940, in which she appointed the defendant, Polley, who was an insurance inspector, and her daughter, the defendant, Gwendoline Reilly, to be her executors. She was twice married, there being 7 children of her first marriage. Six of these are still living, and four of them are before me, the last one, Doris Hutchins, representing also her sisters, Mrs. Saywell and Mrs. Wiltshire, so that all the six daughters of the first marriage are represented here. The plaintiff was the second husband of the testatrix, and there was no issue of that marriage, which took place in August, 1911. He is now an old man in receipt of an old age pension and, according to him, of no other means. By her will the testatrix excluded the plaintiff from any interest in her estate, the major part of which she bequeathed to her trustees on trust to maintain her crippled daughter, Hilda, and after the death of Hilda, to divide the corpus between certain other daughters. If this summons had been taken out in due time and prosecuted with due diligence, I should have been minded to make some provision for this husband, but, apart from the prohibition which, I conceive, lies on him in view of the terms of the Inheritance (Family Provision) Act, 1938, I should have made no such provision in the present circumstances because there has been the most unwarrantable and unreasonable delay in bringing forward the summons—delay which makes me doubt whether the husband's need can be so urgent as he stated it to be in the first of his affidavits made about 4 years ago. Consequently, on the merits of the case I should make no order in his favour.

Probate was granted on Dec. 7, 1942, but the summons was not issued until October, 1943, and the Inheritance (Family Provision) Act, 1938, s. 2, provides:

> (1) Except as provided by s. 4 of this Act, an order under this Act shall not be made save on an application made within six months from the date on which representation . . . is first taken out.

Unless it was saved by s. 4, therefore, this application is one on which I cannot make any order. Section 4 provides:

> (1) On an application made at a date after the expiration of the period specified in s. 2 of this Act, the court may make such an order as is hereinafter mentioned . . . (*a*) an order for varying a previous order . . . or (*b*) an order for making provision for the maintenance of another dependant of the testator.

Those are the only orders the court can make under s. 4 (1). Paragraph (*a*) does not apply here because there was no previous order. Paragraph (*b*), alternatively, refers to an order "for making provision for the maintenance of another dependant," and it is submitted to me that, so long as there is a dependant of the testator, within the meaning of s. 1 of the Act, receiving a bounty under the will, an order can, at any time, be made to provide for another dependant. In my judgment, that is a wrong interpretation of this provision. I think that s. 4 (1) (*b*) merely enables the court to make, after the expiration of six months, orders in favour of a further dependant where there is already a dependant in receipt of provision under the Act, and that "dependant" there means a dependant who is being maintained in pursuance of the Act and not otherwise. Any other construction would open the door to the most extraordinary results and I do not propose so to construe the paragraph. I hold, therefore, that I have no jurisdiction to make any order and I dismiss the application.

Application dismissed.

Solicitors: *Hosking & Berkeley*, agents for *Joseph Lewis & Son*, Cardiff (for the plaintiff and Doris Hutchins); *Pritchard, Englefield & Co.*, agents for *Francis Gabb & Co.*, Cardiff (for the executor and other defendants).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

Affirmed. H.L. [1949] 1 All E.R. 865.

WOLFSON *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Tucker, Somervell and Cohen, L.JJ.), February 19, 20, 25, 26, 27, March 5, 22, 1948.]

Income Tax—Settlement—"Power to revoke or otherwise determine settlement"—Power not found in terms of settlement—Settlement of dividends from shares in company controlled by settlor—Power to wind-up company—Finance Act, 1938 (*c.* 46), *s.* 38 (1) (*a*).

The Finance Act, 1938, s. 38 (1) provides: "If and so long as the terms of any settlement are such that—(*a*) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor . . . will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement . . . any sums payable by the settlor . . . by virtue or in consequence of that provision of the settlement in any year of assessment shall be treated as the income of the settlor for that year and not as the income of any other person . . ."

The capital of a private investment holding company consisted of 1,000 shares of £1 each of which the taxpayer held 700, his two brothers 100 each, and his father's trustees the remaining 100. Each share carried a vote. To make provision for their sisters, the taxpayer and one of his brothers entered into a deed of covenant, under which they each covenanted to pay to trustees for the benefit of the sisters such sum each year as, after the deduction of income tax, left a sum equal to the net amount of all dividends received by them during the previous twelve months on the ordinary shares of the company. The Crown contended that, as the words "any person" in s. 38 (1) (*a*) must, by reason of s. 1 (1) (*b*) of the Interpretation Act, 1889, be construed as including the plural, it followed that, since the sums payable were calculated in terms of the dividends received from a limited liability company, there must always be some persons having the "power to revoke or otherwise determine the settlement or any provision thereof"—*viz.*, a majority of shareholders who could put the company into voluntary liquidation:—

HELD: (COHEN, L.J., *dissenting*) the power referred to in s. 38 (1) (*a*) must be found in the terms of the settlement and not *aliunde*, and, as no such power was to be found in this settlement, the gross equivalent of the net amount paid annually by the taxpayer under the deed was an admissible deduction in computing his total income for sur-tax purposes.

Decision of ATKINSON, J., ([1947] 2 All E.R. 150), *affirmed.*

[FOR THE FINANCE ACT, 1938, s. 38, see HALSBURY'S STATUTES, Vol. 31, p. 348.]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *Payne*, (1941), 110 L.J.K.B. 323; 23 Tax Cas. 610; 2nd Digest Supp.

(2) *Chamberlain* v. *Inland Revenue Comrs.*, [1943] 2 All E.R. 200; 25 Tax Cas. 317; 2nd Digest Supp.

(3) *MacAndrew* v. *Inland Revenue Comrs.*, (1943), 25 Tax Cas. 500; 2nd Digest Supp.

(4) *Jenkins* v. *Inland Revenue Comrs.*, [1944] 2 All E.R. 491; 171 L.T. 355; 26 Tax Cas. 265; 2nd Digest Supp.

(5) *Vestey's (W.) (Baron) Executors and Vestey (E.) (Baronet)* v. *Inland Revenue Comrs.*, (1947), 204 L.T. Jo. 342.

(6) *A.-G.* v. *Avelino Aramayo & Co., Avelino Aramayo & Co.* v. *Ogston, Eccott* v. *Aramayo Francke Mines, Ltd.*, [1925] 1 K.B. 86; 94 L.J.K.B. 145; 132 L.T. 415; C.A.; *on appeal sub nom., Aramayo Francke Mines, Ltd.* v. *Eccott*, [1925] A.C. 634; H.L.; 28 Digest 27, *140*.

APPEAL by the Crown from an order of ATKINSON, J., dated June 6, 1947, and reported [1947] 2 All E.R. 150, reversing a decision of the Special Commissioners that certain payments made by the taxpayer under a deed of covenant in a settlement must be treated as his income for the purpose of assessment to surtax. The appeal was dismissed.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. H. Stamp* and *R. P. Hills* for the Crown.

Sir Roland Burrows, K.C., and *Graham-Dixon* for the taxpayer.

Cur. adv. vult.

Mar. 22. The following judgments were read.

TUCKER, L.J.: By a deed of covenant dated Mar. 26, 1940, made between Isaac Wolfson and Samuel Wolfson, of the one part, as settlors, and Henry Chetham and the said Isaac Wolfson, of the other part, as trustees, each settlor irrevocably covenanted with the trustees that he would on Apr. 1 in each year during the period of seven years commencing on Apr. 1, 1940, or until his death (whichever period should be the shorter) pay to the trustees an annual sum calculated according to the provisions contained in cl. 2 of the deed, each such annual sum to be held by the trustees on the trusts and subject to the powers declared and contained in the deed. Clause 2 provided that each of the said annual sums covenanted to be paid by each settlor should, subject to a proviso, be such an annual sum as, after deduction of income tax at the standard rate for the time being in force, left a sum equal in amount to the net aggregate of dividends received by him during the previous twelve months, expiring on Apr. 1, in each year, on the ordinary shares of Leonard Gordon Estates, Ltd., held by him as set out in the first schedule to the deed. There followed a proviso whereby, if any of the said shares in Leonard Gordon Estates, Ltd., should be sold or otherwise disposed of for value by any settlor, the sum payable by him should equal in amount the net amount of all dividends received during the previous twelve months from any of the shares in Leonard Gordon Estates, Ltd., still held by that settlor, together with the net amount of any other dividends or income received by that settlor during the said twelve months from the re-investment of the proceeds of the shares sold. Clause 3 provided that the trustees should stand possessed of the said annual sums paid to them by the settlors upon trust to pay to each of the beneficiaries – who were the eight sisters of the settlors—so long as she should be living, out of the sums received by them in each year such annual sum as, after deduction of income tax at the standard rate for the time being, left £450.

The question in this appeal is whether the gross equivalent of a sum of £14,612 10*s.* 0*d.* paid by the taxpayer, Isaac Wolfson, under this deed is an admissible deduction in computing his total income for sur-tax purposes. The case has proceeded throughout, before the Special Commissioners and in the court below, on the basis that the deed in question is such that any sums paid thereunder would be admissible deductions unless the Crown was right in its contention that such sums must be treated as the income of the settlor by virtue of s. 38 (1) (*a*) of the Finance Act, 1938. The relevant provisions of this section are as follows:

> (1) If and so long as the terms of any settlement are such that—(*a*) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement . . . any sums payable by the settlor or the wife or husband of the settlor by virtue or in consequence of that provision of the settlement in any year of assessment shall be treated as the income of the settlor for that year and not as the income of any other person . . .

It was not contended by the Crown that the settlement in question consisted of anything other than the deed of Mar. 20, 1940, so that no question arises in the present case of the application of the extended definition of "settlement" in s. 41 (4) (*b*) of the Finance Act, 1938.

The Crown's contentions are set out in the Case Stated by the Special Commissioners, and were as follows: (*a*) the terms of the said deed of covenant were such that the taxpayer had power to determine the said settlement or a provision thereof either himself or with the consent of other persons as by reason of his shareholding he could either prevent the company from declaring a dividend during the whole period of the covenants, or, with the consent of one of his brothers, put the company into liquidation;

(*b*) in the event of the exercise of such power the taxpayer will or may cease to be liable to make the annual payment payable by virtue of the said deed of covenant; (*c*) the sum payable by the taxpayer under the said deed of covenant must be treated as the income of the taxpayer. In this court, however, the argument proceeded, without objection and, in part, at our invitation, on a somewhat wider basis. It was said that as the words "any person" must, by reason of the provisions of the Interpretation Act, 1889, be construed as including the plural, it follows that since the sums payable are calculated in terms of the dividends received from a limited liability company there must always at any given moment be "some persons," whose identity can be ascertained from the register of shareholders, having the power to revoke or otherwise determine the settlement or any provision thereof, *viz.*, a three-quarters majority of such shareholders who could put the company into voluntary liquidation, and that such a power follows necessarily under the general law from the terms of a settlement so worded without the necessity of looking at any extraneous matters such as the articles and memorandum of association of the company. Alternatively, it was contended that the articles and memorandum can properly be looked at, together with any other extraneous matter requisite for the determination of the rights and liabilities of the parties under the settlement. On the other hand, the contention of the taxpayer has been throughout that any such power must be found in the settlement itself, either expressly, or, as a matter of construction, by necessary implication from the language used. The question ultimately resolves itself into the proper interpretation to be put upon the words "if and so long as the terms of any settlement are such that."

Numerous possible cases were advanced on each side to show the curious, and even absurd, consequences which might follow from the adoption of the construction contended for by their opponents, but I have not derived much assistance from this method of approach because it is clear that either construction might, in certain circumstances, produce results which could hardly have been contemplated by the legislature. I turn, therefore, to the language of the section as a whole, taken in conjunction with s. 41 (4) (*b*) for such assistance as I can find therein. In the result, I have arrived at the same conclusion as ATKINSON, J., and substantially for the same reasons, which may be briefly summarised as follows: (*a*) if the Crown is right, it seems to me there was no necessity for the words "and so long as the terms of any settlement are such that . . ."; (*b*) the language is in marked contrast to the opening words of sub-s. (3) of s. 38, which are: "If and so long as the settlor has an interest," and the language of sub-s. (4), *viz.*, "the settlor shall be deemed to have an interest . . ." and then the concluding words "in any circumstances whatsoever"; (*c*) having regard to the extended definition in s. 41 (4) (*b*), I find it difficult to think that the legislature could have contemplated the necessity of going outside the settlement to find the power, and if such need was contemplated I think it could have been provided for in clearer language. With regard to the wider contention based on the calculation of sums by reference to the dividends received from a limited liability company, I have come to the conclusion that the language of s. 38, in speaking of a power to revoke or determine, is not apt to include some power residing in a third party quite unconnected with the settlement, the exercise of which, by him, in ignorance of the existence of the settlement, may automatically result in the destruction of the source from which the settlement derives its funds. I do not think that what I am saying in any way conflicts with the judgment of SIR WILFRID GREENE, M.R., in *Inland Revenue Comrs.* v. *Payne* (1), where the settlement expressly provided that payments should determine on the liquidation of the company.

I have not derived much assistance from the authorities to which ATKINSON, J., referred. *Chamberlain* v. *Inland Revenue Comrs.* (2) was a case under sub-s. (2) of s. 38, and the issue was whether the property comprised in the settlement consisted of the whole assets of Staffa, and it was held that it did not. In *Inland Revenue Comrs.* v. *Payne* (1), the contention of the Crown that the settlement in question consisted of the deed of covenant of Mar. 29, 1938, together with the whole framework of Derwent, Ltd., which was controlled by the taxpayer, was accepted. Accordingly, no question arose whether it was necessary or permissible to look outside the settlement to find the power.

Similarly, in *MacAndrew* v. *Inland Revenue Comrs.* (3) the settlement consisted of the transfer of shares *plus* the deed of July 11, 1940. *Jenkins* v. *Inland Revenue Comrs.* (4) was a case under sub-ss. (3) and (4) of s. 38. I do not feel that I get much support for my interpretation of the section from the fact that in some of these cases the Crown might have relied on the point now taken in preference to the extended definition of the word "settlement." I am, accordingly, driven back to the language of the section itself, unaided by authority.

As, in my view, the power in question must be found in the settlement and derived directly therefrom, and as in the present case it is not so to be found, I think this appeal fails, and, accordingly, I do not find it necessary to discuss the extent of the taxpayer's powers, either alone or with the consent of his brother, to prevent the payment of dividends by Leonard Gordon Estates, Ltd., or to put the company into liquidation, and I express no opinion whether the power to prevent the payment of dividends would amount to a power to revoke or otherwise determine the settlement or any provision thereof, or would merely operate so as to give a power to suspend an obligation under a provision which would still remain in existence.

SOMERVELL, L.J. : It was agreed by the SOLICITOR-GENERAL that the case had been argued below on the basis that the settlement here was the deed of covenant only. The Crown had not contended, and did not contend, that by reason of the extended definition of "settlement" in s. 41 (4) (*b*) the court could and should look at matters outside the deed of covenant in order to decide what was the settlement. No doubt, some day the courts may have to consider whether the decision of the House of Lords in *Chamberlain* v. *Inland Revenue Comrs.* (2) where the issue arose under s. 38 (2) of the Finance Act, 1938, affects the decision of this court in *Inland Revenue Comrs.* v. *Payne* (1) where the issue arose under s. 38 (1). That does not arise here, and I express no opinion on it.

The first issue that arises in this case may be stated as follows : Must the power which "any person" has to revoke or otherwise determine the settlement or any provision thereof be found in the provisions of the settlement, or is it sufficient that such power can be found whether within the settlement or not, provided, of course, that its exercise will bring about the consequence that the settlor or his wife or her husband will or may cease to be liable to make annual payments ? Assume that the settlor covenants to make annual payments so long as company X remains in existence. Assume, though, no doubt, this is an unlikely settlement, that company X is a one-man company which A, a complete stranger to the settlor, could dissolve at any time. On the Crown's construction such a settlement would come within s. 38 (1). I agree with ATKINSON, J., that the natural meaning of "if the terms of any settlement are such that any person has power to revoke or otherwise determine the settlement or any provision thereof" is that the power must be found in and conferred by the terms of the settlement. The Crown relied on the difference between the present words and the words "if the terms thereof"—that is of the settlement—"provide," to be found in s. 21 of the Finance Act, 1936. I think one must be careful not to attach too much weight to differences in wording as between different Finance Acts, but I agree that the opening words are capable of covering the construction for which the Crown contends. I also think that the argument derives some support from the words "any person." On the other hand, the opening words and the description of the power as one to revoke or otherwise determine the settlement or any provision thereof, to my mind, lead to the construction which I believe to be right. If it had been intended that the court was to have regard to powers not to be found in the settlement, exercisable by persons not parties to or named in the settlement, other words would, and should, have been used to make this clear. On this issue I think there is considerable force in the learned judge's reasoning based on the contrast between the opening words of sub-ss. (1) and (2) with the wording of sub-ss. (3) and (4).

There remains an argument to which at one time I was attracted. To avoid certain complications which arise on the present facts, I will assume that the settlor had a 76 per cent. share holding and that a dissolution of the company would be a determination of the settlement. The present deed is on the basis that the settlor is a shareholder and recites the number of shares he holds, though it does not enable one to find out the proportion of that holding to the issued capital. I will assume a settlement in which that fact was recited. Would it, then, be right to say that its terms were such that the settlor had power to determine it? I have come to the conclusion that, in view of the opinion I have formed on what I have called the first issue, the answer to this question must be "No." The power to dissolve in such a case is a power under company law and the articles of association and is not a power under or conferred by the settlement. If the power can be found outside the settlement, so can the person, and, as I have said, I think that such a result would need clear words, which I do not myself find. If it is said that the legislature must have intended to cover a case in which a settlor made his annual payments dependent on the continued existence of a company, which he could himself dissolve, the legislature may have thought that such a case was covered by the extended definition of "settlement," as this court held in *Payne's* case (1). It may be that that case is still good law. So far as it is relevant, on the basis on which the present case has been argued, I think it is, on the whole, against the Crown's argument. I agree with ATKINSON, J., that the MASTER OF THE ROLLS in *Payne's* case (1) proceeded on the basis that the power must be found within the settlement.

With regard to the learned judge's treatment of the cases to which he refers, I think there was force in the SOLICITOR-GENERAL'S submission that the Crown's argument in the present case would not have been relevant in *Chamberlain's* case (2), or in *Jenkins'* case (4). The learned judge did not, however, base his decision on this point. He was considering the cases in order to see whether there was anything inconsistent with the conclusion at which he had arrived on the words of the section. I agree with him that there is nothing inconsistent with his decision to be found in those cases. I also agree with ATKINSON, J., that the withholding of a dividend would not revoke or otherwise determine the settlement or a provision thereof. ATKINSON, J., went on to consider the question of winding-up the company. The settlor has no power himself to wind-up. He must get one other shareholder, at least, to attend a meeting, and get one shareholder to vote with him or not to attend. The argument clearly proceeded on the basis that "any person" means any one individual, and that the singular does not include the plural. Before us it was suggested, applying s. 1 (1) (*b*) of the Interpretation Act, 1889, that no contrary intention appeared and that the singular, therefore, included the plural. It seems odd that this argument was not advanced earlier. In *Vestey* (*Executors*) v. *Inland Revenue Comrs.* (5) there was considerable argument dealt with in the judgment on the basis that the words "any person" in s. 38 (2) meant a single individual. On the view I take the point has not to be decided in the present appeal. I cannot, however, myself detect any contrary intention to displace the rule that words in the singular shall include the plural, certainly if, as I think, the power has to be found in the settlement. In the kind of case with which the section is dealing it would be an odd result if a settlement was taken out of the sub-section by a provision that the settlement could be revoked, say, by a power vested in the settlor and his son, or that a power vested in the settlor was subject to the consent of two other persons. It is not necessary to decide these points but, in view of the argument as advanced to us, I thought it right to refer to them. For the above reasons I think the appeal must be dismissed.

COHEN, L.J.: As TUCKER, L.J., has stated, the only question is whether the sums payable by the settlor under the deed of Mar. 26, 1940, must be treated as his income under s. 38 (1) (*a*) of the Finance Act, 1938. My brother has read that section and called attention to the other relevant provisions in that Act, and I need not repeat them. The contentions by which the Crown sought to apply the Act to the facts of the present case are to be found in the Case, and have also been read by TUCKER, L.J. It will be observed that the Crown did not contend that the "settlement" consisted of anything but the deed of covenant. They could not, therefore, rely on the decision of this court in *Payne's* case (1), where it was held that the "settlement" comprised the whole arrangement, including the formation by the settlor of the company concerned and his voting rights therein. None the less, the commissioners decided in favour of the Crown on the basis of the *MacAndrew* case (3). Atkinson, J., reversed the decision of the commissioners. He first considered the case apart from authority, saying ([1947] 2 All E.R. 150, 152):

> Reading the section unaided by authority, I should say, without much hesitation, that the contention of the taxpayer is right. I think the words mean that the power must be found in the terms of the settlement. I am confirmed in that view by the following considerations: (1) The contrary view would give no effect whatever to the words in the opening line "If and so long as the terms of any settlement are such . . ." Those words might just as well not be there. (2) The contrary view would lead to results which would shock the sense of justice of any reasonable mind. For example, a settlor might settle shares in a company on persons dependent on him. Quite unknown to him, A. and B. might between them hold enough shares to put the company into voluntary liquidation. According to the Crown, that settlement is hit by the section, and would still be hit even if A. and B. acquired their shares after the date on which the settlement had been made.

He then went on to compare the language of s. 38 (1) (*a*) with that of s. 21 (8) of the Finance Act, 1936, which provides that a settlement shall not be irrevocable "if the terms thereof provide" and so on. He said that it was plain that under the last mentioned section the relevant provision must be found within the document and that, if the legislature had not intended the power referred to in s. 38 (1) (*a*) also to be found within the document, it would have said so in unmistakable language. He also relied on the contrast between the language in sub-ss. (1) and (2) of s. 38 and that in sub-ss. (3) and (4), ending this portion of his judgment with these words (*ibid.*, 153):

> There one has what seems to me to be a very striking contrast. The first two sub-sections are introduced by the words: "If and so long as the terms of any settlement are such that," and sub-ss. (3) and (4) contain no such language, but incorporate the words: "in any circumstances whatsoever."

The learned judge then proceeded to consider the authorities, and said that, with the exception of *MacAndrew's* case (3), they support his conclusion, since in his view the argument relied on by the Crown in the case now before us would have been decisive in the Crown's favour, but it was not even raised. This is, I think, true of *Payne's* case (1), but it is not correct as regards the other two cases referred to by the learned judge—*Chamberlain's* case (2) and *Jenkins'* case (4). Those were both cases under s. 38 (2), not s. 38 (1), and the Crown necessarily failed because they were unable to show that any property comprised in the settlement would pass to the settlor or his or her spouse as a result of any exercise of a power of revocation. Atkinson, J., rejected *MacAndrew's* case (3) as unsatisfactory, because he was not satisfied that the question whether the power need be found in the settlement was ever present to the mind of the learned judge who decided it. With this comment I agree, and I do not rely on the decision in the conclusion I am about to state.

I am unable to agree with the learned judge that the power referred to in s. 38 (1) (*a*) need be found in the settlement itself. I think that the use of the words "if the terms of any settlement are such" instead of the words "if the terms of any settlement provide," *prima facie*, contemplate a different approach to the settlement. Under the latter words, unless the power is found in the settlement itself, the section would not be brought into operation. Under the former words one must look at the settlement, and if, looking at the settlement in the light of the general law, one knows that a power must exist in some person or persons, then I see no reason why the section should not operate. It seems to me to follow that any settlement, framed as the settlement before us is framed, must necessarily fall within the mischief of the section. Wherever the annual payment is to be measured by, and conditional on, the payment of dividends by a company, it necessarily follows that some person or persons have or may have power to determine that liability since the company can be put into liquidation by the requisite majority of shareholders passing a special resolution under s. 225 of the Companies Act, 1929. Atkinson, J., seems to have thought that the words "any person" in s. 38 (1) (*a*) must be construed in the singular and not as including the plural, and, if this were right, the reasoning I have indicated would break down, but, in my opinion, there is no justification for such a conclusion. Section 1 (1) of the Interpretation Act, 1889, so far as material, provides that in every Act passed after the year 1850, unless the contrary intention appears, words importing the singular shall include the plural, and I can find nothing in the context of the present section indicating a contrary intention.

In arriving at this conclusion I have not ignored the observations of LORD ROMER in *Chamberlain's* case (2) when he said ([1943] 2 All E.R. 200, 207): "... I must confess that, with all respect to the commissioners, it passes my comprehension how the structure of a company can form part of a settlement." These words were *dicta* and seem inconsistent with the views of the MASTER OF THE ROLLS in *Payne's* case (1), but, accepting them as correctly stating the law, I think it is quite consistent with LORD ROMER'S view to have regard, not to the construction of a particular company, but to the general law in considering whether the effect of the terms of a settlement is such that any person has power to determine it. If so regarded, it is plain that the settlement will completely cease to have effect on the liquidation of the company, the settlement is, in my opinion, within the mischief of s. 38, for, by exercising the power to place the company in liquidation, some person or persons effectively determine the operation of the settlement.

I do not feel impelled to a different conclusion by any of the three considerations stated by ATKINSON, J., in his judgment ([1947] 2 All E.R. 150, 152). I do not think the view I have formed necessarily means that I give no effect to the words: "If and so long as the terms of any settlement are such." True it is that, applied to the facts of the present case, the effect would be the same if they were not there, but the operation of the section is not limited to cases where the liability to pay the annual sum is measured by and conditional on the payment of dividends. In other cases it seems to me the position might be that the power exists, but does not appear from a perusal of the settlement in the light of the general law. Be that as it may, I do not think we are justified in placing what I regard as a strained meaning on the language of the section merely because, giving the words in question their natural meaning, they are surplusage. Unlike the learned judge, I am not shocked by the conclusion to which I have come. It is true that it does lead to the result that a settlement in similar form to the present would be hit by the section although the company, the dividend on the shares of which formed the measure of the obligation, was under the control of persons independent of the settlor and, perhaps, unknown to him, but such a settlement is, I think, a very rare phenomenon, and the legislature may well have thought it desirable to frame the section in wide language in order to prevent evasion. I have already dealt with the argument based on a comparison between s. 38 (1) (*a*) of the Act of 1938 and s. 21 (8) of the Act of 1936. I would add that the language of the former sub-section seems to me to be a half-way house between that of the latter sub-section and the very wide language of s. 38 (4) of the Act of 1938.

I was at one time doubtful whether the ground on which I have reached my conclusion was sufficiently raised before the commissioners or the learned judge in the court below, but counsel for the taxpayer did not rest his case on this ground. He recognised that the point was one of pure law, the decision on which could not be affected by any further findings of fact by the commissioners, and could, therefore, properly be decided by this court even though it had not been raised in the court below: ATKIN, L.J., in *A.-G.* v. *Avelino Aramayo* (6) ([1925] 1 K.B. 86, 109). For those reasons I would have allowed the appeal and restored the decision of the commissioners.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Harris, Chetham & Co.* (for the taxpayer).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

MORANT SETTLEMENT (TRUSTEES) *v.* INLAND REVENUE COMMISSIONERS.

INLAND REVENUE COMMISSIONERS *v.* MORANT SETTLEMENT (TRUSTEES).

[Court of Appeal (Tucker, Somervell and Cohen, L.JJ.), March 1, 22, 1948.]

Income Tax—Deduction of tax—Annual payment—Settlement—Deficiency made up out of capital—Capital or income—Treatment of sums paid as gross or net —Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 21 (*as amended by Finance Act,* 1927 (*c.* 10), *s.* 26 (1)).

The Income Tax Act, 1918, All Schedules Rules, r. 21, as amended by the Finance Act, 1927, s. 26 (1), provides: "(1) Upon payment of any interest of money, annuity, or other annual payment charged with tax under sched. D . . . the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment. (2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver . . . an account of the payment . . . and of the tax deducted . . . and the Special Commissioners shall assess and charge the payment of which an account is so delivered on that person."

By a settlement *inter vivos* the settlor settled a sum of money to which he was absolutely entitled on protective trusts for his benefit during his life, with a proviso that, if and whenever in any year the net income of the trust fund should be less than a certain amount, the trustees should, unless directed in writing by him to the contrary, raise such deficiency out of the capital of the trust fund and pay the amount to him for his own benefit. In pursuance of this provision, and in the absence of any direction in writing to the contrary, the trustees raised out of capital and paid to the settlor for his own benefit, on the footing that they were capital, various sums in successive years, which were, in fact, less than the total amount of the deficiency which they were authorised to raise:—

Held: (i) by the settlement the settlor had irrevocably parted with the capital fund, so that the sums paid to him were not part of his own capital returned to him, but were annual payments of income assessable under r. 21.

(ii) (Tucker, L.J., *dissenting*) the sums raised and paid out of capital should be treated as gross sums and assessable as such.

[As to Payment of Deficiency out of Capital, see HALSBURY, Hailsham Edn., Vol. 17, p. 248, para. 502; and for Cases, see Digest Supp.]

Cases referred to:

(1) *Brodie* v. *Inland Revenue Comrs.*, (1933), 17 Tax Cas. 432; Digest Supp.
(2) *Lindus and Hortin* v. *Inland Revenue Comrs.*, (1933), 17 Tax Cas. 442; Digest Supp.
(3) *Wheeler* v. *Humphreys*, [1898] A.C. 506; 67 L.J.Ch. 499; 78 L.T. 799; *affg. on different grounds, S.C. sub nom., Re Cosier, Humphreys* v. *Gadsden*, [1897] 1 Ch. 325; 44 Digest 1241, *10719*.
(4) *Re Cochrane*, [1905] 2 I.R. 626; *affd.*, [1906] 2 I.R. 200; 21 Digest 45, *r.*
(5) *New South Wales Stamp Duties Comr.* v. *Perpetual Trustee Co., Ltd.*, [1943] 1 All E.R. 525; [1943] A.C. 425; 112 L.J.P.C. 55; 168 L.T. 414; 2nd Digest Supp.

Appeal and Cross-Appeal from an order of Macnaghten, J., dated July 23, 1947.

The Special Commissioners held (i) that certain payments made to the settlor by the trustees of a settlement were annual payments on which the trustees were assessable to income tax under r. 21 of the All Schedules Rules under the Income Tax Act, 1918, and (ii) that the amounts assessable were the gross equivalents of the sums paid. Macnaghten, J., affirmed the decision of the commissioners on the first point, but reversed their decision on the second point, holding that the sums paid should be treated as gross sums, assessable as such, and not as net sums representing some larger fictional gross sums. The trustees appealed on the first point, and the Crown cross-appealed on the second point.

Both appeal and cross-appeal were dismissed, the latter by a majority of the court.

Donovan, K.C., and *Graham-Dixon* for the trustees.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. H. Stamp* and *R. P. Hills* for the Crown.

Cur. adv. vult.

Mar. 22. **COHEN, L.J.**, read the following judgment of the court on the main appeal. This is an appeal from a decision of MACNAGHTEN, J., affirming a decision of the Special Commissioners that certain payments to one Captain Morant, the settlor and a beneficiary under a deed of settlement dated May 31, 1939, were annual payments to the tax on which the trustees of that deed were assessable under r. 21 of the General Rules applicable to All Schedules to the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927. Clause 1 of the settlement recites that the settlor, being absolutely entitled to a sum of £100,000, had paid the same to the trustees. We need not read cl. 2 as no step has been taken to bring it into operation. Clause 3 deals with the investment of the trust funds. Under cl. 4 the trustees are to hold the income of the trust fund on protective trusts as mentioned in s. 33 of the Trustee Act, 1925, for the benefit of the settlor during his life. Clause 5 contains a provision on which the question at issue in this case depends. It is in the following terms:

> Provided always that if and whenever in the year ending on June 24, 1940, or in any subsequent year on June 24, the income of the trust fund actually received by the trustees shall be less than such a sum as after deduction therefrom of income tax at the current rate for the time being (but not any sur-tax) in respect thereof will leave the net amount of £6,500 and if at the end of each year the settlor shall be living and the foregoing trust of income in his sole favour shall not have failed or determined under s. 33 (1) (i) of the Trustee Act, 1925 (as hereby made applicable) then the trustees unless directed in writing by the settlor to the contrary shall at the end of such year forthwith raise out of the capital of the trust fund and pay to the settlor for his own benefit the amount of the said deficiency of income in such year and the trustees in their discretion may from time to time before the end of each or any year referred to in this clause raise out of the capital of the trust fund and pay to the settlor any sum or sums on account and in advance of the sum estimated by them as prospectively payable to him at the end of such year under the last foregoing provision and no sum so raised and paid on account and in advance shall be repayable in the event of the settlor's death (or the failure or determination of the said trust of income in his sole favour) before the end of the year concerned.

Clause 6 prescribes the trusts applicable to the trust fund and the income thereof after the death of the settlor. The trust fund was invested by the trustees as to £50,000 in 10 per cent. non-cumulative preference shares of £1 each in Brokenhurst Estates Co., Ltd., and as to the remaining £50,000 on loan to that company at 4 per cent. interest. The Case states as follows: In none of the years material to these appeals has the income of the trust fund actually received by the trustees amounted to the sum of £6,500 and the trustees have in each year raised money out of the capital of the trust fund and paid to the settlor for his benefit amounts in respect of the deficiency. The Case finds that, in so doing, the trustees purported to act under cl. 5 of the settlement. The sums paid from capital in each of the years 1939-40, 1940-41, 1941-42 and 1942-43 were as follows: £3,895, £4,999 7*s.* 11*d.*, £3,529 3*s.* 11*d.*, £4,732 1*s.* 11*d.* The assessments under appeal were made under r. 21 of the All Schedules Rules on the view that the sums so paid were annual payments, that they must be grossed up to the appropriate amounts having regard to the rate of income tax in force in the years in question, and that the trustees were assessable on the gross amounts thus ascertained.

On these facts it was contended on behalf of the trustees that, on the correct interpretation of the settlement, the settlor never alienated the entire interest in the capital of the trust fund and that the sums paid by the trustees to the settlor were payments to him of his own capital. On behalf of the Crown it was contended that the settlor had irrevocably parted with the sum of £100,000 to the trustees, and that, on the proper construction of the settlement, the sums paid to the settlor by the trustees under cl. 5 were annual payments assessable under r. 21. The commissioners' conclusions are summarised as follows:

> In our opinion, Captain Morant has irrevocably parted with the £100,000 to the trustees and has not kept back capital to himself. In the events which have happened

he has had the deficiency of income made up out of capital, but what comes back comes to him as income under cl. 5 of the settlement. He is not receiving back his own capital or capital to which he is beneficially entitled. In our opinion, the assessments are correct in law and must be confirmed in principle : see *Trustees of H. K. Brodie* v. *Inland Revenue Comrs.* (1) and *Lindus and Hortin* v. *Inland Revenue Comrs.* (2).

The parties being unable to agree the correct basis of assessment in accordance with the above decision of the commissioners, the matter came again before them on the question of *quantum*. The trustees contended that the amounts paid by them to Captain Morant as aforesaid were paid by them as gross sums and that the only tax assessable was the appropriate tax on those gross sums. The Crown, on the other hand, contended that, since it has been found that the payments in question were annual payments, it must be presumed that the trustees had complied with the law and had raised or would raise the amounts necessary to provide for tax on the basis that the sums paid were net sums. The commissioners upheld the contention of the Crown, saying :

> We hold that all sums received by Captain Morant in the years before us under the provisions of cl. 5 of the settlement were net sums after deduction of income tax at the current rate, none the less that they were paid by the trustees without any such understanding and on the footing that they were payable as capital.

From this decision of the commissioners the trustees appealed. On the main point Macnaghten, J., upheld the decision of the commissioners, saying :

> In this case when Captain Morant executed the deed of settlement he ceased to be entitled to the capital. He received as part of his income under the settlement the money which the trustees raised out of capital for that purpose.

On the subsidiary point as to *quantum*, he reversed the decision of the commissioners, saying :

> Taking a year in which the amount paid out of capital was £3,895, it is contended on behalf of the Crown that for the purpose of assessment the £3,895 should be grossed up to £5,993 and that it must be supposed that the trustees had raised that sum out of capital and had paid it to Captain Morant. It seems to me to be a baseless claim. I think this contention on the part of the Crown, based as it is on fiction, cannot be sustained. The trustees are liable for the amount which they ought to have deducted. They are not liable for anything more.

From this decision both the trustees and the Crown appealed. Since it will be unnecessary to consider the point raised in the Crown's appeal if the appeal by the trustees succeeds, it will be convenient to deal first with that appeal.

Both the cases on which the commissioners rely in their decision on the point were cases under wills, but counsel for the trustees admitted that the same principle applies to settlements. He further admitted that he might have been in a difficulty had the £100,000 been settled by a third party, but he said that, as it was provided by Captain Morant himself, the payments directed to be paid to him by cl. 5 of the settlement were payments to him of his own capital, and that, accordingly, this was just such a case as was contemplated by Finlay, J., in *Brodie's* case (1), where he said (17 Tax Cas. 432, 439) :

> If the capital belonged to the person receiving the sums—if he or she was beneficially entitled not only to the income but to the capital—then I should think that, when the payments were made, they ought to be regarded, and would be regarded, as payments out of capital . . .

In support of the view that these payments ought to be regarded as payments to Captain Morant of his own capital, counsel for the trustees relied on three cases. The first was *Wheeler* v. *Humphreys* (3). In that case one question was the amount which a son had to bring into hotchpot, under a hotchpot clause, in respect of the sum paid to the trustees of the son's marriage settlement pursuant to a covenant by his father that his (the father's) executors would, within six months after the father's death, pay to the trustees the sum of £10,000 to be invested and held on trust for the son for life, with remainder to the son's wife for life, with remainder as to capital for the issue of the marriage, but with a proviso, that, should there be no child (as in the events happened), the capital was to be held in trust for the settlor absolutely. It was contended that the son should bring into account the whole £10,000, but the House of Lords rejected this argument. Lord Macnaghten said ([1898] A.C. 506, 509) : " The contingent interest reserved by the settlor is no more given *with*

the son . . . than given to the son. It was not given at all. The settlor kept it." The son had only, therefore, to bring into hotchpot the value of the interest in the said fund taken by himself and by his family. The second case was an Irish authority, *Re Cochrane* (4). There Sir Henry Cochrane had vested in trustees a mortgage debt of £15,000 and securities therefor and established trusts of the £15,000 under which the trustees were to pay to Sir Henry's daughter, Mrs. Day, an annuity to her for life of £575 and, after her decease,
A were to hold the trust funds for her issue as she should by deed or will appoint, and, in default of appointment, for her children who, being sons, should attain 21, or, being daughters, should attain 21 or marry. Power was given by Mrs. Day to appoint by will to her husband for his life a yearly sum not exceeding £300 out of the income of the £15,000. If no child of Mrs. Day were to obtain a vested interest absolutely, the trust fund was to be held in trust for Sir Henry absolutely. There was also a trust of the balance of the yearly income for
B Sir Henry absolutely. The trustees duly carried out the trust until, in March, 1904, Sir Henry directed them to pay in future the whole income to Mrs. Day. He died in September of that year and the Crown claimed estate duty in respect of the entire sum of £15,000 as property deemed to be included as property passing on the death of Sir Henry within s. 2 (1) (*c*) of the Finance Act, 1894. The question at issue was whether the £15,000 was property taken under a
C gift of which property *bona fide* possession and enjoyment had not been assumed by the donee immediately on receipt of the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. Both the court below and the Court of Appeal in Ireland held that estate duty was not payable in respect of the £15,000, but only in respect of the value of Sir Henry's interest in the balance of the income and his contingent interest in the £15,000. PALLES, C.B., whose judgment was approved by the
D Court of Appeal, said ([1905] 2 I.R. 626, 636, 637) that a person who declares trusts of property only gives the beneficial interests covered by the trusts. Everything else he retains and does not give. This decision was approved by LORD RUSSELL OF KILLOWEN in a judgment of the Privy Council, *Commissioner for Stamp Duties of New South Wales* v. *Perpetual Trustee Co., Ltd.* (5) ([1943] A.C. 425, 440, 442).

In none of these cases had the court to consider the nature of the interest
E retained by the settlor, but counsel for the trustees said that they showed that where a settlor settles property on the terms that he is one of the beneficiaries under the settlement, the interest thus provided by the settlor for himself remains his interest and does not change in character. If it was an income interest before the settlement was made, it will remain an income interest, but if, and so far as, it was an interest in capital, it will still be a capital payment
F though it may have to be made annually. Counsel for the Crown said that one must look at the settlement and nothing but the settlement, that cl. 5 of the settlement clearly provided for annual payments, and that it was wholly immaterial who provided the funds from which these annual payments were to be made. They relied, in effect, on the final two sentences of MACNAGHTEN, J.'s judgment which I have already read.

The question is one of considerable difficulty, but we have come to the con-
G clusion that the argument presented by counsel for the Crown must prevail. In the cases on which counsel for the trustees relied the quality of the interest retained by the settlor was not in issue. We think that it is always open to the settlor to determine the nature of the interest he retains, but that in order to see what that nature is the court must look at the settlement. We do not doubt that the document could have been so framed as to reserve to the settlor an interest in the capital. Equally, the settlor could have directed the applica-
H tion of part of the capital in the purchase from a third party of an annuity for the settlor. Had he done so, the annuity would have been taxable as income in his hands. It seems to us that in the case before us he has directed the trustees to pay him an annuity primarily out of income, but, if, and so far as the income is insufficient for the purpose, out of capital unless he otherwise directs. We are unable, therefore, to avoid the conclusion that the settlor has chosen to attach an income quality to the payments under consideration and must abide the consequences. For these reasons the trustees' appeal must be dismissed.

Their Lordships then gave judgment in the cross-appeal.

TUCKER, L.J.: The Crown's cross-appeal depends also on the proper construction of cl. 5. I read this clause as amounting to a direction to pay a net sum of £6,500 per annum, or, assuming tax at 10*s.* in the £, a gross sum of £13,000. The trustees are found to have been purporting to act under this clause in making the payments in question, and the Special Commissioners have further found in the Case that the net income of the trust fund actually received by the trustees never reached £6,500 and that they accordingly raised out of capital and paid to the settlor amounts in respect of that deficiency of net income. If any such payment in any one year had brought the sum up to £6,500 there could, I think, have been no question but that the trustees would have been liable for tax on the gross sum of £13,000 regardless of the amount of capital they had, in fact, realised or contemplated realising. The trustees did not, in fact, ever pay as much as £6,500, but such payments as they did make were, I think, rightly regarded by the Special Commissioners as net payments. They had no authority either under cl. 5 or by reason of r. 21 of the All Schedules Rules to make any payment other than a net payment, and neither the fact that they took a mistaken view of the law in regarding the payments made by them as being payments out of capital nor the fact that the settlor's directions to them as to the realisation of capital might have been different, can, in my view, affect the *quantum* of tax payable in respect of these annual payments of income. In the result, I agree with the view taken by the Special Commissioners and, hard though the consequences may be for the taxpayer, I think these payments are liable to the tax payable on the gross equivalent of the sums paid to the settlor, and I would allow the cross-appeal.

SOMERVELL, L.J.: On the cross-appeal as to the amount of the assessment, I agree with the conclusion of the learned judge. If the settlor had had no power under cl. 5 to direct the raising of a smaller sum, I should have accepted the Crown's argument on this point. The commissioners have found that the sums raised out of capital and paid were paid on the footing that they were payable as capital. Both trustees and settlor thought this was the position in law. If the settlor had realised that the receipt by him of a sum of £*x* involved a further raising out of capital of the appropriate sum for tax, it is, at any rate, possible that he would have given a direction limiting the sum to be raised out of capital to the sum, in fact, raised and suffering deduction of tax from that sum. In these circumstances, it seems to me right that he should be entitled to have the sums actually raised out of capital treated as the gross sums. On the cross-appeal, therefore, I think the Crown fails.

COHEN, L.J.: On the cross-appeal, like Somervell, L.J., I agree with Macnaghten, J. The relevant facts are to be found in para. 4 of the Case which is as follows:

> In none of the years material to these appeals has the income of the trust fund actually received by the trustees amounted to the sum of £6,500 and the trustees have in each year raised money out of the capital of the trust fund and paid to the settlor for his benefit amounts in respect of the deficiency.

The Case finds that in so doing the trustees purported to act under cl. 5 of the settlement. Nowhere is there any indication that the trustees ever intended to raise any other sums in exercise of their power under cl. 5 of the settlement. Under that clause Captain Morant could have forbidden wholly or in part the exercise of the power thereby conferred. The figures indicate that he must have expressly or tacitly done so as to part, and, in my view, the proper inference from the facts as found by the commissioners is that the power conferred by cl. 5 of the settlement was only exercised to the extent of the sums actually raised, that there was no intention to raise any further sums, and that those sums were paid and received as gross sums from which the deductions which ought to have been made pursuant to r. 21 of the All Schedules Rules were not made. Accordingly, I would dismiss the cross-appeal.

Appeal and cross-appeal dismissed with costs, one set off against the other.

Solicitors: *Janson, Cobb, Pearson & Co.* (for the trustees); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

Distinguished. WILLIAMS v. PORTMAN (VISCOUNT) [1951] 2 K. ... 48

BUTLINS, LTD. v. FYTCHE & ANOTHER.

[COURT OF APPEAL (Tucker and Somervell, L.JJ., and Roxburgh, J.), March 16, 17, 1948.]

istinguished. WILLIAMS v PORTAN. [1951] 2 All E.R. 539.

–Goodwill—Compensation—Goodwill arising from activities of sub-lessees or licensees—Alternative claims for new lease or compensation—Landlord and Tenant Act, 1927 (*c.* 36), *ss.* 4 (1); 5 (3).

A The tenant of certain land constructed thereon an amusement park in which the sideshows were run by licensees or sub-lessees. On Oct. 3, 1946, a valid notice to quit on Apr. 6, 1947, was served by the landlord, and on Oct. 23, 1946, a notice under the Landlord and Tenant Act, 1927, was given on behalf of the tenant claiming compensation for goodwill or a new lease. The claim for a new lease was later withdrawn. The county court judge, having considered the referee's report, awarded £1,050 to the tenant. B On appeal:

HELD: it being clear from the referee's report that the tenant company was responsible for the whole lay-out of the premises and devised the scheme thereof, it was immaterial that as between landlord and tenant goodwill may have attached to the premises in part as a result of the activities on the premises of sub-lessees or licensees.

C *Quaere*: whether a tenant who claims under s. 5 of the Act of 1927 for a new lease can claim at the appropriate time in the alternative for compensation under s. 4.

Observations per SOMERVELL, L.J., and ROXBURGH, J., on the unsatisfactory relationship between procedure under s. 4 and that under s. 5.

[AS TO COMPENSATION FOR GOODWILL AND GRANT OF NEW LEASE, see HALSBURY, D Hailsham Edn., Vol. 20, pp. 294-301, paras. 333-345; and FOR CASES, see DIGEST Supp.]

Cases referred to:

(1) *Smith, Stone & Knight, Ltd.* v. *Birmingham Corpn.*, [1939] 4 All E.R. 116; 161 L.T. 371; 104 J.P. 31; Digest Supp.

(2) *Simpson* v. *Charrington & Co., Ltd.*, [1934] 1 K.B. 64; 103 L.J.K.B. 49; 150 L.T. 103; *on appeal, sub nom.*, *Charrington & Co., Ltd.* v. *Simpson*, [1935] E A.C. 325; 104 L.J.K.B. 226; 152 L.T. 469; Digest Supp.

(3) *Smith* v. *Metropolitan Properties Co., Ltd.*, [1932] 1 K.B. 314; 101 L.J.K.B. 110; 146 L.T. 133; Digest Supp.

APPEAL by the landlord from an order made by HIS HONOUR JUDGE SHOVE, sitting at Louth County Court, on May 20, 1947, ordering the payment of compensation for goodwill to the tenant, Butlins, Ltd., under the Landlord and Tenant Act, 1927. The Court of Appeal dismissed the appeal. The facts F appear in the judgment of TUCKER, L.J.

Hanbury Aggs for the landlord.
H. A. Hill and *Kerrigan* for the tenant.

TUCKER, L.J.: In 1928 Mr. Butlin took a lease of a plot of land from a Miss Parrott, and that lease, which was for seven years, expired on Apr. 6, 1935. G In 1935 a further lease for four years expiring on Apr. 6, 1939, was granted, and thereafter the lessee continued in possession and held over as tenant from year to year on the terms of the lease of 1935. In 1937, Mr. Butlin assigned his interest in the lease to Butlins, Ltd. In 1945, Miss Parrott contracted to sell the property to Thomas Reynolds subject to the tenancy of the applicant. She died in July, 1945, and John Fytche was duly appointed her executor. In August, 1945, a conveyance was executed. On Oct. 3, 1946, notice to quit H was given on behalf of Thomas Reynolds, to take effect on Apr. 6, 1947, and on Oct. 23, 1946, a notice was given on behalf of the tenant claiming compensation or a new lease. To dispose of one point, the judgment in the court below was made against both Mr. Reynolds and Mr. Fytche, the executor. Counsel for the tenant agrees that the order should not have been made against Mr. Fytche and that the tenant's remedy, if any, is against Mr. Reynolds. Having regard to counsel's admission and consent, Mr. Fytche can drop out of these proceedings, and, if the tenant is entitled to an order, that order will be against Mr. Reynolds only.

This claim was made in respect of a plot of land some 22,500 sq. ft. in area. When let, it had no buildings on it. It was situate at Mablethorpe, Lincolnshire, and on it the tenant erected buildings of a temporary nature and turned it into an amusement park. There was there a "Dodgem" track and sideshows which were run by persons who obtained leases or licences from a company called Sussex Amusements, Ltd. They had the advantage of electricity supplied by Butlins. The notice claiming a new lease or compensation, dated Oct. 23, 1946, is signed by solicitors on behalf of Butlins, Ltd., and it says:

> We . . . hereby give you notice that they allege that although Butlins, Ltd., would be entitled to compensation under s. 4 of the said Act [*i.e.*, the Landlord and Tenant Act, 1927] yet the sum which would be awarded to them under that section for compensation for loss of goodwill . . . would not compensate them for the loss of goodwill which they would suffer if they should have to remove to and carry on their said trade or business in other premises, and that in lieu of claiming such compensation the said Butlins, Ltd., require a new lease of the said premises to be granted to them. Provided always that if it shall be held that they are not entitled to such new lease we hereby give you notice that they claim the sum of £3,000 as compensation for the said goodwill.

It is to be observed that, as I have mentioned, the notice to quit in 6 months was given on Oct. 3, 1946, and so would not terminate until April, 1947. The notice having been given, in due course county court proceedings were taken. The document of claim in the county court was dated Nov. 30, 1946, and it begins: "Messrs. Butlins, Ltd., amusement caterers . . . apply to the court for the grant of a new lease, or, alternatively, for compensation for goodwill." They give a number of particulars with regard to the property and the lease, and so forth. A defence or answer was put in by the respondents in those proceedings as follows:

> Take notice that the respondents' answer to the application of the applicant for compensation for goodwill is as follows:—1. There is no goodwill within the meaning of the Landlord and Tenant Act, 1927, relating to these premises. 2. The application by the applicant has not been made within the time specified in the said Act. 3. The applicant is not a tenant, but is a trespasser. 4. The applicant has for many years sublet portions of the premises in contravention of the covenant in the lease referred to in its application. 5. The applicant is not entitled to any compensation for loss of goodwill.

None of those points of defence would appear to have been relied on at the hearing, nor were they relied on at this appeal, except the first and fifth, which, I think, amount to the same thing, that there is no goodwill within the meaning of the Act relating to the premises and that the tenant is not entitled to compensation for loss of goodwill.

The matter was referred to a referee for his report, and the referee's inquiry took place on Feb. 19 and on Mar. 19 and 20, 1947, still before the expiration of the notice to quit. His report is dated Apr. 5, 1947. Having set out a number of facts, in para. 14 he states the following conclusions:

> (*a*) In view of the fact that the proper basis for a claim for compensation is not the loss to the tenant but the gain to the landlord . . . and the fact that the second respondent (who is for all practical purposes the sole respondent) [*i.e.*, Mr. Reynolds] does not intend to use the site for an amusement park but for development of quite a different character, I cannot see that any claim for compensation for goodwill can be substantiated. (*b*) If I am considered to be wrong in law upon this point, then it becomes necessary for me to advance a finding as to the amount of such compensation. In my view, the main cause of the attraction to the lower amusement park has been its situation, and this is not a factor to be taken into account in estimating the compensation payable: see s. 4 (1) (*d*) (ii) of the Act. Further, I am not satisfied that the advertising carried out by the applicant was so exclusively directed to boosting the lower amusement park as to be the proximate cause of the patronage there of the public. Further, the applicants did not start from absolute scratch so far as provision of amusements on the site was concerned since the site had been associated with amusements and amusements with the site for many years before the applicant or its predecessor in leasehold title appeared on the scene . . . I consider that the advance in the letting value of the site as an amusement park is mainly due to its favourable situation coupled with the development of the day visitor and other visitors to Mablethorpe with which development it may be that the applicant's provision of amusements and advertising had something to do. I consider that the applicant undoubtedly managed the lower amusement park well—it certainly appeared to be financially a success from the figures produced. If the court, therefore, considers a figure of compensation is required from me, I place this at £1,050, and I would add that I have

arrived at this figure by allowing for an enhanced rent attributable to goodwill created by the applicant which I consider to be £350 per annum at three years' purchase.

[HIS LORDSHIP considered the arguments advanced before the county court judge, who came to the conclusion that the referee's decision in para. 14 (*a*) of his report was wrong in law, and he found for the tenant in accordance with para. 14 (*b*). HIS LORDSHIP referred to the notice of appeal, and observed that no reference appeared therein to the only two points argued before the A county court judge, nor were any of those matters discussed before the Court of Appeal, except the question whether the judge had misdirected himself in law. Counsel for the landlord had argued that a claim for compensation under s. 4 of the Act of 1927 would not lie, and that only under s. 5 (3) (*b*) could there be such a claim in the circumstances, but that there was no finding by the referee of any of the facts necessary to bring s. 5 (3) (*b*) into question. HIS LORDSHIP continued :] All those are difficult and interesting questions, but, in my view, B none of them was taken before the county court judge and none of them is open to the landlord on this appeal. I will, however, say a word about the question whether or not, in my view, it is correct to say that, on the face of this report, no goodwill exists or attaches. It is possible that that point is open to the landlord, it having been covered by one of the submissions made to the county court judge. Counsel refers to paras. 11 and 14 (*b*) of the referee's report to C support his submission that no goodwill attached to these premises. In para. 11 the referee says :

> It also transpired in the course of the hearing of the reference that the letting of the sideshows at the lower amusement park was carried through and the agreements with the tenants or licensees were all granted by Sussex Amusements, Ltd., and not by the applicants. It was explained to me that Sussex Amusements, Ltd., was a subsidiary company wholly owned (so far as any public company may be wholly owned) D by the applicants. The respondents naturally contended that the applicants were claiming compensation for a goodwill which on their own evidence had been in part created by Sussex Amusements, Ltd., and not by the applicants at all. For the applicants it was contended that what had been done by a subsidiary company enured for the benefit of the parent company and the case of *Smith, Stone & Knight, Ltd.* v. *Birmingham Corpn.* (1) (see sched. II hereto) was quoted in support of this view. This may be an important factor, since clearly the rents paid by the licensees (which in the lower amusement park for 1946 amounted to £1,515) are clearly a part of the goodwill.

E It is said that that paragraph, coupled with para. 14 (*b*) of the referee's report, discloses no goodwill. I do not think that that is a sound contention. Looking at this report, it is clear that the whole lay-out and the scheme of these premises was devised by Butlins. They organised this place as an amusement park, and I think it is clear from the referee's report that goodwill did attach to these premises. It seems to me quite immaterial that the goodwill may have so F attached in part as a result of sub-leases granted to other persons. The report does not disclose precisely how Sussex Amusements, Ltd., obtained from Butlins the right to grant these licences or sub-leases to the persons who occupied the stalls and ran the sideshows, but it is clear that it was done in some way with the consent of Butlins, Ltd. As between Butlins and their landlords, it seems to me immaterial that goodwill may have been built up in part as the result of the operations conducted on the premises by sub-lessees or licensees. Looking G at this report, it appears probable that the referee may have reduced the amount of compensation which he awarded because he took the view that Butlins were not entitled to any part of the compensation which resulted from the operations of Sussex Amusements, Ltd. I express no final view about that, but I can see nothing in this report which justifies a view that there is no goodwill attaching to these premises. For these reasons, I think this appeal fails.

H **SOMERVELL, L.J. :** I agree with the judgment which has been just delivered and that this appeal fails.

I do not want to add anything on the first point, namely, whether there was any evidence in this report of goodwill attaching to these premises created by the tenant. My brother doubted whether that point was open, and I am bound to say that I share that doubt. On the second point, the argument that a claim under s. 4 would not lie, the matter, I think, can be stated in this way. When the tenant stated before the county court judge that he was not asking for a new lease but also made it clear that he was asking for the compensation as awarded in para. 14 (*b*), it was open to the landlord to say: " You are not entitled to any compensation. You cannot claim it under s. 4 because your claim was filed before the tenancy came to an end and you had quitted." That was a point which could have been taken, and, if it had been taken, there would have been a possible answer to it. The tenant could have said: " I am not claiming in the alternative under s. 4; I am claiming under the power under which the tribunal can award compensation under s. 5." To get compensation under s. 5, the tribunal have to be precluded from granting the new lease by reason of the provisions set out in s. 5 (3) (*b*). There was, undoubtedly, material in the referee's report which might have supported, and I think probably would have supported, a claim for compensation put in that way, but, the point not having been taken, it seems to me clear that it is not open to the landlord in this court.

I only wish to say one or two words on those points which, although they do not really arise in this appeal, were argued before us and which would seem to me to reveal an obscure position with regard to the relationship of ss. 4 and 5. It may be that those concerned with these matters might well consider the question whether, if opportunity offered, this legislation, which has wide scope and is obviously of importance, might not be amended so as to clarify and simplify the position. I think I can state the matter, as it seems to me to arise, quite shortly. In *Simpson* v. *Charrington & Co., Ltd.* (2) it was laid down, among other things, that a notice stated in the alternative was not invalid, that is to say, a notice under which a tenant claimed, in the first instance, under s. 5 and then added an alternative claim under s. 4. In that case the court was dealing with a notice and not with the question whether before the county court a tenant can bring a claim under s. 5 and an alternative claim, if he fails to get a new lease, to compensation under s. 4. The question of the date at which a s. 4 claim can properly be made was considered in *Smith* v. *Metropolitan Properties Co., Ltd.* (3). That was a decision of Talbot, J., in which he considered carefully all the various aspects of the issue before him, and he came to the conclusion which is stated in the headnote ([1932] 1 K.B. 314):

> A tenant of a holding, to which the Landlord and Tenant Act, 1927, applies, cannot commence an action to recover compensation for goodwill under s. 4 of that Act, in a case where the tenancy is terminated otherwise than by notice, until the tenancy has terminated and the tenant has quitted the holding.

The form of application in the county court for a claim under s. 4 or for a claim under s. 5 is Form 330. The same Form is applicable for an applicant who is applying to the court for compensation for goodwill and for an applicant who is applying to the court for the grant of a new lease. According to Talbot, J.'s decision, if a tenant is applying for compensation under s. 4, for reasons which he gives and which, I am bound to say, seem to me convincing, he cannot start his claim until he has brought his tenancy to an end and quitted. On the other hand, it would seem obvious that if he is claiming under s. 5 for a new lease, he is making —and, perhaps, must make—his claim, as was done here, well before the time when the lease will normally expire, because, although it may not be necessary that the decision as to a new lease should be made finally before the old lease has expired, it is obviously desirable that it should, or, at any rate, as soon as possible thereafter.

The questions dealt with which would seem to me difficult are these. Can a tenant who puts in a claim under s. 5 for a new lease claim at the appropriate time in the alternative for compensation under s. 4? It may be that under the Act he cannot. It does not seem to me plain and, as the matter was not before us, I say nothing about it except that it is a difficult point and one which ought to be made plain. I can see no reason in logic why, if a tenant puts in an application under s. 5 for a new lease, he should only be able to get compensation if his application fails on the grounds mentioned in s. 5 (3), para. (*b*), those being the only grounds a failure on which entitles him to compensation under s. 5 in accordance with the cases to which we have been referred and the words of the section. If he fails, for instance, under s. 5 (3) (*a*) on grounds which I will indicate in a moment, he is precluded from claiming compensation under s. 5. Is he also shut out from claiming compensation under s. 4? Section 5 provides:

> (3) Where the tenant is the applicant, the grant of a new lease under this section shall not be deemed to be reasonable—(*a*) unless the tenant proves that he is a suitable tenant and that he would be entitled to compensation under the last foregoing section, but that the sum which could be awarded to him under that section would not compensate him for the loss he would suffer if he removed to and carried on his trade or business in other premises, . . .

Let me assume that the applicant satisfies the court that he is a suitable tenant A and that he is entitled to compensation, but the court comes to the conclusion that compensation would compensate him for the loss he would suffer if he removed and carried on elsewhere. On that view, the court would say he cannot have a new lease, but it would seem to me to be rather hard if he was precluded from getting the compensation to which he has proved he would have been entitled if he had claimed simply under s. 4. Assuming that he is entitled to B claim in the alternative under s. 4, which would seem to be what the legislature may well have intended, how complicated and unsatisfactory is the procedure on the decisions to which I have referred. He wants a new lease and starts the proceedings reasonably as early as possible after giving the notice so that the matter can if possible be determined and both sides know where they are before the lease will terminate in the ordinary course. In those proceedings he has to call the evidence which would be relevant under a s. 4 C claim, namely, as to the goodwill which he has accumulated, but for reasons other than those in s. 5 (3) (*b*) he fails in that. If he is entitled to an alternative claim under s. 4, he is precluded from making that claim in the proceedings which he starts under s. 5 because those proceedings will *ex hypothesi* have been started before he has quitted his holding. He would, therefore, have to start a separate and later set of proceedings after he had left the holding in which, to a very large extent, evidence would have to be re-called unless, of course, D the parties came to some agreement. I thought it was worth stating this, because it does seem to me to disclose a position which might well receive the attention of those concerned. I agree that this appeal fails.

ROXBURGH, J.: I should prefer to express no opinion on the important question whether, as the Act now stands, the prosecution of a claim under s. 5 E precludes the prosecution of an alternative claim under s. 4, but I am in full agreement with my Lords that the learned county court judge reached a right conclusion on all the questions which were raised before him. I also agree with SOMERVELL, L.J., that matters have arisen during this hearing which, though not open to the landlord on this appeal, are difficult to resolve and point to an unsatisfactory relationship between ss. 4 and 5.

F *Order of county court judge varied by deletion of name of John Fytche. Otherwise appeal dismissed with costs.*

Solicitors: *Maude & Tunnicliffe*, agents for *James Young*, Grimsby (for the applicants); *Amphlett & Co.*, agents for *R. V. Stokes & Metcalfe*, Portsmouth (for the respondents).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Re PARANA PLANTATIONS, LTD.

[Chancery Division (Vaisey, J.), February 9, 16, March 24, 1948.]

Company—Winding-up—Proof of debts—Money owed in reichsmarks under contracts made in Germany—Performance of contracts impossible and illegal owing to outbreak of war—Obligation to refund limited to refunding in Germany—Debts payable at future date—Rate of exchange at which creditors' claims to be allowed—Claims by Custodian of Enemy Property—Companies Act, 1929 (*c.* 23), *s.* 261—*Trading with the Enemy* (*Custodian*) *Order,* 1939 (*S.R. & O.*, 1939, *No.* 1198), *art.* 1 (i), (ii) (*e*), (iv) (*d*) (*as amended by Trading with the Enemy* (*Custodian*) (*Amendment*) *Order,* 1940 (*S.R. & O.*, 1940, *No.* 94)).

Under a barter scheme arranged in Germany before the war, an English company entered into a number of individual contracts in Germany for the purchase of land in Brazil by German nationals, the purchase price to be paid by the participants in the scheme into a blocked account of the company with a German bank and used for the purchase by the company of German railway material to be delivered to Brazil. On the outbreak of war further performance of these contracts became impossible because the railway stock could not be delivered, and, moreover, the contracts became illegal under English law. Under the terms of the contracts, the company thereupon became liable to refund the money deposited with it by the participants in the scheme, but it was illegal to refund the money in Germany. On Mar. 31, 1944, the company went into voluntary liquidation, and O., who had paid Rm.20,600 to the company in 1938 under one of these contracts and who had come to England before the outbreak of the war, put in a proof in the winding-up for the sterling equivalent at the rate of exchange on Sept. 2, 1939, of the amount owing to him by the company, on the ground that, since he was in England when the money became repayable, the company was liable to refund to him in England the sterling equivalent at that date (*i.e.*, Sept. 2, 1939) of the amount paid by him. On May 31, 1946, the Court of Appeal held that the company's obligation to refund was limited to a refunding in Germany and that the company was not liable to refund to O. in England the sterling equivalent on Sept. 2, 1939, of the amount paid by him, but that the liquidator could properly admit a proof by O. "on the basis (*a*) of a claim that the company was at the commencement of its winding-up indebted to him in the sum of Rm.20,600 payable in Germany, but not elsewhere, on such date, then future, as might come when it would be lawful for the company to make such payment, and (*b*) that a just estimate of the value of such claim at the said date would be made by treating the claim in respect of every Rm. 40 of such debt as of the value of £1." On an application by the liquidator for the determination of further questions in regard to the proof of debts, it was argued by the Custodian of Enemy Property that, under the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, art. 1 (as amended by the Trading with the Enemy (Custodian) (Amendment) Order, 1940), he was entitled to be paid the appropriate sums of money which, on the outbreak of war, became immediately payable in Germany to the creditors in whose shoes he stood, and that at the commencement of the winding-up he had a right already crystallised, ascertained and finally quantified in sterling at the rate of Rm.10.77 to the £. Article 1 of the Order of 1939 provides: "(i) Any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, and any money which is to be deemed for the purposes of the Act to be money which would, but for the existence of a state of war, be so payable, shall be paid to the Custodian. (ii) . . . there shall be paid to the Custodian in particular any money which would, but for the existence of a state of war, be payable to . . . a person who is an enemy, by way of . . . (*e*) debt . . ." By art. 1 (iv) (*d*) (added to the Order of 1939 by the Trading with the Enemy (Custodian) (Amendment) Order, 1940), any money required to be paid to the Custodian under the foregoing paragraphs of art 1, shall be paid: "In cases in which money would, but for the existence of a state of war, be payable in a foreign currency to . . . a person who is an enemy . . .

in English currency," at a rate fixed by the Treasury where there was no rate fixed by the Bank of England on the date on which the payment became due. The rate fixed by the Treasury, under the provisions of art 1 (iv) (*d*) was Rm.10.77 to the £ sterling. By the Trading with the Enemy (Insolvency) Order, 1940, art. 1, on the winding-up of a company " the benefit of all debts and of all claims which would but for the existence of a state of war be provable by an enemy in the winding-up . . . shall forthwith stand vested in the Custodian."

HELD : (i) for the purposes of proof in a winding-up, the estimation of the value of the claims at its commencement must be arrived at by a consideration of the position at that date, and, on a just estimate of claims made in respect of deposits under the barter scheme, an exchange rate of Rm.40 to the £ might properly be assumed by the liquidator, even in the case of claims made by the Custodian of Enemy Property, because every claimant's right was in the nature of a chose in action, giving a right of proof in sterling, and the claims of the Custodian were not to be treated as liquidated amounts.

(ii) the claims of such of the creditors who were or might have been German nationals on Sept. 3, 1939, but who were outside Germany on that date and had at no material time thereafter resided in enemy territory within the meaning of the Trading with the Enemy Act, 1939, could now be satisfied by the liquidator, notwithstanding that they were or might have been German nationals.

(iii) the blocked reichsmarks should be used and applied as assets as and when they became available.

(iv) the liquidator was not entitled to treat the claims of creditors which appeared to have been satisfied in reichsmarks in Germany during the war as being discharged and not provable by the Custodian of Enemy Property, as only the Custodian could have given a receipt or a discharge for these moneys, even though the claims provable in liquidation did not crystallise until the beginning of the winding-up.

[AS TO PROOF OF DEBTS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 674-676, paras. 1118-1121.]

Case referred to :

(1) *Re Parana Plantations, Ltd.*, [1946] 2 All E.R. 214 ; 2nd Digest Supp.

ADJOURNED SUMMONS by the liquidator to determine questions in regard to the proof of debts on the voluntary winding-up of a company.

Parana Plantations, Ltd., an English company, had two subsidiary companies in Brazil, a railway company and a land company. The railway company was anxious to buy rolling stock in Germany, and the land company wished to sell its land. In 1938 a barter transaction was arranged in Germany, with the approval of the German government, whereby a German national anxious to emigrate might purchase a plot of land in Brazil by paying the relevant sum into a blocked account of the English company with a German bank and authorising the company to use the sum so paid in payment for German railway material to be delivered to Brazil. A German national who was admitted into the scheme became a " participant." A clause in the contract between the participant and the company provided : " In the event of it being impossible, by reason of *force majeure*, for the railway material ordered to be delivered, the marks amount paid in is refunded." Further clauses provided (*a*) that the participant might withdraw from the transaction in respect of any of his money which had not been used in paying for the rolling stock, and that any amounts regarding which notice of termination had been given would be repaid where they fell due ; (*b*) that acceptance of the amount and of the participation of the individual German in the transaction was subject to the provisions of the German Currency Control Office and to the necessary permits, and, if it was not possible to obtain these, the amounts paid in would be refunded. The contract was in German. On the outbreak of war, further performance of the contract became impossible because the railway stock could not be delivered, and, moreover (the company being an English company) the contract became illegal under English law. As a result, since the railway material could not be delivered " by reasons of *force majeure*," the company was liable, under the terms of the contract, to refund " the marks amount paid in." It was, however, illegal for the company to refund the money in Germany. In July, 1938, O., a German national who was then living in Germany, had become a participant in the scheme and paid Rm.20,600. On Mar. 31, 1944, the company went into voluntary liquidation, and O., who had come to England before the outbreak of war and was then living in England, lodged a proof, as a creditor of the company, for the sum of £1,943 7*s.* 11*d.*, on the basis that, since he was in England when the amount became repayable, he was entitled to be repaid in England the sterling equivalent at the official rate of exchange on Sept. 2, 1939, of the amount paid by him. On May 31, 1946, the Court of Appeal held in *Re Parana Plantations, Ltd.* ([1946] 2 All E.R. 214) that the obligation to refund was limited to a refunding in Germany and that the liquidator had rightly rejected the proof put in by O., but that the liquidator could properly admit a proof of debt by O. to rank for dividend on the winding-up on the basis (*a*) of a claim that the company was at the commencement of its winding-up indebted to him in the sum of Rm.20,600 payable in Germany, but not elsewhere, on such date, then future, as might come when it would be lawful for the company to make such payment, and (*b*) that a just estimate of the value of such claim at the said date would be made by treating the claim in respect of every Rm.40 of such debt as of the value of £1. The liquidator now applied for further directions in regard to the proof of debts. The questions raised by this summons and the arguments appear in the judgment.

C. W. Turner for the liquidator.
Danckwerts for the Custodian of Enemy Property.
Lindner for a non-enemy creditor.
Charles Russell for a shareholder.

Cur. adv. vult.

Mar. 24. **VAISEY, J.,** read the following judgment. This is a summons dated Oct. 27, 1947, taken out by the liquidator of Parana Plantations, Ltd., which went into voluntary winding-up on Mar. 31, 1944. It propounds a number of questions to which the court is invited to supply the answers. A previous application on the part of the former liquidator came before me on Feb. 25, 1946, and before the Court of Appeal on May 30 and 31, 1946. The judgments of the Court of Appeal are reported: see *Re Parana Plantations, Ltd.* (1), where the statement of the facts by LORD GREENE, M.R., makes it unnecessary for me to recapitulate them now. I ought, however, to explain that this previous application originated in the rejection by the then liquidator of a proof lodged by a Mr. Oppenheim, as a creditor of the company, for the sum of £1,943 7*s.* 11*d.* as the sterling equivalent of Rm.20,600 at the official rate of exchange ruling on Sept. 2, 1939, namely, Rm.10.60 to the £ sterling. By my order the rejection was reversed and the proof admitted at that sum. The Court of Appeal discharged my order, with the result that the rejection of the proof was confirmed, and the order of the Court of Appeal then proceeded as follows:

> And this court being of opinion (but without thinking fit to give any directions in that behalf) that the said liquidator can properly admit a proof of debt by the said Leopold (sometimes called Awigdor) Oppenheim to rank for dividend in the said winding-up on the basis (*a*) of a claim that the said company was at the commencement of its winding-up indebted to him in the sum of Rm.20,600 payable in Germany but not elsewhere on such date then future as might come when it would be lawful for the company to make such payment and (*b*) that a just estimate of the value of such claim at the said date would be made by treating the claim in respect of every Rm. 40 of such debt as of the value of £1. This court doth order that the said Leopold (sometimes called Awigdor) Oppenheim be at liberty within 21 days of the date of this order (or within such extended time as the said liquidator may think fit to allow) to deliver to the said liquidator a fresh proof of debt and that the said liquidator do examine and admit or reject the same in accordance with the Companies (Winding-up) Rules, 1929.

The rate of Rm.40 to the £, mentioned in the said order of the Court of Appeal, was described by counsel as in the nature of a "judicial guess." The description seems to me to be not unfair. I understand that no further material is available on which I could properly be invited to propound a revised guess, and that no relevant change of circumstances since the date of the order has occurred. True it is that the expression of opinion in the passage which I have quoted from the order in terms relates only to the claim of Mr. Oppenheim, but the judgment of LORD GREENE, M.R., appears to regard it as, probably at least, of general application. I quote a passage from the judgment as follows ([1946] 2 All E.R. 219) :

> I must not be taken as laying down any sort of principle for dealing with claims in what might appear to be analogous cases, or laying down that which is to be regarded as in any way a direction in law as to what should be done. I am only dealing with the general facts of this particular case. We are told that there are many cases of the same character under this contract, and what I have said in regard to the right of the liquidator to treat the matter on that basis would, unless there are special circumstances differentiating those cases, apply equally to them. When I say that I am not suggesting any line of conduct which a liquidator in a different case should adopt, what I mean is that under some different contract, in some different circumstances, he might have to act on other lines.

Strictly speaking, I am probably entitled to differ from the view that Rm.40 to the £ was the nearest possible, or, at any rate, a proper, estimate of the value of the claims of creditors standing in the same, or a similar, position to that of Mr. Oppenheim, but I have not the slightest intention of doing so. Indeed, no reason for my doing so is suggested.

The relevant section of the Companies Act, 1929, is s. 261, which reads as follows :

> In every winding-up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of bankruptcy) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value.

The first question raised by the present summons is as follows :

> Whether all persons entitled to rank as creditors of the company under its barter schemes who were outside Germany on Sept. 3, 1939, and who at no material time thereafter resided in enemy territory within the meaning of the Trading with the Enemy Act, 1939, ought to rank as creditors in the liquidation of the company on the basis of a rate of exchange of Rm.40 to the £ or any other and what rate.

On the face of it, this would seem to be equivalent to asking me whether the liquidator could safely and properly follow the guidance already given to him by the said order of the Court of Appeal, to which an affirmative answer would seem to be inevitable and obvious, but the point of it really is whether it makes a difference if some other computation has to be made in respect of the debts vested in the Custodian of Enemy Property which might result in a striking and, it is said, impossible contrast in the treatment of the two classes of case. The second question raised is as follows :

> Whether the claims of such of the creditors aforesaid as were or may have been German nationals on the date aforesaid may now be satisfied by the liquidator notwithstanding that they were or may have been German nationals as aforesaid.

In that question "creditors aforesaid" means the creditors referred to in the first question. I now come to the third question, which reads thus :

> Whether all persons entitled to rank as creditors of the company under its barter schemes who were in Germany on Sept. 3, 1939, or who thereafter became or at any time were enemies within the meaning of the Trading with the Enemy Act, 1939, are entitled to rank as creditors in the liquidation of the company on the basis of a rate of exchange of Rm.40 to the £ or any other and what rate.

Such question, however, would, in my judgment, have been more accurately expressed in some such terms as : "Whether the Custodian of Enemy Property in respect of the rights and claims of all persons," and so forth, "is entitled to rank as a creditor in the liquidation," and so forth.

On that question counsel for the Custodian of Enemy Property has submitted that the Custodian has the right to come in and prove at the rate of Rm.10.77 to the £, and his argument may be thus summarised. After referring to the Trading with the Enemy Act, 1939, ss. 1, 2, 4, 7 and 15, he drew attention to the Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198), which, as amended by the Trading with the Enemy (Custodian) (Amendment) Order, 1940 (S.R. & O., 1940, No. 94), provides as follows. By art. 1:

> (i) Any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, and any money which is to be deemed for the purposes of the Act to be money which would, but for the existence of a state

> of war, be so payable, shall be paid to the Custodian. (ii) Without prejudice to the generality of the foregoing paragraph, there shall be paid to the Custodian in particular any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, by way of . . . (*e*) debt, including money in the possession of any bankers, whether on deposit or current account or whether held in trust or in custody for or for the benefit of an enemy.

Then by art. 1 (iv) (*d*) [added by the Order of 1940] any money required to be paid under the foregoing paragraphs of art. 1 to the Custodian shall be paid :

> In cases in which money would, but for the existence of a state of war, be payable in a foreign currency to or for the benefit of a person who is an enemy (other than cases in which money is payable under a contract in which provision is made for a specified rate of exchange), in English currency at the middle official rate of exchange fixed by the Bank of England on the date on which the payment became due to that person, or the middle rate of exchange for telegraphic transfers in London on that date, or if there was no such rate on that date at such rate as the Treasury may determine as appropriate for ascertaining the value in English currency of the money payable on that date.

An affidavit has been sworn by an official of the Treasury to the following effect, namely, that :

> In accordance with the provisions of art. 1 (iv) (*d*) of the Trading with the Enemy (Custodian) Order, 1939, the Lords Commissioners of His Majesty's Treasury determined that the rate of exchange for reichmarks where there was no official rate of exchange fixed by the Bank of England and no rate of exchange for the telegraphic transfers in London should be Rm.10.77 to the £ sterling.

The document further says :

> In respect of reichmarks there was no rate of exchange fixed by the Bank of England and no rate of exchange for telegraphic transfers in London on or after Sept. 4, 1939.

It is said by counsel for the Custodian of Enemy Property that the combined effect of the said Act and Order and the outbreak of war was to entitle the Custodian to the payment of the appropriate sums of money which, on the outbreak of war, became immediately payable in Germany to the creditors in whose shoes he stands, and that at the commencement of the winding-up he had a right already crystallised, ascertained and finally quantified in sterling at the before-mentioned rate of Rm.10.77 to the £. Counsel for the non-enemy creditor supports that contention so far as it enables the latter to say that he ought, in principle, to be treated on the same footing. On the other hand, counsel for the shareholder urged that, for the purposes of proof in a winding-up, the estimation of the value of the claims at its commencement must be arrived at by a consideration of the position at that date, that the claims of the Custodian ought not to be treated as claims for liquidated amounts, and that the estimation must be on the same footing throughout. Every claimant's right was in the nature of a chose in action, giving a right of proof in sterling. He submitted that art. 1 of the Trading with the Enemy (Insolvency) Order, 1940 (S.R. & O., 1940, No. 1419), supported his view. That article reads :

> Where any company goes into winding-up . . . the benefit of all debts and of all claims which would but for the existence of a state of war be provable by an enemy in the winding-up . . . shall forthwith stand vested in the Custodian.

Counsel for the shareholder submitted that the Court of Appeal had expressed a considered opinion that Rm.40 to the £ was as sound a basis as could be found, and that, as there was no suggestion of any change of any material kind since that decision, the proper course was to follow it throughout. I was told that the existence of the prescribed rate of Rm.10.77 to the £ had been brought to the attention of the Court of Appeal on the hearing of the former summons, but I gather that no arguments on the lines of those which I heard from counsel for the Custodian of Enemy Property and counsel for the non-enemy creditor were addressed to, or in any way suggested to, the Court of Appeal.

I have, with a good deal of hesitation, come to the conclusion that the contentions of counsel for the shareholder must prevail and I propose to deal with questions 1 and 3 of the summons together by declaring that in a just estimate of claims made in respect of deposits under the barter scheme (including claims by the Custodian of Enemy Property) an exchange rate of Rm.40 to the £ may properly be assumed by the applicant liquidator. I will also make a declaration in the terms of para. 2 of the summons.

Question 4 of the summons is in these terms:

> Whether the blocked reichmarks now held to the credit of the company in the Commerz und Privat Bank and the Deutsche Sudamerikanische Bank in Germany may upon being unblocked be used by the liquidator in whole or in part for discharging in reichmarks the claims of the persons entitled to rank as creditors of the company under its barter schemes and particularly the claims of such of the said creditors as were in Germany on Sept. 3, 1939.

A I am not quite sure that I understand the difficulty which the liquidator feels about this, but I am prepared to declare that the blocked reichsmarks ought to be used and applied as assets of the company in the winding-up as and when they become available. I do not see what further guidance I can give on this point.

By question 5 I am asked:

> B Whether the liquidator is entitled to treat the claims of creditors which appear to have been satisfied in reichmarks in Germany during the war as having been discharged and not provable by the Custodian of Enemy Property.

That I answer in the negative. So far as the law of this country is concerned, nobody, except the Custodian, could have given a receipt or a discharge for the moneys in question, and this notwithstanding the fact that the claims provable in the liquidation did not crystallise until the beginning of the winding-up.

Question 6 is of a two-fold character. First, it asks:

> C Whether the liquidator may now, or at what (if any) future date, disregard any possible claims in respect of which no proofs have been submitted to him.

On this, at the moment, I do not propose to give any direction at all, nor as regards question 8, which is:

> How the liquidator ought to deal with any deposits in respect of which no claim has been made.

D It seems to me that the Companies (Winding-up) Rules, 1929, r. 104 (1), enables the liquidator to deal with the situation at his own discretion, and I do not see what more he requires or can expect. Rule 104 (1) reads as follows:

> Subject to the provisions of the Act, and unless otherwise ordered by the court, the liquidator in any winding-up may from time to time fix a certain day, which shall be not less than 14 days from the date of the notice, on or before which the creditors of the company are to prove their debts or claims, and to establish any title they E may have to priority under s. 264 of the Act, or to be excluded from the benefit of any distribution made before such debts are proved, or as the case may be from objecting to such distribution.

Then there are directions as to how the notice is to be given, and I do not think that the liquidator ought to find any difficulty in applying that rule at his discretion. The second part of question 6 is:

> What (if any) further steps should be taken by him with a view to tracing depositors F who have not put in any claims?

I cannot see that anything else can be done.

As to question 7, that is to say:

> Upon what (if any) evidence the applicant is justified in admitting claims in respect of which complete evidence of the identity of the claimant cannot be supplied?

It seems to me that, if the liquidator is prepared to continue to rely on the assist- G ance of Dr. Schauff, mentioned in his affidavit, and to accept his statements as accurate, I think it is within his discretion to do so. Any particular case of doubt may have to be brought before the court to be specially dealt with.

Nothing remains of the summons except to deal with the costs, as to which the order should, I think, follow the order of the Court of Appeal by directing that the costs of the respondents as between solicitor and client should be paid out of the assets, to which I assume that the liquidator raised no objection. H His own costs should be retained out of the assets and they will include the cost of taking a shorthand note of this judgment and of a transcript of such note.

Declaration accordingly. Costs of the respondents, as between solicitor and client to be paid out of the assets, and costs of the applicant to be retained out of the assets.

Solicitors: *Holmes, Son & Pott* (for the liquidator); *Solicitor, Board of Trade* (for the Custodian of Enemy Property); *Slaughter & May* (for the non-enemy creditor); *Linklaters & Paines* (for the shareholder).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

MORRIS & ANOTHER *v.* MINISTER OF PENSIONS.

[King's Bench Division (Denning, J.), April 6, 1948.]

Pensions—Appeal to High Court—Assessment of extent of disablement—Pensions Appeal Tribunals Act, 1943 (*c.* 39), *ss.* 5 (2), 6 (3).

By the Pensions Appeal Tribunals Act, 1943, s. 6 (2), an appeal lies to the High Court from the decision of a pensions appeal tribunal on an appeal by a claimant from a decision of the Minister under ss. 1, 2, 3 or 4 of the Act. By s. 6 (3), subject to this provision, the decision of a tribunal is to be final and conclusive. Two claimants sought leave to appeal to the court from decisions of a tribunal assessing extent of disablement under s. 5:—

Held: the court had no jurisdiction to hear the appeals.

[For the Pensions Appeal Tribunals Act, 1943, ss. 5 and 6, see HALSBURY'S STATUTES, Vol. 36, pp. 486, 487.]

Applications for leave to appeal from decisions of a pensions appeal tribunal under the Pensions Appeal Tribunals Act, 1943, s. 5. Denning, J., held that he had no jurisdiction to hear the appeals. The facts appear in the judgment.

The applicant, Violet Morris, appeared in person.

The applicant, R. N. Baird, did not appear, but he made submissions in writing.

H. L. Parker for the Minister of Pensions.

DENNING, J.: Miss Morris and Mr. Baird, the applicants in these two cases, desire me to give them leave to appeal from assessments made by an assessment tribunal under the Pensions Appeal Tribunals Act, 1943, s. 5. Miss Morris was injured in an air raid in Bournemouth on May 23, 1943, and suffered severe injuries to her right forearm. She was treated in hospital and was awarded a pension which was assessed in the first place at 50 per cent., but was afterwards reduced. After recommendations had been made on her behalf, it was increased and it now stands at 40 per cent. She seeks leave to appeal to this court from the decision of the assessment tribunal fixing the pension at 40 per cent. Mr. Baird was an officer in the Navy from September, 1939, until September, 1943, when he retired. After an appeal to this court and a re-hearing by a tribunal, he was eventually found entitled to a pension on the ground of psycho-neurosis. It has been assessed by an assessment tribunal, and he seeks leave to appeal from that assessment.

The question which arises in both cases is whether I have any jurisdiction to consider such an appeal. The jurisdiction which I exercise arises solely under s. 6 (2) of the Pensions Appeal Tribunals Act, 1943, and it is plain that the only appeals that I can deal with are those which arise as to entitlement under ss. 1, 2, 3 and 4 of the Act. I have no jurisdiction in respect of appeals as to assessment under s. 5 of the Act. Section 6 (3) expressly says that, subject to my jurisdiction under the first four sections, the decision of a pensions appeal tribunal shall be final and conclusive.

The tribunals dealing with assessment of disablement are constituted differently from those dealing with entitlement: [see para. 3 of the schedule to the Act]. They are all pensions appeal tribunals, but an entitlement tribunal is constituted on the basis that there are legal questions arising, as, indeed, very often there are. The chairman is a lawyer of not less than seven years standing. He sits with a medical practitioner and an appropriate layman. In the case of an assessment tribunal, however, there is no lawyer and no layman. There are two duly qualified medical practitioners, and the chairman is one of those medical practitioners. The reason for the difference is that in assessment questions there are no questions of law arising. They are medical questions which are essentially matters for medical men. It seems to me, therefore, that in both of these cases I have no jurisdiction to deal with the matter. The decision of the assessment tribunals is final and conclusive, and these applications must be refused.

Applications refused.

Solicitor: *Treasury Solicitor* (for the Minister of Pensions).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

SMART *v.* SPENCER.

[COURT OF APPEAL (Tucker, Somervell and Cohen, L.JJ.), March 10, 11, 23, 1948.]

Agriculture—Agricultural worker—Wages—Illness—Agreement that no wages be paid while worker away through illness—Validity—Agricultural Wages (Regulation) Act, 1924 (*c.* 37), *s.* 7 (1), (10); *s.* 8 (1) (*a*).

The contract of service between an employer and an agricultural worker contained a term that no wages should be paid for a period when the workman was away through illness. The worker was away through illness for 8 months, but during that time he was allowed by the employer to continue to occupy a cottage rent free and his employment was not terminated. The worker claimed pay for the period that he was away ill and contended that the term of the contract that no wages were payable during illness was void under the Agricultural Wages (Regulation) Act, 1924, s. 7 (10), which provides: "Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment in accordance with this Act, shall be void."

HELD: (i) the object of the Act of 1924 was to fix a minimum wage to be paid for work done, and, where the worker was employed by the week, the machinery set up by the Act fixed the minimum wage he was to receive for a week in which he worked, but the Act did not deal with a period of a week or longer in which the worker did no work, and, therefore, s. 7 (10) did not render void an agreement whereby the worker was to receive no wages, or part only of his wages, for a period when he was away from work through illness.

Seabrook & Sons, Ltd. v. *Jones*, ([1929] 1 K.B. 335), *distinguished.*

(ii) the fact that under s. 8 (1) (*a*) of the Act and the Northamptonshire and Soke of Peterborough Agricultural Wages Order, dated Jan. 19, 1942, made thereunder, the benefit of occupying a cottage rent free "may be reckoned as payment of wages" for the purpose of the minimum wage would not necessarily make it wages in other contexts.

[AS TO AGRICULTURAL WORKERS' WAGES, see HALSBURY, Hailsham Edn., Vol. 1, pp. 389-394, paras. 652-658; and FOR CASES, see DIGEST, Vol. 44, pp. 1301, 1302, Nos. *63-70*, and Supplement.]

Case referred to:

(1) *Seabrook & Sons, Ltd.* v. *Jones*, [1929] 1 K.B. 335; 98 L.J.K.B. 169; 140 L.T. 497; 93 J.P. 47; Digest Supp.

APPEAL by the employer from an order of His Honour JUDGE FIELD, K.C., made at Kettering County Court, and dated Apr. 29, 1947, whereby he granted the worker's claim for wages in respect of a period of 8 months during which the worker was away from work through illness. The judge held that a term in the contract of employment that the worker was to receive no wages when away from work through illness or of his own accord was void under the Agricultural Wages (Regulation) Act, 1924, s. 7 (10). The employer's appeal from this decision was now allowed by the Court of Appeal. The facts appear in the judgment of the court delivered by SOMERVELL, L.J.

Garth Moore for the employer.
Diplock for the worker.

Cur. adv. vult.

Mar. 23. **SOMERVELL, L.J.,** read the following judgment of the court. This is a claim by an agricultural worker for £153 18*s.* 3*d.* as arrears of wages from Oct. 22, 1945, to June 20, 1946. The main defence was that during that period the worker was away sick, and that either by the contract or by custom he was not entitled to wages. At the conclusion of the evidence, what is, in effect, an alternative claim was put forward under the Agricultural Wages (Regulation) Act, 1924, on the basis, which we will examine in detail later, that a term of a contract that no wages are payable during sickness is void under that Act. The learned county court judge found as a fact that during the period in question the employer did not terminate the worker's employment. "Employment" may be an ambiguous word, but this finding, which is one of fact, is that the contract between the parties subsisted in accordance with its terms, apart from any effect of the Act on those terms. The judge then found that it was a term of the contract that no wages should be paid for a period when the worker was away from work whether from illness or through his own will. He then held as a matter of law that the worker was entitled to the wages claimed by reason of the provisions of the Act relied on.

Although in our conclusion we are differing from the learned judge, we have been much assisted by his judgment on what is a difficult case. The judge based his decision mainly on *Seabrook & Sons, Ltd.* v. *Jones* (1). Before examining that case, we will consider the terms of the Act relied on. The Agricultural Wages (Regulation) Act, 1924, provides for the setting up of a committee with statutory powers to fix minimum rates of wages for workers employed in agriculture. Section 2 (1) is as follows:

> Subject to the provisions of this Act, agricultural wages committees shall fix minimum rates of wages for workers employed in agriculture for time work, and may also, if and so far as they think it necessary or expedient, fix minimum rates of wages for workers employed in agriculture for piece work.

Section 7 (1) is as follows:

> Where any minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate, and, if he fails to do so, shall be liable on summary conviction in respect of each offence to a fine not exceeding £20 and to a fine not exceeding £1 for each day on which the offence is continued after conviction.

Section 7 (10) is:

> Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void.

A subsidiary point arises under the power conferred by s. 8 (1) (*a*), which gives power to make regulations requiring the committees to define and value benefits which may be reckoned as payment of wages.

In approaching the problem of construction, it is, we think, important to bear in mind the distinction between two quite different matters in which legislation might impose terms as between employer and employed. The first is the provision of a minimum wage for work done. There is more than one Act on the statute book which sets up machinery for fixing minimum rates of pay in certain industries. There is another and quite different issue, namely, whether a man should receive wages in respect of a period when he does no work and is not required by his employer to work. An example which led to legislation in 1938 is that of holidays. It is common knowledge (otherwise the Holidays with Pay Act, 1938, would have been unnecessary) that a workman under the terms of his employment had one or more weeks' holiday without pay, or, perhaps, in some cases with half or some other proportion of his pay. The contract was not terminated by notice before the holiday and the man re-engaged afterwards. The contractual relationship subsisted, but according to its terms no work was required from the workman and no wages were due from the employer. Although the workman was in one sense not "employed" during that week, in the other sense he remained in the employment of his employer. Another example is where the contract expressly provides that during a defined or indefinite period of inability to work through sickness the workman shall receive no pay, or again, possibly, a proportion of his pay.

If the legislature was minded to interfere with this matter in a minimum wage Act, one would expect the language to make it perfectly clear that this separate subject-matter was also being dealt with. Holidays with pay is the simplest example. The fact that the wages, or some of the wages, paid in a particular industry are thought to be too low would afford no logical basis for singling out that particular industry for imposing a minimum rate to be paid during holidays or sickness where the contract provides otherwise. The judge construed s. 7 (10) and s. 7 (1) of the Act of 1924 as producing this result, and he regarded the issue as covered by the case to which we have referred. It seems to us clear that the Act is dealing with what we have called the first matter, namely, the fixing of a minimum wage to be paid for work done, and it would, in our view, need clear and express words if its scope was to be extended to the second matter to which we have referred. The long title refers to "the regulation of wages of workers in agriculture." The wording of s. 2 (1) supports this view. One curious result of the argument of counsel for the worker would be that it would, so far as we can see, be legal to provide for no pay during holidays or sickness for a "piece worker," but not for a man employed for time work. The piece worker would have no claim during the periods in question. It would seem absurd to make (say) holidays with pay depend on the method of remuneration. The Act is, in other words, in our opinion, operating on the primary provision of any contract of service of the kind with which it is dealing, namely, what is to be paid for the work which the worker contracts to do during the period in question. We are concerned with a worker employed by the week, and we construe the Act as setting up machinery to lay down what is the least he is to be paid for a week in which he works. When, therefore, s. 7 (10) speaks of an "agreement for the payment of wages in contravention of this Act," it is not dealing with weeks in which under his contract the worker is not required to do any work.

In *Seabrook & Sons, Ltd.* v. *Jones* (1) the court were dealing with an order of the Agricultural Wages Board in the following terms:

> Where a whole-time male worker is employed by the week or any longer period, and the hours of work agreed between the worker and the employer in any week (excluding hours of overtime employment) are less than 50 in summer or 48 in winter, the rate of wages applicable to that worker shall be such as to secure to the worker the wages which would have been payable if the agreed hours had been 50 in summer and 48 in winter as the case may be.

This order is, of course, plainly designed to deal with weeks in which a worker works. It speaks of the "hours of work agreed between the worker and the employer." The employers had placed up a notice:

> Good Friday, Apr. 6 . . . Employees will not be required on this day and work cannot be found for them. Pay for half a day will be given.

This was in accordance with custom. The man was paid the minimum less the sum calculated to represent his remuneration for half Friday. It was argued that the provision of the order was *ultra vires* as compelling employers to pay for time which is not worked. The orders made under the Act have proceeded on the basis of providing a minimum wage for a week of so many hours. These are, of course, the hours during which the worker undertakes to work, and in itself seems to us to show the inapplicability of such orders to a week in which a worker does not have to work any hours. *Seabrook & Sons, Ltd.* v. *Jones* (1) was dealing with a week in which the worker was working. It seems to us clearly within the Act to lay down that where a worker is employed by the week—at that time 50 hours in summer and 48 in winter—if in any week the hours as agreed are less, the minimum shall still be paid. There was another clause referred to in argument which provided, possibly *ex abundanti cautela*, that the minimum should not be reduced because the weather conditions prevented the full hours being actually worked. The decision that the provision of the order was *intra vires* and applied to the facts of the case does not seem to us to affect in any way the conclusion to which we come in this appeal. LORD HEWART, C.J., based his conclusion ([1929] 1 K.B. 339) on the definition of employment in s. 16 (1) of the Act of 1924, which is:

> The expression "employment" means employment under a contract of service or apprenticeship, and the expressions "employed" and "employer" shall be construed accordingly.

He added (*ibid.*):

> It does not mean actual working at the moment.

With respect, we doubt if the definition clause does more than make it clear that apprenticeship is covered. We think, without any reliance on this definition, that the words [in s. 2 (1) of the Act], "fix minimum rates . . . for workers employed in agriculture for time work," cover a provision that a minimum for a 50 hours week shall be paid although "in any week" because of a local holiday or other special circumstances the employer says to a worker: "I shall not require you this week for the full 50 hours." LORD HEWART'S observation must be read in its context, and, no doubt, it must have been argued that, although the worker was clearly employed during the week the weekly wage of which was in issue, the Friday must in some way be allowed to reduce the weekly minimum because the worker was not actually at work " at the moment." If, which we do not think, Lord Hewart, C.J., intended to lay down a general principle covering the issue in the present appeal, we respectfully disagree. It was not necessary to the decision. We would like to express our complete agreement with the actual decision come to and with the reasoning of Avory, J. (*ibid.*, 341).

The learned judge in the present case found that the agreement for no pay applied if the worker was sick only for one day in a week in which he worked the remaining days, and, therefore, under the agreement, the minimum would fall to be *pro tanto* reduced. The actual claim here is for complete weeks in which the worker, being sick, could not and was not required to work. If an issue had been raised as to odd days within a week, we think that, if the application of the contract reduced the amount below the minimum, it might have been void under s. 7 (10) or that a regulation so providing would have been *intra vires*. It might have been argued that sched. I, para. 2, to the Northamptonshire and Soke of Peterborough Agricultural Wages Order, dated Mar. 27, 1946, [whereby a minimum wage was guaranteed to whole-time workers employed by the week or any longer period] covered the point. The judge regarded the whole weeks with which we are concerned as on the same basis as odd days in a week in which the worker works, and, therefore, regarded this case as covered by *Seabrook & Sons, Ltd.* v. *Jones* (1). We have given our reasons for disagreeing with this view.

The argument for the employer was at one time put on the basis that the Act did not apply during a week when no wages were due. An answer was made to this based on the fact that throughout this period the worker was allowed to occupy a cottage rent free, and that the benefit of this is, under the Act and the Wages Order of Jan. 19, 1942, to be treated as wages to the extent of 3*s*. a week. The fact that under s. 8 (1) (*a*) of the Act such a benefit " may be reckoned as payment of wages " for the purpose of the minimum would not necessarily make it wages in other contexts. This does not, in any event, effect our reasons for allowing the appeal. In our view, as we have said, a contract that during a limited or indefinite number of weeks of sickness a man should receive (say) half wages when wholly absent from work is not voided by s. 7 (10). If there is doubt about the construction, it is relevant that s. 7 (1) makes it a criminal offence to pay wages at a rate less than the minimum rate when such rate is applicable. For these reasons we think the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Taylor, Jelf & Co.*, agents for *Josiah Hincks & Son*, Leicester (for the employer); *Boxall & Boxall*, agents for *Wilson & Wilson*, Kettering (for the worker).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

TITHE REDEMPTION COMMISSION *v.* BROWN.

[Court of Appeal (Lord Greene, M.R., Somervell, L.J., and Roxburgh, J.), April 6, 7, 1948.]

Tithe—Redemption annuity—Land held by several owners—No apportionment of annuity—Liability of owner of part of land for annuity in respect of whole—Tithe Act, 1936 (*c.* 43), *ss.* 3 (1), 16 (1).

The defendant owned part of an area of land in respect of which a tithe redemption annuity was charged under the Tithe Act, 1936, s. 3 (1). No apportionment of the annuity had been made. The defendant was sued by the Tithe Redemption Commission for arrears of the whole annuity.

Held: the apportionment of the annuity between the several owners of the land was not a condition precedent to the liability of each such owner, and, as in the case of tithe rentcharge the whole and every part of the land to which it was originally ascribed was charged with the whole thereof, so the whole annuity under s. 3 was charged in respect of each and every part of the land to which it was referable, and the defendant was, therefore, liable.

[For the Tithe Act, 1936 (c. 43), see HALSBURY'S STATUTES, Vol. 29, p. 923 *et seq.*]

APPEAL by the Tithe Redemption Commission against an order of His Honour JUDGE ARCHER, K.C., made at Chichester County Court on July 11, 1947, dismissing a claim for arrears of a tithe redemption annuity alleged to be charged on land of which the defendant owned part. The Court of Appeal now allowed the appeal. The facts appear in the judgment of LORD GREENE, M.R.

Diplock, K.C., and *Quintin Hogg* for the Tithe Redemption Commission.
Jukes for the defendant.

LORD GREENE, M.R.: This appeal has given rise to an interesting discussion as to the incidence of the liability for redemption annuities created by the Tithe Act, 1936. The action was brought in the Chichester County Court by the Tithe Redemption Commission against the defendant, who is the owner of some plots of land in the neighbourhood of Chichester. Two claims were made. The first claim was to the effect that the tithe redemption annuities, alleged to be charged in respect of those plots of land, were subject to compulsory redemption under the Act. The second branch of the claim was for certain arrears of annuity which had become payable, so it was alleged, in respect of those plots of land. The learned county court judge dismissed the action. By far the more important of the two claims, from the financial point of view, was the first claim, namely, in respect of compulsory redemption. It was to that claim that the argument was almost entirely directed, and it is with that claim alone that the learned judge expressly deals in his judgment.

I can dispose of the first claim very shortly. The judge dismissed it on two grounds. The first ground was that, in any event, the right to compulsory redemption had not yet arisen because the parcels of land in respect of which the question arose originally formed parts of certain larger parcels in respect of which the old tithe rentcharge had been charged. The judge held that, on the true meaning of the Act, the right to compulsory redemption in such a case could not arise until the procedure of apportionment which the Act contemplates had been gone through, with the result that the original amount chargeable in respect of the larger parcel as a whole must, first, be apportioned between the plots which are held by different owners. There is no appeal against that part of the judgment. It is admitted that the notice was irregular, and on that ground alone that part of the action had to be dismissed. The second reason, however, is more important because, if the judge was right in taking the view that apportionment was a condition precedent to the liability to compulsory redemption, it follows from the language of the Act that apportionment was also a condition precedent in the case of a claim for annuity. Therefore, the second reason for dismissing the first part of the claim was, in itself, a sufficient reason for dismissing the second part of the claim, provided it was right in law. The only matter appealed before us is the second part of the claim. We had some discussion whether the reason for dismissing that part of the claim could be definitely and surely ascertained from the judgment of the learned judge. In my opinion, it can, as the reason for dismissing it was that reason alone, namely, the fact that no apportionment had taken place.

Counsel for the defendant complained of the action of the Commission in coming to this court. He pointed out that his clients, since the judgment, had made an offer to pay the amount of the arrears of the annuity, but they did so in terms which still asserted the correctness of the judgment in that respect. Quite obviously, it was impossible for the Commission to accept any such offer and they could not be reasonably expected to accept it unless it was in effect accompanied by an admission that the judgment was wrong in that respect, and a submission to have the judgment reversed by order of this court. Nothing of the kind was done. In my opinion, the Commission was perfectly entitled to come to this court to get rid of a judgment against them which was based on a view of the law which they say, and which I agree, was an incorrect view.

[HIS LORDSHIP referred to the fact that the point that there had been no "determination" by the Commission of the amount of the annuity was not taken before the county court judge, and could not now be entertained. A further submission, that unreasonable delay by the Commission in making an apportionment precluded the liability of the defendant, was also not competent, because, in fact a reasonable time had not elapsed. HIS LORDSHIP continued :] Having got rid of these preliminary matters, I can deal with the substantial point of the case, namely, whether apportionment is necessary before there can be any liability on the owner of a part of the land in question. The claim for arrears of annuity is in respect of three areas :—(i) a large area called 367A, (ii) certain small areas consisting of pieces 4, 6 and 8 of 418D etc., as it is called, and (iii) part of 419E. The areas 4, 6 and 8 of 418D etc., and part of 419E, are in the sole ownership of the defendant. The apportionment had been made of the annuity referable to the land out of which these parts had been cut. The apportioned parts of the annuity had been ascertained, and as regards those parcels separately owned by the defendant there is no question before us but that the judgment was wrong in dismissing the claim with regard to those apportioned parts.

The important point involved is in relation to the claim to the annuity in respect of the other area, 367A, of which the defendant owns part. No apportionment has taken place of the tithe redemption annuity referable to that area. He is being sued for arrears of the whole of that annuity, and not for an apportioned part, for the simple reason that no apportionment has taken place. He contends that he is not liable to be sued for the whole of the annuity, but that the Commission is only entitled to sue him for an apportioned part if, and when, an apportionment is made. The judge accepted that view of the Act. I need say no more on the redemption point, but, if that view of the Act is right, two consequences follow—one, there was no case for redemption, and, two, there is no right to sue the defendant for this unapportioned annuity. Precisely the same words give rise to these different consequences, and that is why the decision of the judge on the second of the two points on which he dismissed the claim for redemption necessarily involves dismissal of the claim for the annuity. Under the Act the old tithe rentcharge was to be apportioned and in place of it there were created redemption annuities. The annuities are terminable annuities. They last for sixty years, after which they disappear. Under the law as it existed before the Tithe Act, 1936, tithe rentcharge was a charge on the land itself, and it was charged on specific identifiable parcels of land pursuant to the original procedure under the old Acts. The law was that, apart from a legal apportionment, the tithe owner was always entitled to sue for the whole amount any person who had become the owner of a part of a plot of land which was subjected to a sum of tithe rentcharge. There were, of course, informal apportionments which landowners entered into on occasions when land got broken up, but those informal apportionments did not bind the tithe owner, although they would be binding as between the parties to them. By that means, a purchaser of a part of a piece of land could obtain redress if he was called on by a tithe owner to pay the whole. That being the existing position when the provisions of the Act came into force, namely, on Oct. 2, 1936, land in this country was divided up into a number of different plots, each subject to tithe rentcharge. The tithe rentcharge was charged on the original plot and not on the subsequent sub-divisions of it. By the Act tithe rentcharge is extinguished, and by s. 3 (1) the redemption annuities are brought into existence in place of the old tithe rentcharge. They are to be annuities charged for the use of His Majesty, in other words, they are matters of charge as between the Crown and the subject. They no longer exist for the benefit of the tithe owner, the reason being that the compensatory provisions of the Act in favour of the old tithe owners are undertaken by the Revenue and this is a method of recouping the Revenue for the compensation it provided. Section 3 provides :

> (1) Subject to the provisions of this Act, an annuity (to be called a " redemption annuity ") shall be charged in respect of the land out of which a tithe rentcharge extinguished by this Act issued immediately before the appointed day, for the use of His Majesty . . .

Those words are important because when the Act came into operation Whiteacre (let me say) which since the charge of the original tithe rentcharge had become owned by three persons, was " land out of which a tithe rentcharge extinguished by this Act issued . . ." The totality of the tithe rentcharge issued out of the totality of the land and affected every one of the three several owners up to the total amount of the tithe rentcharge. That tithe rentcharge is to be extinguished, and in its place there is to be charged in respect of Whiteacre the new redemption annuity, and, by s. 3 (2), the amount of the redemption annuity is to be ascertained in accordance with a formula which produces a different result according to whether such land is or is not agricultural land. It seems to me clear, according to that section, that on the appointed day there comes into existence a charge of an annuity exactly comparable to the old tithe rentcharge as regards the land in respect of which it is charged, subject to the one qualification that the amount will not be the same. It will either be slightly more or slightly less than the rentcharge, but it is to be in respect of the same land as the land on which tithe rentcharge had originally been charged.

Section 9 imposes on the Tithe Commission the following duty:

> As soon as may be after the appointed day, the Commission shall determine in relation to every district the amount of each annuity charged in respect of land in the district and the land in respect of which each such annuity is charged, and shall prepare a register specifying the amount of each such annuity and indicating by reference to a map the land in respect of which it is charged . . .

Those words are obviously wide enough to cover the charge which is created by s. 3. What is to be determined there is the land subject to the old tithe rentcharge and the amount of the new charge. Section 10 provides:

> (1) Subject to the provisions of this Act, the Commission shall, in every case in which they ascertain that an annuity is charged in respect of land in the ownership of two or more owners, apportion the annuity as between the several parts of the land that are in different ownership in such manner as appears to the Commission to be just and equitable . . . (2) When the Commission have apportioned an annuity, they shall make an order specifying the amount apportioned to each part of the land, and, subject to the provisions of this Act, where such an order is made, the existing annuity shall be deemed to have been extinguished as from the day following the last payment date before the date on which the order is made, and annuities (in this Act referred to as "substituted annuities") of the amounts apportioned to the several parts of the land shall be charged by virtue of this Act in respect of those parts respectively for the use of His Majesty for the period commencing on the day following that payment date and ending on the day preceding the sixtieth anniversary of the appointed day.

The language of sub-s. (2) is very significant. Before I examine it a little more carefully I ought to mention that in the interpretation section, s. 47, the word "annuity" is defined as meaning "a redemption annuity charged by s. 3 of this Act or a substituted annuity." By s. 10 (2) a substituted annuity is substituted for the original annuity charged by s. 3 and the existing annuity is extinguished. It, therefore, is clearly contemplated that at the date of apportionment there is an existing annuity, and, in a case where an original apportionment is being dealt with, that existing annuity can only be the annuity charged under s. 3. That annuity, therefore, is contemplated as being in existence at the date when the apportionment takes place. It is said that that existing annuity, if it be a charge at all—and I cannot myself see how it is possible to put any meaning on s. 3 unless it is a charge—is, nevertheless, a charge which only comes in as a convenient piece of machinery, as a stage, so to speak, in ascertaining the effective charge which is only the substituted annuity charged on the individual owners. Again, I cannot follow that. Section 3 states that there is to be a charge for the use of His Majesty, a charge the amount of which is what I may call the global amount ascertained, and only ascertainable, by reference to the global area in respect of which the old tithe rentcharge was charged. In my opinion, it is impossible to read s. 3 (1) as solemnly creating in favour of His Majesty in such a case a charge which is going to be mere machinery, not to secure some payment to His Majesty, but for the purpose of some subsequent operation which will result in an obligation to make payments to His Majesty.

Section 13 provides:

> (7) Where an annuity is charged in respect of land in the ownership of two or more owners, any one of those owners who makes pursuant to this Act a payment in respect of an instalment of the annuity, or in respect of an amount payable in respect of the compulsory redemption of the annuity, shall be entitled to recover from the other, or from each of the others, of them as a simple contract debt such proportion of the payment as may be agreed between the owners or, in default of agreement, may be fixed by the appropriate authority.

That language clearly contemplates the existence of a piece of land in the ownership of two or more persons, in other words, a piece of land in respect of which, under s. 10, the Commissioners are ordered to make an apportionment. It is contemplating a situation, existing before any such apportionment is made, in which one of those owners will have made a payment in respect of an instalment of the annuity. That cannot mean in respect of an instalment of the substituted annuity, because *ex hypothesi* there has been no apportionment capable of bringing a substituted annuity into existence. It can only, therefore, contemplate a payment in respect of an instalment of the original annuity charged by s. 3. It also contemplates that the person who makes the payment will have made the payment " pursuant to this Act," and that can only mean pursuant to some obligation imposed or some permission given by the Act. There is no permission given by the Act to do anything of the kind. The argument of the Tithe Commission is that there is an obligation imposed on such a person pursuant to the Act, and if he discharges it he is entitled by this s. 13 (7) to claim part of his payment against the other owners. The amount to be paid will be ascertained by the Commission in the present state of affairs, they being the appropriate authority at the moment, and they will for that purpose have to make some sort of provisional *ad hoc* apportionment of the amount among the different owners so as to give effect to s. 13 (7). I cannot make the language of s. 13 (7) in any way square with the idea that no liability arises to make any payment until an apportionment has been made, or with the idea that the only liability created by the Act is a liability to pay an apportioned sum if and when an apportionment has been made.

Down to this point I have found, if I am right, language which clearly contemplates (i) the existence of a charge coming into operation at once, (ii) a liability in respect of that charge, and (iii) a method of extinguishing that charge and bringing into existence in its place a number of charges called substituted annuities. That brings me to s. 16, which appears to me to put the final brick on that structure. It provides :

> (1) An instalment of an annuity payable on any payment date shall be a debt due to His Majesty from the person who is on that date the owner of any land in respect of which the annuity is charged.

That contemplates that an annuity, whether an original one which comes into existence under s. 3 or a substituted one which comes into existence on apportionment, shall be an effective charge in the sense that it is going to create a debt in favour of His Majesty. According to the argument, the original annuity in this case did not become a debt due to His Majesty in spite of the fact that by s. 3 it was brought into existence as a charge for the use of His Majesty, but the language, " a debt due to His Majesty from the person who is on that date the owner of any land in respect of which the annuity is charged," is most significant. That takes me back to s. 3. What happened under s. 3, as I have pointed out in the example that I took of Whiteacre, which is owned by three people at the date when the Act comes into operation, is that, it having been charged with rentcharge, there is brought into existence a charge in respect of Whiteacre exactly comparable with the old tithe rentcharge save on the question of amount. Just as the whole of the old tithe rentcharge was charged on the whole of the land to which it was originally ascribed and (in the absence of legal apportionment) on every part of it into whoever's ownership the different parts might go, so the whole of the annuity under s. 3 is charged in respect of the totality of the land and equally on every part of the land in the case of separate ownership. The only way of putting an end to that state of affairs is by an apportionment —in other words, each owner of a part is liable for the whole amount unless and until his liability is diminished and limited to a proportionate part of the whole by the creation of a substituted annuity.

In my opinion, having regard to s. 3 and the references there to the old tithe rentcharge, in the case of an original annuity the phrase " the owner of any land in respect of which the annuity is charged " in s. 16 (1) means the owner of any part of the land in respect of which a global annuity is charged for the simple reason that the global annuity charged by s. 3 is charged in respect of the whole of the land irrespective of the fact that until an apportionment is made there are several owners who, in the meanwhile, will each be liable for the whole. The phrase " any land " appears to me to be exactly consistent with the language of s. 3 and with the other matters to which I have referred. Particularly, perhaps, I may join it up with the language which I have already considered of s. 13 (7). As I have said, the second reason given by the learned judge for rejecting the redemption claim was based on the view which I have respectfully said was the wrong view, namely, that before anything can be done there must be an apportionment. The two consequences of that proposition were that there could be here no compulsory redemption and no suit to recover arrears of the full amount of the original annuity. That is, in my opinion, miscontruing the Act. All that we are concerned with is to deal with the facts in support of the particular matter which is appealed, namely, the annuity. In my opinion, the present claim in respect of the annuity should succeed. A What the actual amount will be we have not had to consider, but that, no doubt, is known or will be agreed. In the result, therefore, the appeal must be allowed and the appropriate order made.

SOMERVELL, L.J.: I agree with what has been already said by the MASTER OF THE ROLLS in his examination of the various sections of the Act. He referred to the position, and this was common ground in the argument, B which existed before the Act when tithe rentcharge under the old Act was in operation. There is no dispute that at that time if an area on which tithe rentcharge was charged came into the hands of different owners and there was more than one owner of such an area each owner could be sued by the tithe owner for the full amount of the tithe rentcharge on the whole area. When Parliament came to legislate it might, of course, have done what counsel for the defendant submitted it has done. It might have said: "These are things C which it is desirable to abolish and in the future no owner of part shall be responsible for the whole. Where the new annuity" (to be determined in the way which has been explained by the MASTER OF THE ROLLS) "covers an area in more than one hand, there shall be no liability until the machinery of apportionment has been applied and each person made responsible for his appropriate part of the whole annuity." If Parliament had done that, I think the first D thing that one would have expected to find would have been that the apportioned amount would be retrospective and would date back to the day from which the new annuity replaced the old tithe rentcharge. Unless this was done, in cases in which there was more than one owner there would have been a gap when those concerned would have been wholly free from any liability and the Crown in respect of that land would have collected nothing until there had been time for the apportionment to be completed. So far from that being the E case, in the words which have been already read the apportionment is to take effect from the date of the apportionment, and what is called the existing annuity is deemed to be extinguished as from that date.

The matter does not rest there, but I do not want to go into all the points referred to by the MASTER OF THE ROLLS. I will mention shortly the points which seem to me to be conclusive upon this matter. First, I think that s. 16 (1) is framed so as expressly to preserve the liability of an owner of part for the F whole in respect of annuities which was previously applicable in respect of tithe rentcharge. The other point is the existence of s. 13 (7). The learned judge based his whole conclusion on the word "shall" in s. 10 (1). Whether or not the existence of that word in the form in which that sub-section is framed might in certain circumstances give someone in the position of the defendant here a right to *mandamus* the Commission is a matter which does not arise in this G appeal and on it I express no opinion, but I am clear that one cannot from the form, referred to by the learned judge as the mandatory form, of that sub-section draw the inference, which seems to me to be contradicted by so many other provisions of the Act, that it is to be a condition precedent to any liability where there is more than one owner of a tithe area.

ROXBURGH, J.: I agree.

H *Appeal dismissed. The Commission did not press for costs, and no order was made with regard thereto.*

Solicitors: *Official Solicitors to the Tithe Redemption Commission; Beaumont, Son & Rigden* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BREAMS PROPERTY INVESTMENT CO., LTD. *v.* STROULGER.

[Court of Appeal (Scott, Bucknill and Asquith, L.JJ.), March 1, 2, 3, 24, 1948.]

Lease—Covenant—Covenant running with land—Restriction on right to determine tenancy for three years—Repugnancy—Quarterly tenancy—Law of Property Act, 1925 (*c.* 20), *s.* 142 (1).

S. and two companies controlled by him, P. and M., were quarterly tenants of separate parts of a building held on long lease by H., Ltd. To enable H., Ltd., to increase the rents, valid notices to quit were served on the tenants and negotiations were entered into with a view to granting new quarterly tenancies from Mar. 25, 1946. The negotiations were conducted on H., Ltd.'s, behalf by their estate managers and their solicitors. On Jan. 21, 1946, while S. was negotiating a new tenancy for P. the estate managers, as an inducement to P. to consent to an increased rent, informed P. by letter that H., Ltd., would not give a further notice to quit unless they required the premises for their own occupation, and a clause (cl. 5) giving effect to this proposal for three years from Mar. 25, 1946, was incorporated in P.'s tenancy agreement. In July, 1946, during the exchange between the solicitors of original and counterpart agreements, references were made in letters to the incorporation in the other tenancy agreements of a similar restriction on H., Ltd.'s right to terminate the tenancies, but no such restriction was in fact incorporated in the other agreements. On Aug. 21, 1946, pursuant to an agreement dated June 24, 1946, H., Ltd., through a separate firm of solicitors and without disclosing the restriction on giving notices to quit, completed a sale of their whole interest in the building to the plaintiffs, and thereafter H., Ltd.'s estate managers acted for the plaintiffs. On Sept. 19, 1946, the plaintiffs, through the estate managers, gave the tenants notice to quit and, on their refusing to do so, brought actions for the recovery of the premises.

Held : the correspondence in July, 1946, constituted an agreement between H., Ltd., and S. and M., that H., Ltd., would not terminate their tenancy agreements for three years from the date of the agreement unless they required the premises for their own occupation ; the term limiting H., Ltd.'s right to terminate the new tenancies was not repugnant to the quarterly tenancies, but was an added condition ; the burden of that term of the agreements ran with the land and devolved on the plaintiffs whether or not they had notice of it ; and, therefore, the plaintiffs failed.

[As to Covenants Running with the Land, see HALSBURY, Hailsham Edn., Vol. 20, pp. 356-359, paras. 431-433 ; and for Cases, see DIGEST, Vol. 31, pp. 141-146, Nos. *2769-2810.*]

Appeals from an order of Oliver, J., dated Jan. 13, 1948.

In consolidated actions by the plaintiffs, as reversioners in title to Hulton Press, Ltd., for recovery of possession of premises held on quarterly tenancies by the defendants Stroulger, Microgage, Ltd., and the Squire Paper Co., Ltd., the learned judge granted possession of the premises held by Stroulger and Microgage, Ltd., but refused possession of the premises held by the Squire Paper Co., Ltd. Stroulger and Microgage, Ltd., appealed and their appeals were allowed. The facts appear in the headnote.

Holroyd Pearce, K.C., and *F. D. L. McIntyre* for the defendants.

Beney, K.C., and *S. Terrell* for the plaintiffs.

Cur. adv. vult.

Mar. 24. The following judgments were read.

SCOTT, L.J. (whose judgment was read by Bucknill, L.J.) stated the facts and continued :—The question is whether or not the plaintiffs were bound by the bargain which Hulton Press, Ltd., had made with the tenants. Counsel for the tenants submitted (i) that the burden of the limitation on the landlord's freedom to give notice to quit restricted to the first three years was one which runs with the land, and is, therefore, binding on the plaintiffs without notice ; and (ii) if notice was legally necessary, that the knowledge of the estate managers was notice to the plaintiffs as their principals. In answer to the first of those contentions, counsel for the plaintiffs argued that the arrangements contained in the letters were " personal " to Hulton Press, Ltd., and, therefore, did not run with the land, and, in answer to the second, that knowledge of estate managers was not notice to their new principal. In regard to the Squire Paper Co.'s agreement, cl. 5 of which made it different from the others, he submitted that the clause was repugnant to the quarterly tenancy and should be treated by the court as deleted, and, consequently, that the learned judge was in error in not so holding. The argument of repugnancy he also used in regard to the other two tenants.

I will consider the repugnancy point first. In the Squire Paper Co.'s agreement, cl. 5, in my view, attached a condition to the quarterly right to give notice by suspending it during the first three years, unless the landlord required possession for his own occupation. It is noticeable that it also expressly provides that the condition shall not have any operative effect "if the tenants shall commit any breach of the agreements on their part herein contained." In my opinion, there is no repugnancy in that clause with the quarterly tenancy. It is only an added condition. I, therefore, think that the learned judge was right in his decision on the issue in the consolidated action between the plaintiffs and Squire Paper Co., Ltd.

Except that that term of the agreements common to all three tenancies was in the other two cases expressed, not in the formal agreement, but only in the correspondence, there is no difference between the Squire Paper Co.'s case and the other two. I will consider, first, the question whether the burden of that term of the agreement "ran with the land" so as to bind the plaintiffs without notice. In my opinion, it did in equity and even at law. In each case the agreement was for a "term of years absolute" within s. 205 of the Law of Property Act, 1925, and also was a lease for a term not exceeding three years within the meaning of s. 54 (2) of that Act, with the result that s. 52 (2) (*d*) excepted it from the nullifying effect of sub-s. (1) of that section which invalidates leases for more than three years unless made by deed. If the agreement contained in the correspondence can be regarded as a condition of the contract contained in each of the signed "agreements," the only question remaining for consideration is whether the obligation entered into by the lessor in that total bargain was "with reference to the subject-matter of the lease" within s. 142 of the Act. If it was, the burden passed by reason of that section to the plaintiffs. The phrase "subject-matter of the lease" was, as we know, substituted for the ancient expression "touching and concerning the land." The elucidation of its meaning in Cheshire's Modern Real Property, 5th ed., pp. 214-5, in my respectful opinion, supplies the true test:

> If a simple test is desired for ascertaining into which category a covenant falls, it is suggested that the proper inquiry should be whether the covenant affects either the landlord *qua* landlord or the tenant *qua* tenant. A covenant may very well have reference to the land, but, unless it is reasonably incidental to the relation of landlord and tenant, it cannot be said to touch and concern the land so as to be capable of running therewith or with the reversion. Tested by this principle the following covenants have been held to touch and concern the land . . .

Of the covenants by the tenant running with the reversion those "to pay rent or taxes" and "not to assign or underlet," and of those by the landlord running with the land that "to renew the lease" are the most apposite of the instances which he quotes from decided cases. Although the case of a limitation on or condition precedent to a right to serve a notice to quit does not appear to have been the subject of judicial decision, his principle that, if a covenant affects a landlord *qua* landlord, it must necessarily run with the land, appeals to me as a sound criterion. One object of that rule of law is just to prevent the sort of thing that was done in the present case. I see no difficulty in treating the composite written agreement, consisting, on the one hand, of the more formal "original" and "counterpart," and, on the other, of the correspondence, as together constituting the "instrument" to which s. 6 (2) of the Act is directed. Had the whole agreement been by correspondence, that position would have been obvious. Even if at law there were doubt, equity supplies the necessary help. Specific performance would have been granted. If equity would have directed a single document to be drawn up to embody the conditional term in the case of the other two tenancies as was done by the parties in the Squire Paper Co.'s lease, the written instrument must now be treated as if that had been already done.

That conclusion renders the alternative argument of counsel for the tenants, based on implied notice, superfluous, but I doubt whether he could have established any such duty on the agents to inform their new principal of the additional term, if it was merely personal and did not run with the land, as would have been necessary to satisfy the doctrine of implied notice. The two appeals must be allowed with costs here and below.

BUCKNILL, L.J., reviewed the correspondence and continued: At the trial the plaintiffs raised, *inter alia*, the point that, as regards Microgage, Ltd., and Stroulger, the terms of the tenancy agreements did not contain a clause incorporating the letters written in July about security of tenure for three years. On this question Oliver, J., decided that the letters written in July between the agents of Hulton Press, Ltd., and the tenants' solicitors did not refer to the tenancy agreements made between Hulton Press, Ltd., and Stroulger or Microgage, Ltd. The learned judge took the view that the letters only referred to the Squire Paper Co., Ltd. With great respect to the learned judge, I am unable to accept this view. In my opinion, the letters constituted an agreement between Hulton Press, Ltd., on the one hand, and Stroulger and Microgage, Ltd., on the other hand, that Hulton Press, Ltd., would not terminate their tenancy agreements for three years from the date of the agreement unless they required the premises for their own occupation. Oliver, J., decided in favour of Squire Paper Co. on the plaintiffs' contention that cl. 5 was personal and was also repugnant to a quarterly agreement. Although the plaintiffs do not appeal from this decision, counsel for the plaintiffs contended, and properly contended, that, if the letters of July formed a clause in the tenancy agreements with Strougler and Microgage, Ltd., such a clause was personal and collateral, and, therefore, not binding on the plaintiffs, and was also repugnant to a quarterly agreement. On these points of law I agree with the judgmentof Scott, L.J., and have nothing to add. I agree that the two appeals should be allowed.

ASQUITH, L.J.: I agree. It seems to me quite impossible to maintain that the correspondence from July, 1946, did not cover the agreements with Stroulger and Microgage, Ltd., but related only to that with the Squire Co., or that the intention and effect of that correspondence is anything else but to incorporate in the first two agreements the equivalent of cl. 5 in the third. It seems to me also clear that the terms so incorporated touched or concerned with the things demised, or, to use the modern statutory expression, referred to the subject-matter of the lease. If so, its burden devolved on the plaintiffs as assignees of the reversion, whether they had notice of it or not. On the question of repugnancy and the other questions, I have nothing to add. I agree the appeals should be allowed.

Appeals allowed with costs in both courts.

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiffs); *Griffinhoofe & Brewster* (for the defendants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

ed. C.A. [1948] 2 All E.R. 622.

HALDANE *v.* ECKFORD. ECKFORD *v.* SIMPSON. HACKET *v.* SIMPSON. HACKET *v.* HALSEY.

[Chancery Division (Romer, J.), March 11, 12, 24, 1948.]

Estate Duty—Property "passing"—Accumulations—Direction by testator to accumulate up to £8,000 and then invest in land—Land to be entailed on fixed date—Periodical distributions under Scottish law of entail—Change in beneficial interest or possession of property on death of person contingently entitled to distributions—Finance Act, 1894 (*c.* 30), *s.* 1.

By his will, dated Mar. 28, 1862, a testator, who died on Feb. 27, 1865, domiciled in Jersey, directed the conversion of his estate and instructed his trustees to invest the proceeds of such conversion in the purchase of a landed estate in Scotland, which they were to settle under a strict entail in conformity with Scottish law. By a first codicil dated Feb. 15, 1865, the testator directed that the trusts of his will for the sale and conversion of his estate and the investment of the proceeds in land should not be carried out until a certain period (certified by a certificate in the suit made by the Chief Clerk to end in 1956) had elapsed, but that the income from certain parts of his estate should be accumulated and invested in certain securities. The codicil continued: "I direct that such investments and accumulations . . . shall continue and be made until such investments and accumulations amount in value to . . . £8,000 sterling or upwards and when . . . the same shall amount in value to the last mentioned sum I direct . . . that my trustees . . . shall . . . convert the same into money and invest the proceeds thereof in the purchase of real estate in the parish of Eckford . . . and in like manner thereafter whenever the investments of the . . . rents dividends interest and annual produce of my estate and the accumulations shall amount in value to the sum of £8,000 or upwards I direct that my trustees . . . shall . . . convert into money and . . . invest the same in the purchase of real estate in . . . Eckford . . . these successive purchases of real estate to continue . . . until [1956] . . . when . . . I will and direct that the trusts for the sale and conversion . . . and the investments of the trust moneys . . . in my said will contained shall be carried into effect . . ." Under an administration order of the Court of Chancery in England made in 1865, the trust funds were paid into court, and an inquiry was answered by that court to the effect that, according to the law of Jersey, the bequests and directions contained in the will and codicils were valid. Under the Scottish Entail Acts, where property is held in trust to purchase land to be entailed, it is competent for the person who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land, to make summary application to the court for the payment to him of such property, and the court will order such payment without the consent of any person. Such an order was made by the Court of Session in favour of D.E., who received certain sums of money thereunder from time to time. In 1912, D.E. died, and his daughter H.E. became tenant in tail in possession. In 1926, 1927 and 1932, by orders of the court, three amounts of £8,000 were disentailed and paid to H.E. for her own use. On Dec. 31, 1935, H.E. died, and this petition was presented by the Crown to obtain payment out of the funds in court on her death of estate duty alleged to become payable under the Finance Act, 1894, s. 1, in respect of the corpus of the funds. No claim was made under s. 2.

Held: even assuming the irrelevance of the fact that the enlargement of her interest was procurable only by an application to the Court of Session, H.E. had no right whatever at or prior to her death to any current income, but only the right to compel the performance by the trustees of their trust obligations (which right, at all material times, her successor also had), and the expectation of receiving, if she lived for some uncertain time, one or more sums of £8,000; all that happened on H.E.'s death was that her expectation ceased, and one of the contingencies on which her successor's expectation depended was removed; and there was, therefore, no change in the beneficial title or possession of the property as a whole so as to amount to a "passing" within s. 1.

Dictum of Lord Parker *in A.-G.* v. *Milne* ([1914] A.C. 765, 779; 111 L.T. 343, 347), *applied.*

[As to Property which Passes, see HALSBURY, Hailsham Edn., Vol. 13, pp. 232-234, paras. 222, 223; and for Cases, see DIGEST, Vol. 21, pp. 7, 8, Nos. *21-27*.]

Cases referred to:

(1) *A.-G.* v. *Milne*, [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 21 Digest 46, *296*.

(2) *Scott & Coutts & Co.* v. *Inland Revenue Comrs.*, [1936] 3 All E.R. 752; [1937] A.C. 174; 106 L.J.Ch. 36; 156 L.T. 33; Digest Supp.

(3) *Burrell & Kinnaird* v. *A.-G.*, [1936] 3 All E.R. 758; [1937] A.C. 286; 106 L.J.K.B. 134; 156 L.T. 36; Digest Supp.

(4) *Re Hodson's Settlement, Brookes* v. *A.-G.*, [1939] 1 All E.R. 196; [1939] Ch. 343; 108 L.J.Ch. 200; 160 L.T. 193; Digest Supp.

(5) *A.-G.* v. *Lloyds Bank, Ltd.*, [1935] A.C. 382; 104 L.J.K.B. 523; 152 L.T. 577; *affg.*, 151 L.T. 268; Digest Supp.

(6) *Lord Advocate* v. *Muir's Trustees*, (1942), 21 Annotated Tax Cas. 204.

(7) *A.-G.* v. *Beech*, [1899] A.C. 53; 68 L.J.Q.B. 130; 79 L.T. 565; 63 J.P. 116; *affg.*, [1898] 2 Q.B. 147; 21 Digest 7, *26*.

Petition for the payment out of money from a fund in court to the Inland Revenue Commissioners in respect of estate duty alleged to be payable under the Finance Act, 1894, s. 1, on the death of Helen Eckford, who, under the Scottish law of entail, was entitled to have paid to her from time to time under court order accumulations arising from a fund directed by the testator's will to be invested in real property and, at a fixed future date, entailed. Romer, J., dismissed the petition. The facts appear in the judgment.

J. H. Stamp for the Attorney-General.

Salt, K.C., and *F. H. Talbot* for the trustees of the will.

Cur. adv. vult.

Mar. 24. **ROMER, J.**, read the following judgment. This petition has been presented by the Attorney-General on behalf of His Majesty with the object of obtaining payment to the Commissioners of Inland Revenue of estate duty which, as they contend, became payable under the Finance Act, 1894, s. 1, in respect of the fund standing to the credit of this action on its passing (as the commissioners allege) on the death, on Dec. 31, 1935, of Helen Lois Vivienne Eckford. No claim is founded on s. 2 of the Act.

The relevant facts are not in dispute. The fund in court is subject to the trusts declared concerning it by the will dated, Mar. 28, 1862, and two codicils, dated respectively Feb. 15 and 21, 1865, of one Robert Eckford (hereinafter called " the testator ") who died on Feb. 27, 1865, which will and codicils were proved in the Principal Probate Registry on Apr. 27, 1865. By his said will, after a specific bequest and certain pecuniary bequests, the testator directed the conversion of his estate, and, subject to certain directions which were revoked by the said first codicil, directed his trustees to stand possessed of his ready money and the net proceeds of such conversion on trust after payment of debts and legacies to invest the residue of the trust moneys in the purchase of a landed estate in the parish of Eckford, Roxburgshire, North Britain, or near to that parish if a suitable estate could not be found in the parish itself (with a power which came to an end on the death of the original defendant, William James Eckford, to purchase the estate if he wished in some other country or locality), and the testator directed that the estate so to be purchased should, if the same should be situate in Scotland, be settled under the fetters of a strict entail in terms of and in conformity with the Scottish law of entail and by a deed or deeds containing the necessary prohibiting irritant and resolutive clauses in favour of the said William James Eckford and the heirs male of his body, whom failing the heirs female of his body, the eldest heir female throughout the whole order of succession excluding the other sisters and heirs portioners, whom failing the testator's grandson, Robert Eckford, and the heirs male of his body, whom failing his heirs female in the order and manner above specified, whom failing the testator's nephew, Edward James Simpson (referred to in the said will as Edward Simpson), and the heirs male of his body, whom failing his heirs female in the order and manner above specified, with an ultimate limitation (which was revoked by the first codicil) to the nearest heir of the said Edward James Simpson, and the said will contained provisions which were superseded by the said codicils for the application of the interim income of the said residuary premises. By the said first codicil (so far as it is now relevant), after a recital that part of his property was invested in the Paris and Orleans Railway Co., the testator directed that the trusts in his said will contained for sale and conversion of his real and personal estate and the investment of the said trust moneys in the purchase of a landed estate in the parish of Eckford, or near to that parish or other locality, should not be carried out until the time fixed by the agreement entered into by the said railway company and the French government, and then in force, for giving up the railway to the French government, and the testator directed that (subject to a trust for payment of an annuity during the life of the said William James Eckford which has long since determined) the rents and profits, dividends, interest and annual produce to arise from such parts of his estate as should at the time of his decease be situate in Great Britain, or should be invested in government or other securities in Great Britain, should from time to time be invested in the purchase of £3 per cent. consolidated bank annuities, and that the dividends therefrom should be accumulated by like investments, and that the surplus income from his investments in continental Europe should be similarly invested and accumulated in French £3 per cent. *rentes* in Paris, and the surplus income from his Indian securities should be similarly invested and accumulated in the Government

Bank of Bengal, with power for the trustees or trustee for the time being of the said will at their discretion to vary the securities, whether British, continental or Indian, for others of a similar nature. The said codicil then proceeded:

> I direct that such investments and accumulations of the surplus rents dividends and annual produce of my estate shall continue and be made until such investments and accumulations amount in value to the sum of £8,000 sterling or upwards and when and so soon as the same shall amount in value to the last mentioned sum I direct and A declare that my trustees or trustee for the time being shall stand possessed thereof upon trust to make sale or convert the same into money and invest the proceeds thereof in the purchase of real estate in the parish of Eckford Roxburgshire North Britain or near to that parish if a suitable estate cannot be found in the parish itself unless the said William James Eckford if then living shall prefer some other country or locality in Scotland in lieu of Eckford and then in purchase of a landed estate in the country or locality in Scotland that he shall so prefer and in like manner thereafter whenever the investments of the surplus rents dividends interest and annual produce of my estate B and the accumulations thereof shall amount in value to the sum of £8,000 or upwards I direct that my said trustees or trustee for the time being shall stand possessed thereof upon trust to sell and convert into money and lay out and invest the same in the purchase of real estate in or near the parish of Eckford or such other country or locality in Scotland as hereinbefore mentioned these successive purchases of real estate to continue and be made until the time fixed as hereinbefore mentioned for giving up the Paris and Orleans Railway to the French government by the said agreement of the C present Paris and Orleans Railway Company and when and so soon as the last mentioned time shall arrive I will and direct that the trusts for the sale and conversion of my real and personal estate and effects and the investments of the trust moneys in the purchase of a landed estate in or near the said parish of Eckford or other locality in my said will contained shall be carried into effect and I direct that the estates so to be purchased from time to time shall be settled under the fetters of a strict entail with such limitations in such manner and subject to such provisions and declarations as in and by my said will directed and contained concerning the landed estate thereby D directed to be purchased.

After a declaration that the ultimate limitation of the landed estates to be purchased as aforesaid should be to the testator's own right heir instead of the nearest heir of the said Edward James Simpson, the codicil conferred powers for the interim investment of any moneys liable to be laid out in the purchase of landed property if and when no suitable property could be immediately E found. By the said second codicil (which is written at the foot of the said first codicil), the testator provided:

> To prevent any doubt I direct and declare that the rents of the estates to be from time to time purchased as directed in the above written codicil shall from the times of such purchases respectively go and belong to the person or persons for the time being entitled under the entail in the said codicil mentioned.

The testator left no real estate, but he left personal estate in England, on the F continent of Europe and in India. All the debts and funeral and testamentary expenses of the testator, and the legacies payable under his will and codicils, have been paid, and the annuities thereby bequeathed have terminated and have been fully paid.

These proceedings were instituted in the High Court of Chancery in England for the purpose of ascertaining the domicil of the testator and (if necessary and G proper) of administering his estate and carrying the trusts of his will into execution under the order and direction of the said court, and, by the decree made therein and dated July 8, 1865, accounts and inquiries were directed as usual in administration suits, together with the following particular inquiries, namely, (i) an inquiry as to the testator's domicil; (ii) an inquiry whether, according to the law of the country of the testator at the time of his death, the bequests and directions contained in his will and codicils were wholly, or to any and what H extent, valid and what was the legal effect thereof; and (iii) an inquiry what period the testator meant by the description "the time fixed by the agreement entered into by the Paris and Orleans Railway and the French government." The said special inquiries have been answered as follows: (i) by an order dated July 20, 1869, it was declared that the deceased was domiciled in Jersey at the date of his death; (ii) by an order dated June 29, 1871, it was declared that, according to the law of Jersey, the bequests and directions contained in the testator's will and codicils were wholly valid, and that the executors and trustees therein named were bound to execute and perform the trusts thereof according to their tenor; and, (iii), by a certificate of the chief clerk made in the suit and dated Nov. 8, 1872, it was certified that Dec. 31, 1956, was the period meant in the said codicil by "the time fixed by the agreement entered into by the Paris and Orleans Railway and the French government and now in force for giving up the Paris and Orleans Railway to the French government." By an order dated Mar. 23, 1868, a receiver was appointed to collect and get in the outstanding personal estate of the testator. On Mar. 22, 1873, an order was made for distinguishing between the corpus and income of the trust and for payment of moneys representing corpus to the credit of *Haldane* v. *Eckford* (1865 H. 174), and for the payment of moneys representing income to the credit of the same cause—"income and accumulations of income"—and (if the amount of income and accumulations should be certified to exceed £8,000) for carrying over an amount equal to £8,000 to an account to be entitled: "Moneys subject to be invested in land," and for payment of the income to arise from the last-mentioned moneys to the said William James Eckford during his life.

The said William James Eckford died a bachelor on Aug. 10, 1874, and the said Robert Eckford was the tenant in tail next in succession under the said will. The said Robert Eckford died on Mar. 8, 1887, survived by daughters and one son only, Douglas Eckford, then an infant, who became thereupon heir male of entail in possession of the estates to be purchased under the said will. The said Douglas Eckford reached his age of twenty-one years on June 10, 1899. Pursuant to the said order of Mar. 22, 1873, and subsequent orders dated respectively Mar. 30, 1874, July 29, 1876, June 28, 1879, May 21, 1885, Mar. 14, 1891, June 23, 1894, and Nov. 19, 1898, divers sums of stock or cash, representing on each occasion the value of £8,000 and derived partly from the funds in court and partly from the testator's assets outside Great Britain, were carried over or paid into court to the credit of the account entitled: "Moneys subject to be invested in land," and pursuant to the three last mentioned orders the dividends on stocks to the credit of the last mentioned account were carried over to the credit of "the account of income of infant tenant in tail in possession Douglas Eckford," and paid out to the said Douglas Eckford under an order dated July 27, 1899, on his attaining the age of 21 years. Pursuant to a petition presented by the said Douglas Eckford to the Lords of Council and Session in Scotland, in accordance with the Scottish Entail Acts, an order was made on Dec. 7, 1899, by the Court of Session declaring the petitioner to be entitled to acquire for his own use and behoof the whole of the funds, estate and effects standing at the credit of the said account: "Moneys subject to be invested in land," and the court thereby granted warrant to and authorised the Paymaster-General for the time being, on behalf of the Supreme Court of Judicature, to pay, convey, or transfer the said funds to the said Douglas Eckford for his own use and behoof, and the said funds were so paid or transferred under an order made in this action on Feb. 20, 1900. Pursuant to orders in this action dated Nov. 24, 1903, and Dec. 1, 1908, and orders of the Court of Session in Scotland dated Feb. 6, 1904 and Feb. 26, 1909, two further amounts of £8,000 respectively were carried over from the account: "Income and accumulations of income" to the account: "Moneys subject to be invested in land" and from that account paid or transferred to the said Douglas Eckford.

The said Douglas Eckford died on Sept. 30, 1912, and his only child, Helen Lois Vivienne Eckford, who was born on Feb. 4, 1905, thereupon became the heir female in possession of the estates directed to be purchased in Scotland and settled by the testator's will and codicils. During the minority of the said Helen Lois Vivienne Eckford, pursuant to two orders dated respectively June 24, 1914, and Dec. 12, 1922, two amounts, each of £8,000, were carried over to the account: "Moneys subject to be invested in land," and the interest arising therefrom was carried over to a separate account: "The account of income of Helen Lois Vivienne Eckford, born Feb. 4, 1905, infant tenant in tail in possession." Pursuant to an order of the Court of Session in Scotland dated Sept. 16, 1926, and an order in this action dated Jan. 14, 1927, the funds carried over pursuant to the said orders of June 24, 1914, and Dec. 12, 1922, respectively were disentailed and paid or transferred to the said Helen Lois Vivienne Eckford for her own use and benefit. Pursuant to an order in this action dated Oct. 13, 1931, a further amount of £8,000 was carried over to the account: "Moneys subject to be invested in land," and, pursuant to an order of the Court of Session in Scotland dated Jan. 5, 1932, and an order in this action dated Feb. 25, 1932, the funds so carried over were disentailed and paid or transferred to the said Helen Lois Vivienne Eckford.

This lady (to whom I will hereafter refer as "Helen") died on Dec. 31, 1935, without having been married. On her death the heirs in tail under the testator's will claiming through the said Douglas Eckford became extinct and John Eckford Hacket, the present plaintiff, a grandson of the said Robert Eckford through his eldest daughter, Henrietta Maria, became tenant in tail in possession. Since Helen's death the accumulation of a further income fund, amounting in value to £8,000, has been completed, and, pursuant to certain orders made in this action and to an order of the Court of Session, the said income fund was carried over to the account: "Moneys subject to be invested in land," and thence paid or transferred to the trustees of a settlement which had been executed by the said John Eckford Hacket.

The relevant provisions of the law of Scotland have been proved by an affidavit of Mr. Henry Alexander Shewan, who is a member of the Faculty of Advocates in Edinburgh and who is, and has been for some years past, in practice as an advocate before the Court of Session. His evidence is:

> I am well acquainted with the law of Scotland regarding the disentailing of entailed lands in Scotland and the freeing from entail provisions of moneys directed to be laid out in the purchase of lands in Scotland for the purpose of being entailed. By Scots law particularly under the stat. 11 and 12 Vict. c. 36, ss. 1, 27 and 28, where any money or other property has been invested in trust for the purpose of purchasing land to be entailed, or where any land has been directed to be entailed, but the direction has not been carried into effect, it is competent for the person who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land, to make, provided he is *capax* and of full age, summary application to the Court of Session for warrant and authority for the payment to him of such money, or for the conveyance to him of such land in fee simple, and the Court of Session will grant such warrant and authority without the consent of any person if the direction to entail was contained in the will of a testator who died subsequent to Aug. 1, 1848, and the applicant was born subsequent to the death of the testator. When summary application is made in the circumstances aforesaid, it is in the discretion of the court to order such service as the court may think proper. It is the practice of the court in such circumstances to order service on the next three heirs of entail (if there be so many), notwithstanding that their consent is not necessary to the application. It is accepted that the purpose of such service is to allow such heirs, if so advised, to appear and contradict by evidence the averments of fact on which the application is based.

The funds in court standing to the general credit of this action at Helen's death were of a total value of about £20,813. The petition is opposed by the present trustee of the testator's will and codicils.

The facts of this case are somewhat unusual and the only guidance that I can obtain from the authorities is afforded by such statements of principle as appear in reported judgments and as seem relevant to the particular problem that I have to solve. In *Attorney-General* v. *Milne* (1) LORD PARKER expressed himself as follows ([1914] A.C. 779):

> The first section of the Finance Act, 1894, imposes in the case of every person dying after Aug. 1, 1894, a duty, called "estate duty", leviable on the capital value of all property which passes on the death of such person. The expression "property passing on the death" includes, according to the definition contained in s. 22 of the Act, property passing either immediately on the death or after any interval either contingently or certainly, and either originally or by way of substitutive limitation, and the expression "on the death" includes "at a period ascertainable only by reference to death." The expression "passing on the death" is not further defined, but is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death. For the purpose of this section it is absolutely immaterial to whom or by virtue of what disposition the property passes.

In *Scott* v. *Inland Revenue Comrs.* (2) LORD RUSSELL OF KILLOWEN used language which shows, I think, that he had LORD PARKER'S observations in mind. He said ([1936] 3 All E.R. 756):

> On the death of the sixth earl the seventh earl's estate in tail male became, instead of an estate in remainder, an estate in tail male in possession. He became entitled to receive the whole income of the estate, which immediately before the death of the sixth earl was primarily applicable for the benefit of the objects of the discretionary trust. That, in my opinion, was a change of hands in the beneficial title or possession

of the property as a whole, occurring on the death of the sixth earl, which constituted a passing of the property on that death within the meaning of s. 1 of the Finance Act, 1894.

In *Burrell* v. *Attorney-General* (3) the same learned Lord pointed out ([1936] 3 All E.R. 764) that, in order to test whether it could be said that property passed on a particular death, one must compare the position as regards the persons beneficially interested in the property immediately before the death with the position immediately afterwards. He then gave the following illustration (*ibid.*, 765) :

> If there is a trust during A's life of the income of a property for a group of persons fulfilling certain qualifications, the persons who are to share from time to time and the amounts which they respectively take being in the discretion of the trustees, followed on A's death by a similar discretionary trust during B's life of the income of the property for a group of persons fulfilling different qualifications, I would say that the title to the beneficial interest in the property as a whole changed hands on the death of A and passed on his death under s. 1 ; and that notwithstanding that one or more persons fulfilled both sets of qualifications.

In *Re Hodson's Settlement* (4) Clauson, L.J., after reviewing a number of authorities, said ([1939] 1 All E.R. 208) :

> This lengthy survey of the authorities leads us to the conclusion that, omitting for the moment the judgments of this court in *A.-G.* v. *Lloyds Bank, Ltd.* (5), the decided cases not only contain nothing inconsistent with the view which we have expressed above—namely, that in the present case the accumulations fund " passed," within the meaning of the Finance Act, 1894, s. 1, on Mr. Hodson's death—but also make it necessary for this court so to decide. In our judgment, this court is bound, in view of the later authorities, to hold that the view taken by this court in *A.-G.* v. *Lloyds Bank, Ltd.* (5), of the principles to be applied in such cases as the present must be now recognised to have been deficient, in that it failed to bring out the crucial point that, in order to arrive at a correct decision, attention must be focussed upon a comparison between the persons beneficially interested in the fund the moment before the relevant death and the persons so interested the moment after the death, and upon the question whether the death effected an alteration in rights, as distinguished from merely removing the possibility of an alteration.

In *Lord Advocate* v. *Muir* (6) a son of the testator was entitled at his decease to a share of the residue of his father's testamentary trust fund on his attaining the age of twenty-five. If he died before attaining that age, his share was to go to his children, and, if he died before attaining twenty-five without issue, his share was to go to his sister. The trustees had power to pay to the deceased, or to apply for his benefit, as much of the income of his presumptive share as they thought necessary until he attained the age of twenty-five, and the balance of the income was to be accumulated and added to the capital of his share. The deceased was killed in action, aged twenty-three, and died without issue, and, accordingly, his share had to be held by the trustees for the benefit of his sister and her issue. Under the trustees' discretionary power to make advances the deceased received about £39,000 from income during his life. The Crown claimed estate duty under the Finance Act, 1894, s. 1, on the footing that the property passed on the son's death. This claim was rejected by the Court of Session. In his judgment, Lord Keith, after referring to *Re Hodson's Settlement* (4) and *Scott* v. *Inland Revenue Comrs.* (2) said :

> In my opinion these cases fall to be distinguished from the present case. In these cases the whole income passed on the death from a certain set of beneficiaries, for whose benefit the income was being applied or accumulated under certain trusts, to an individual who took the whole income, in the one case under the deed of trust, and in the other by succession as heir in tail. There was thus a change of hands in the beneficial title or possession of the property as a whole. In the present case the estate in question was destined in certain events to the deceased or his issue, whom failing to the daughter and her issue, whom failing to brothers and sisters of the truster or their issue. The deceased failed to survive the contingency on which alone he could take, and the estate vested on his death in the daughter in liferent. In my opinion the estate did not pass on the death from one beneficiary or one set of beneficiaries to another beneficiary. Before the death of the deceased it was held primarily no doubt for him, but his right was a mere expectancy. Only the passage of time could show for whom the property was really held. As events have transpired it is now seen to have been held in reality for the daughter and her issue. For a passing of property under s. 1 there must be, in my opinion, a real beneficial right, as distinguished from a mere *spes successionis* in someone at the time of the death, which undergoes a change in title or possession

as a result of the death. Here at the time of the death there was no real beneficial right in anyone. There was merely a prospective beneficial right in some one of a series of persons. The daughter no doubt succeeded to something of value on the death of the deceased. But that is not the test. The question is whether that something enjoyed by the deceased passed from him on his death within the meaning of s. 1. I think that it did not, and if it did not the claim of the Revenue, in my opinion, fails. The position is not, I think, altered by the fact that there was an express power given to the trustees to make advances of income or capital to the son, and that in fact £39,000 was advanced to him out of income. The trustees were not bound to exercise the power. It was a power ancillary to the main purpose of the trust, and when not exercised there did not result an accumulation for any ascertained beneficiary or class of beneficiaries. The termination of this power on the death is not, I think, sufficient to constitute a change of hands in the beneficial title or possession of the property as a whole.

A feature of importance and novelty in the present case is that on the death of Helen no change whatever occurred in the manner of application of the income of the trust fund from the manner in which it had been applied previously, whereas in each of the cases which were brought to my attention during the argument there was an undoubted change in the application of income arising by reason of the decease of the person on whose death a claim for estate duty was advanced by the Crown. Counsel for the Attorney-General argued before me that during the life of Helen she had the exclusive interest in the income of the trust fund, and no one else had any interest in it at all. Even if she had died before receiving any of the accumulated sums of £8,000 she would still have been entitled to this interest or title, but no duty would have been exigible having regard to the provisions of the Finance Act, 1894, s. 5 (3). As she did receive one or more of these sums, the exempting provisions do not apply, and duty became payable on the passing to her successor of her title to the property. Counsel defined the interest which was vested in Helen during her lifetime, and which he said passed to her successor on her death, as being the right as the primary beneficiary to insist on the income being accumulated by the trustees for her benefit, subject to her surviving the point of time when the accumulations should amount to £8,000. He conceded that, even if Helen did survive this point of time, she would become entitled only to the income of the accumulated £8,000, if one looked to the provisions of the will alone, but he said that the result of Scots law operating on the will would be to entitle her to payment of the £8,000 itself if she took the appropriate steps before the Court of Session to obtain the necessary decree, and that such operation must, for relevant purposes, be regarded as so tied to the gift itself as to form an incident of it. Counsel further contended that the trust property has clearly "passed" for the purposes of s. 1 of the Act repeatedly since the testator's death, and that it can only have so passed either on the formation of each accumulated sum of £8,000 or on the death of each of the persons who occupied the position which Helen held at her death. His contention is that the latter of these two views is the correct one. The argument to the contrary by counsel for the trustees may be summarised as follows. Helen was not at her death entitled to any income then accruing, nor did her successor become so entitled after her death. It is, accordingly, impossible to say that there was a change in or passing of the title or possession of the trust fund on Helen's death. The current income was in suspense both before and after Helen's death, and in these circumstances it cannot be said that the property, on Helen's death, "changed hands." In this connection counsel relied particularly on the observations of Clauson, L.J., already cited, in *Re Hodson's Settlement* (4). Counsel further relied on the fact that Helen was not expectantly entitled even to the sums of accumulated income under the terms of the trust instrument, for that instrument gave her only the income arising from those sums, and he argued that, as the enlargement of that interest, which forms an essential ingredient of the Crown's present claim, could be obtained only by her taking the appropriate action before the Court of Session, that potential right of enlargement should be disregarded for the purpose of inquiring whether the Crown's claim to duty on Helen's death is well-founded.

Had Helen, at her death, been, and been reasonably certain to remain, wanting in personal capacity, and, therefore, disqualified from making to the Court of Session applications of the requisite nature, it is difficult to see how it could be said of her that she died possessed of wider rights than those expressly conferred on her by the language of the trust instrument itself. However, there is no evidence or reason to believe that this was the case, and I am prepared to assume (without deciding) the irrelevance of the fact that the enlargement of her interest was procurable only by an application, as and when required, to the Court of Session. Even so, I am of opinion that the claim of the Crown to estate duty on the trust fund at her death is not well founded. In my judgment, there was no change of hands in the beneficial title or possession of the property as a whole on Helen's death. There was clearly no change in the beneficial possession. That was not in Helen prior to her death, nor in her successor afterwards. Was there a change in the beneficial title ? I cannot think that there was. The right that Helen had in relation to the trust property was to compel, by resort to the courts if necessary, the performance by the trustees of their duty to accumulate the income. That right certainly did not pass on Helen's death to her successor, if only for the reason that he, as a contingent beneficiary under the trust, had it already. But that right, as I see it, was the only immediately subsisting right or title in relation to the trust property that Helen had. She had already received three sums of accumulated income and she had an expectation that, if she lived long enough, there would be one or more recurrences of these receipts, but such an expectation of contingent future benefit does not, in my opinion, amount to a right or title to the property as a whole. I would summarise the position thus :—(i) Helen had no right whatever at or prior to her death to any current income, and no such right could or did pass to her successor or at all ; (ii) she had a right to compel the due performance by the trustees of their trust obligations, and so, also, had, at all material times, her successor ; (iii) she had the expectation of receiving, if she lived for some uncertain period of time, one or more sums of £8,000 ; (iv) such expectation would ripen into a right to enforce payment of those sums provided that she was still alive when they accrued. As to Helen's successor, his interest prior to Helen's death, consisted (apart from a right to enforce a due execution of the trusts) of an expectation of receiving, if he both survived Helen and also lived for some uncertain period of time, one or more sums of £8,000, that is to say, his expectation was the same as Helen's except that its fruition was dependent on two contingencies instead of one. On Helen's death the current income from the trust fund continued in suspense in the hands of the trustees, and her successor's rights in relation to it were not enlarged in any way. All that happened was that Helen's expectation ceased, and that one contingency was thereby eliminated from the successor's expectation, which, accordingly, was thenceforward subject to the other contingency alone. The question is whether this compound event resulted in " some actual change in the title or possession of the property as a whole," to use LORD PARKER'S phrase. I am unable to bring myself to the conclusion that it did. So to hold would, in my judgment, not only involve attributing to the Finance Act, 1894, s. 1, a scope wider than it has, so far as I am aware, ever been accorded before, but wider than its language, as interpreted and applied by former decisions, can fairly justify. With regard to the contention of counsel for the Attorney-General that the property must surely have passed repeatedly, for the purposes of s. 1, since the testator's death, I would refer to a passage from the speech of LORD HALSBURY, L.C., in *Attorney-General* v. *Beech* (7), where he said ([1899] A.C. 53, 56):

> It is said indeed that there was a life estate, and that when once a settlement has been made it is supposed to fasten and stamp upon every estate that may be comprehended within it an indelible obligation to pay estate duty at some time or another. Well, it seems to me that is not the natural meaning of the words. What the statute intended to make liable to pay duty is the succession by one person from another upon death.

In my judgment, there was no such succession on Helen's death as LORD HALSBURY had in mind. I am, accordingly, of opinion that this petition fails and must be dismissed.

Petition dismissed. Crown to bear its own costs and pay the party and party costs of the trustees. Trustees to have recourse to the fund for the difference between the party and party costs and the solicitor and client costs.

Solicitors : *Solicitor of Inland Revenue* (for the Attorney-General) ; *Halsey, Lightly & Hemsley* (for the trustees of the will).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

R. *v.* FITZPATRICK.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 7, 19, 1948.]

Customs—Importation of prohibited goods—Dealing with uncustomed goods with intent to defraud—Evasion of purchase tax—Recovery of penalties—Payment of duties and legality of importation—Onus of proof—Goods not seized—Customs Consolidation Act, 1876 (*c.* 36), *ss.* 186, 259.

The Customs Consolidation Act, 1876, s. 186, imposes penalties on persons " who shall be . . . knowingly concerned in . . . in any manner dealing with . . . goods " the import of which is prohibited or which are liable to duty " with intent to defraud " the Crown " of any duties due thereon, or to evade any prohibition " applicable to such goods. By s. 259 : " If in any prosecution in respect of any goods seized for non-payment of duties, or any other cause of forfeiture, or for the recovering any penalty or penalties under the Customs Acts, any dispute shall arise whether the duties of customs have been paid in respect of such goods, or whether the same have been lawfully imported . . . then and in every such case the proof thereof shall be on the defendant in such prosecution . . ."

An indictment containing three counts charged the appellant with three offences against s. 186 : (*a*) unlawfully importing prohibited goods, *viz.*, 46 Swiss watches ; (*b*) not declaring them for the purpose of Customs duty ; and (*c*) evading purchase tax on them. Only six of the watches had been seized by Customs officers, but evidence was given that the other forty had been dealt in on behalf of the appellant. In the proceedings there was a dispute whether duty had been paid in respect of these goods and whether they had been lawfully imported, and the chairman of quarter sessions directed the jury that, under s. 259 of the Act, the burden of proof was on the appellant in regard to all the 46 watches. The appellant was convicted and sentenced to 2 months' imprisonment on each count of the indictment, the sentences to run consecutively, and to a monetary penalty on each count. On appeal, the appellant contended that under s. 259 the burden of proof was on her only in respect of the 6 watches which had been seized :—

HELD : s. 259 of the Act of 1876 put the onus of proof on the defendant not only where the goods were seized but also where the Crown sought to recover any penalties under the Customs Acts, whether the goods had been seized or not, and, therefore, the onus was on the appellant to establish her innocence in respect of the forty-six watches and not only in respect of the six which had been seized.

[AS TO BURDEN OF PROOF IN PROCEEDINGS FOR RECOVERY OF PENALTIES UNDER CUSTOMS ACTS, see HALSBURY, Hailsham Edn., Vol. 28, p. 502, para. 1058.]

APPEAL against conviction at Essex Quarter Sessions.

The indictment contained three counts charging the appellant (i) with unlawfully importing prohibited goods, *viz.*, 46 watches, contrary to the Customs Consolidation Act, 1876, s. 186 ; (ii) unlawfully dealing with uncustomed goods (*viz.*, the 46 watches) with intent to defraud the Crown of duties, contrary to s. 186 ; and (iii) dealing with the watches with intent to defraud the Crown of purchase tax. The appellant was convicted and sentenced to 2 months' imprisonment on each count of the indictment, the sentences to run consecutively, and to a monetary penalty of £138 on each count. She appealed against the conviction on the ground, *inter alia*, of misdirection, but the Court of Criminal Appeal now held that there had been no misdirection and dismissed the appeal. On an intimation by the court that an application for leave to appeal against sentence would be granted, leave was applied for and granted, and the sentence was reduced. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

Marshall, K.C., and *Marston Garsia* for the appellant.
Neve, K.C., and *Hines* for the Crown.

Cur. adv. vult.

Apr. 19. **LORD GODDARD, C.J.,** read the following judgment of the court. An indictment was preferred at the Essex Epiphany Quarter Sessions against the appellant, her husband, and one Newton containing three counts. The first charged them with unlawfully dealing with certain prohibited goods between Sept. 1, 1946, and Apr. 9, 1947, *viz.*, forty-six watches, contrary to the Customs Consolidation Act, 1876, s. 186, with intent to evade the prohibition applicable to such goods contained in the Import of Goods (Control) Order, 1940, made by the Board of Trade under the Import, Export and Customs Powers (Defence) Act, 1939, s. 1. The second count charged them with unlawfully dealing with certain uncustomed goods, *viz.*, the same forty-six watches with intent to defraud His Majesty of the duties thereon, contrary to the provisions of the same section of the Act of 1876 and the Additional Import Duties (No. 4) Order, 1945, made by the Treasury under the Import Duties Act, 1932, ss. 3 and 19, and the Import Duties (Emergency Provisions) Act, 1939, s. 1. The third count charged them with dealing with the same goods on which purchase tax had not been paid with intent to defraud His Majesty of the tax, contrary to the Finance (No. 2) Act, 1940, s. 18, as amended by the Finance Act, 1944, s. 10, and to the Customs Consolidation Act, 1876, s. 186, as applied by the Finance Act, 1944, s. 11. Newton was acquitted by the jury, and the appellant and her husband were convicted. She appeals by leave of this court against her conviction. The grounds submitted by counsel on her behalf were (*a*) that there was no evidence to go to the jury, and that, consequently, the court should have directed a verdict of Not Guilty at the close of the case for the prosecution; (*b*) that there was misdirection in the summing up; and (*c*) that her defence was not properly put to the jury. In the opinion of the court, the real and substantial question in the appeal is whether there was a misdirection as to the burden of proof.

The facts, so far as it is necessary to state them for the purpose of this appeal, are that in April, 1947, Newton offered some Swiss watches for sale to a man who proved to be a detective officer, telling him that duty had not been paid on them. Watches are goods the importation of which is prohibited except under licence, as, indeed, at the material time, were all goods except live animals. These six watches were in due course seized by the Customs. In consequence of this conversation with Newton, and a subsequent statement made by him, the matter was reported to the Customs authorities and, on two occasions, two officers visited the house where the appellant and her husband lived. On the first visit, while the appellant was present at the interview, she took no part in the conversation, though she did assist in a search to find a Customs receipt which showed that duty had been paid on certain goods including three watches. Evidence was given by the officers that the practice at the ports was to allow persons arriving to bring in, on payment of duty, a few watches for personal or domestic use or as gifts, and it would necessarily follow that a person who was allowed to import a watch or watches with such permission and paid duty thereon could not by any possibility be said to be doing so with intent to avoid the prohibition. The second interview was with the appellant, who, according to the evidence of the officer, admitted that she had on one occasion brought in eleven watches after she had visited Switzerland and on which she said she had paid duty. She admitted that she had employed Newton to sell watches and she put the number as not more than a hundred, but she alleged that she had bought these watches in Petticoat Lane, and that, in saying, as she admitted she had, to prospective buyers that they had not paid duty, her intention was only to make people think they were getting the watches cheap. The Customs receipts produced by the appellant and her husband related only to fifteen watches in all. When proceedings were taken against her she was charged along with the two other defendants in respect of forty-six watches. These were forty which Newton admitted having dealt in on behalf of the appellant or her husband and the six which had been seized by the Customs officers.

It is now necessary to refer to the relevant sections of the Customs Consolidation Act, 1876. Section 186, so far as is material for this case, imposes penalties on persons "who shall be . . . knowingly concerned in . . . in any manner dealing with . . . goods" the import of which is prohibited or which are liable to duty "with intent to defraud" His Majesty "of any duties due thereon, or to evade any prohibition " applicable to such goods. Section 259 is in these terms :

> If in any prosecution in respect of any goods seized for non-payment of duties, or any other cause of forfeiture, or for the recovering any penalty or penalties under the Customs Acts, any dispute shall arise whether the duties of customs have been paid in respect of such goods, or whether the same have been lawfully imported or lawfully unshipped, or concerning the place from whence such goods were brought, then and in every such case the proof thereof shall be on the defendant in such prosecution, and where any such proceedings are had in the High Court of Justice on the Revenue side, the defendant shall be competent and compellable to give evidence.

Dealing first with the question whether there was any evidence to be left to the jury at the close of the case for the prosecution, there was evidence that the appellant had been dealing in Swiss watches. This appeared from her admission to the Customs officers. Swiss watches were prohibited goods and were liable to duty. Six watches had been seized. In the proceedings there was a dispute whether duty had been paid in respect of these goods and whether they had been lawfully imported. If, then, the onus of proving that the goods had been lawfully imported and that the duty had been paid was on the appellant, there clearly was a case to go to the jury in respect of six watches. Counsel for the appellant, however, contends that the onus was on the appellant only in respect of those six, and, as the learned chairman directed the jury that the burden was on her in respect of all the forty-six, this was a misdirection which would invalidate the conviction. The court agreed, as did the prosecution, that, if the onus was put on the appellant only with regard to six and not in respect to all, the conviction could not stand. The proposition is that all the prosecution proved was that the appellant had dealt in prohibited goods, and that there was no evidence from which it could be inferred either that she did so with intent to avoid the prohibition or that she knew they were in this category when she dealt in them, for they might have been imported under licence, and still less was there evidence that she knew duty had not been paid or, indeed, that duty had not been paid by someone. The question, therefore, is on whom did the onus of proof lie. If the onus was shifted only with regard to six, though the greater includes the less, so that a verdict of Guilty could pass in respect of part only of the watches included in the indictment, it is obvious that the jury might have accepted the appellant's explanation in respect of only six watches and rejected it, as they clearly did, with regard to forty-six. We have, therefore, to consider the true construction of s. 259 of the Customs Consolidation Act, 1876, and determine whether the onus is cast on a defendant only, as counsel for the appellant contended, in respect of goods which have been seized.

In considering the grammatical construction of the section, it will be observed that the word " for " does not appear before the words " any other cause of forfeiture " in the second line. It seems, therefore, that the section is referring only to two and not three classes of prosecution, (i) in respect of any goods seized for non-payment of duty or any other cause of forfeiture, and (ii) for the recovering any penalty under the Customs Acts. The question then arises as to the meaning to be attached to the words " such goods " and " the same " in the section. Prosecutions under the Customs Acts must relate to some goods, for it is with goods that the Acts deal. " Such goods," therefore, may be either goods seized for non-payment of duty or other cause of forfeiture, or goods in respect of which the recovery of a penalty is sought and which need not necessarily have been seized. That this was the intention of the legislature is confirmed by an examination of other sections in the Act dealing with forfeiture and penalties. By s. 177 dutiable goods unshipped or removed from warehouse without the duty being paid or prohibited goods illegally imported are to be forfeited, and by s. 178 goods the importation of which is restricted are, when found or seized, deemed to be goods liable to duty and unshipped without payment of duty. Section 207 deals with proceedings for the condemnation and forfeiture in the High Court. These sections, it will be seen, deal with remedies against the goods themselves and for those remedies to be effective it follows that the goods must have been seized. Section 186 imposes penalties on the person who does the acts prohibited by s. 177 and extends the offences in respect of goods to harbouring and dealing with them. Section

218 is the first of a code of sections which, as the cross-heading shows, deal with "the course of procedure for recovering penalties, enforcing forfeitures, and punishing offenders under the Customs Acts," and s. 259 is part of this code. The cross-heading relating to ss. 259 to 263 is "As to proofs in proceedings," which must refer not only to proceedings in regard to goods seized but also to those in which penalties are the object. The onus is put on the defendant when there is a dispute in the proceedings whether duty has been paid or whether the goods were lawfully imported. The obvious reason for this provision is that the facts must be within the knowledge, and often within the exclusive knowledge, of the defendant. If, for instance, it is found that he has dealt in prohibited goods, if he can show that he acquired them in the ordinary course of business obviously he would not be guilty of dealing in them with intent to avoid the prohibition. He can prove the positive and, unless he had to undertake the proof, the Crown would generally have to undertake the proof of a negative. We can see no reason for saying that the proof is on the defendant only where the goods are seized and that s. 259 does not apply equally to goods which are not seized, and which cannot, therefore, be condemned, but in respect of which the defendant is liable to a penalty. In our opinion, there was no misdirection, and the appellant was called on to establish her innocence not only as to the six watches seized but also in respect of the others.

Other criticisms of the summing-up were made by counsel for the appellant. As usually happens in the course of a long summing-up, some expressions were used which might, perhaps, have been put differently, but it is unnecessary to go through the passages attacked as in no case did they amount to misdirection which would invalidate the conviction. Accordingly, it must be taken that the jury rejected the appellant's explanation and the conviction must be affirmed.

[After HIS LORDSHIP had intimated that the court would grant an application for leave to appeal against sentence, leave was asked for and granted. HIS LORDSHIP then asked counsel for the Crown for argument on the question whether counts 1 and 2 of the indictment were not really alternative.]

Hines (for the Crown): The way in which the prosecution have put this matter is that, in substance, none of the counts is alternative, in that the nature of each of the three offences is a distinct and separate one—in the first case, the avoidance of the duty on the import of the watches; in the second case, the avoidance of the purchase tax in respect of the watches; and, in the third case, the avoidance of the prohibition on their import, which is a matter independent of any question of revenue.

LORD GODDARD, C.J.: The court considers that there is good reason for interfering with the sentences. There were three counts in the indictment; (i) for importing prohibited goods, (ii) for not declaring them so that the duty was not paid, and (iii) for evading purchase tax. As to the sentence on the third count, the penalty will stand, but the court thinks that, on the whole, a sentence of three months in all would have been adequate and two penalties. Therefore, they propose to reduce the sentence to one of one month on each count of the indictment to run consecutively, and they impose the monetary penalty on the second count and on the third count. It means that the appellant will have to pay two penalties instead of three and go to prison for three months instead of six.

Appeal against conviction dismissed. Appeal against sentence allowed.

Solicitors: *William Gorringe & Co.* (for the appellant); *Solicitor for Customs and Excise* (for the Crown).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

HUDSON *v.* HUDSON (EXELBY cited).

[LEEDS ASSIZES (Lord Merriman, P.), February 23, 24, 25, 1948.]

Divorce—Estoppel—Finding of justices affirmed by Divisional Court—Subsequent petition based on same matrimonial offence—Denial by respondent—Competence—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), *s.* 178 (1) (*as substituted by the Matrimonial Causes Act,* 1937 (c. 57), *s.* 4).

On a complaint by the wife before a court of summary jurisdiction the justices found the husband guilty of persistent cruelty and their decision was affirmed on the merits by a Divisional Court of the Probate, Divorce and Admiralty Division. Subsequently, the wife petitioned for divorce on the ground of cruelty, relying on what was admittedly the same course of conduct. By his answer the husband denied the cruelty and alleged adultery. By her reply the wife pleaded that the husband was estopped from denying the cruelty by virtue of the decision of the justices affirmed by the Divisional Court.

HELD: the decision of the Divisional Court did not effect an estoppel *per rem judicatam*, but, as the Divorce Court was obliged, under s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925 (as substituted by s. 4 of the Matrimonial Causes Act, 1937), to inquire, so far as possible, into the facts alleged and to satisfy itself on the evidence that the offence had been committed, it was entitled to investigate the charge by way of a contest *inter partes*.

Harriman v. *Harriman* ([1909] P. 123), *applied.*

[AS TO ESTOPPEL AS A BAR TO RELIEF IN MATRIMONIAL CAUSES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 670-673, paras. 990-994; and FOR CASES, see DIGEST, Vol. 27, pp. 324-326, Nos. *3026-3051*.]

Cases referred to:

(1) *Knott* v. *Knott*, [1935] P. 158; 104 L.J.P. 50; 153 L.T. 256; 99 J.P. 329; Digest Supp.

(2) *James* v. *James*, [1948] 1 All E.R. 214.

(3) *Harriman* v. *Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 21 Digest 137, *8*; 27 Digest 321, *2995*.

(4) *Finney* v. *Finney*, (1868), L.R. 1 P. & D. 483; 37 L.J.P. & M. 43; 18 L.T. 489; 27 Digest 324, *3030*.

(5) *Pratt* v. *Pratt*, (1927), 96 L.J.P. 123; 137 L.T. 491; Digest Supp.

PETITION by the wife for divorce on the ground of cruelty. The husband denied cruelty and alleged adultery, and the wife, by her reply, pleaded that the husband was estopped from denying the cruelty by virtue of the fact that a court of summary jurisdiction had found against the husband on what was admittedly the same course of conduct and that this decision was affirmed, on the merits, by a Divisional Court of the Probate, Divorce and Admiralty Division. The learned President declined to try the case on its merits, but at the request of counsel dealt with the estoppel point, held that there was no estoppel *per rem judicatam*, and adjourned the case to the next Assizes for trial by another judge.

Ernest Ould for the wife.

Quintin Hogg and *G. F. Leslie* for the husband.

LORD MERRIMAN, P.: This is a wife's petition for divorce on the ground of cruelty. By his answer the husband denies cruelty and makes a charge of adultery. The wife, in her reply, alleges that the husband is estopped from denying the cruelty by virtue of the fact that what was admittedly precisely the same course of cruelty was held to have been proved by a decision of the justices of the petty sessional division of Otley, Yorkshire, and that their decision has been affirmed on the merits by a Divisional Court of the Probate, Divorce and Admiralty Division.* As it happens that I was presiding on the occasion on which the Divisional Court affirmed the judgment, and as, in any case, there is a new issue in this case—the issue of adultery—I propose to take first of the two questions which arise that which is logically the second. The two questions are: Who shall try this case; and, secondly: What is the law relating to this plea of estoppel?

As regards the trial of the case, I propose to say in a few sentences why I do not propose to try it. On the appeal, while it was not admitted that the charge of cruelty was made out before the justices, it was indicated very plainly by counsel for the husband who argued the appeal and who has taken up the same position here that he would have found himself in some difficulty in contending that there was not sufficient evidence on which, if accepted, the justices could hold that the charge of cruelty had been made out, but he took the point that the justices of that particular petty sessional division, which was the division in which the wife was living after the parting between herself and her husband had taken place, had no jurisdiction because the whole sum and substance of the charge of cruelty had occurred while they were still living together in the petty sessional division of Scunthorpe, Lincolnshire. That, of course, would have been a conclusive answer to the jurisdiction of the justices in the petty sessional division of Otley unless it could be shown that the cause of complaint " partially " arose in that petty sessional division. To ascertain whether that could be said, it became necessary to examine the whole of the evidence regarding the conduct that was alleged to constitute a course of persistent cruelty to see whether a particular incident, which admittedly occurred in the petty sessional division of Otley, did, or did not, form part of that course of conduct. I, therefore, devoted a considerable part of my judgment to examining that issue, and, in the course of it, I expressed my own conclusions on the matter, and I am reminded by reading the transcript that I did so in unmistakable language. I came to the conclusion, which, at the moment, I am entitled to assume is correct because it has not been challenged elsewhere, that this last incident was all of a piece with that which had been alleged to have occurred while the spouses were still living together and that the court was not concerned, in deciding where the cause of complaint partially arose, with apportioning the fractional value of that part of the whole which arose in one and that which arose in the other petty sessional division, and, consequently, that the justices of the Otley petty sessional division had jurisdiction. Jones, J., agreed with me, and, consequently, the appeal was dismissed. Assuming, however, that it is necessary to fight this case from beginning to end, a point which will be discussed in a moment, having read my own judgment, I have come to the conclusion, in spite of counsel's polite assurance that I would, no doubt, detach myself from it when hearing the case, that the husband, at any rate, will be convinced that there is one judge who cannot possibly do justice between him and his wife, and that is the judge delivering judgment at this moment. Therefore, I decline, on any consideration whatever, to deal with the merits of this case myself. That decision is accepted by both parties, but without prejudice to their asking me, nevertheless, to decide the other issue on the reply. I confess I do not feel the same embarrassment about that.

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* Jan. 22, 1947. See 111 J.P. 194.

I would like to preface my observations with a statement of what has been the practice of the Divisional Court in these matters, a practice that has invariably been followed since the decision in *Knott* v. *Knott* (1). Before that decision the Divisional Court had laid down, not so much as a matter of jurisdiction as of discretion, that justices, although their jurisdiction is statutory and is unfettered by the fact that there may be concurrent jurisdiction in the Divorce Court, ought not to proceed to determine an issue of adultery, cruelty, or whatever it may happen to be, when they know that the same issue is about to be determined on a petition in the High Court. That advice, so far as I know, has been loyally followed by courts of summary jurisdiction. Correspondingly it seemed to us, as was said in *Knott* v. *Knott* (1), that it was very inadvisable, when it was known that a petition for divorce was actually pending, that the Divisional Court itself should decide an appeal from justices, and, without the advantage, of course, of hearing the witnesses, but merely on reading the note which the justices' clerk had made of their evidence, should proceed to try the same issue which was about to be raised before a judge of the High Court on a petition for divorce. Down, however, to the latest expression of this rule of practice in *James* v. *James* (2) we have never actually decided that a decision of the Divisional Court would effect an estoppel *per rem judicatam*, as, on a well known authority, which I will discuss in a moment, a decision of the justices themselves plainly would not. I do not propose in this case to attempt to resolve the doubt which I indicated in *James* v. *James* (2), whether there is or is not a distinction to be drawn between a judgment dismissing the cause of complaint and a judgment finding that the cause of complaint is proved. The effect of the dismissal of a complaint does not arise in this case. What we are concerned with here is the effect on the trial of this divorce suit of a previous decision finding that the complaint is true, and the upholding of that decision by a judgment of the Divisional Court. It is sufficient to indicate that there may be a distinction between these cases for two, if not more, reasons. The first is that in *Harriman* v. *Harriman* (3) no doubt was expressed about the correctness of the decision in *Finney* v. *Finney* (4), where the wife was precluded from including in a subsequent petition a charge of cruelty which had previously been found not to be proved, notwithstanding the fact that the charge of cruelty had formerly been made to support a petition for judicial separation only, whereas by the later petition the wife included a charge of adultery and a prayer for divorce. Secondly, it may well be that, if a party is estopped by the earlier decision, the estoppel may operate to prevent that party from bringing the same charge at all before any other court, whereas the doctrine of estoppel will not operate so as to abrogate the statutory duty of the court to inquire into the truth of a petition which is properly brought before it. I need only add that the decision of the Divisional Court in *Pratt* v. *Pratt* (5), supports the view that an earlier dismissal of a charge may be conclusive.

That brings me back to the real point in this case, *i.e.*, the real effect of *Harriman* v. *Harriman* (3) on this plea of estoppel. There is only one general observation which I would make before quoting one or two passages from the judgments in *Harriman* v. *Harriman* (3). I agree with an observation made by counsel for the husband in the course of his argument, namely, that, strictly speaking, the fact that this decision of the justices has been dealt with by the Divisional Court may be irrelevant in the sense that the effect of producing an order of justices based on a finding of cruelty would be exactly the same whether the order was based on a complaint which was undefended and went by default in a court of summary jurisdiction, or was made in a hotly contested case, every detail of which was fully examined by that tribunal. There is no distinction as regards the probative effect between an order on an undefended summons before justices and a decree of judicial separation pronounced by a judge of the High Court, affirmed, it may be, by the Court of Appeal, but I still think that, assuming there is no estoppel and that it is merely a question of the weight to be attached to, or, as it is sometimes called, the evidential value of, the former judgment, a judge may well feel that, for example, a decision of the Court of Appeal affirming the finding of a judge of the High Court who has pronounced a decree of judicial separation does carry more weight than an order on an undefended summons before justices. Putting it another way, the embarrassment which may be caused by an appellate tribunal proceeding to a decision when it is known that the same issue is to be tried by a judge is a real one, even if no question of estoppel is involved. As the result of this argument I do not at all recede from the view hitherto taken by the Divisional Court that that court should hold its hand when the same issue is ripe for trial before a judge of the High Court.

In considering *Harriman* v. *Harriman* (3), it is necessary to remember that two different kinds of estoppel were set up, one of which was quite irrelevant to our present purpose, although it created some difficulty, whereas the other is directly in point. That which is irrelevant is the estoppel which, it was argued, resulted from the enactment in s. 5 (*a*) of the Summary Jurisdiction (Married Women) Act, 1895, that an order of the justices containing a non-cohabitation clause should " have the effect in all respects of a decree of judicial separation on the ground of cruelty." The wife's case in *Harriman* v. *Harriman* (3) was one of mere desertion, uncomplicated by any cruelty. The magistrate found that the desertion had been proved. After the lapse of two years the wife presented a petition for divorce in which she added a charge of adultery to the charge of desertion for two years. The magistrate had, however, included in his order, on the ground of desertion, a non-cohabitation clause, and the Court of Appeal held that the desertion could not continue after the date of that order. To get over that difficulty it was said that the effect of the section already quoted was that, by the very effect of the non-cohabitation clause, the charge of desertion had been converted into a charge of cruelty and, therefore, the question of the duration of the desertion did not arise. That curious argument was not received with much favour. The other question of estoppel, which does concern this case, was whether, even if there had been a previous finding of cruelty by the magistrate, the judge hearing the petition was bound to treat the matter as concluded. On that authority I think it is quite easy to see how the present issue would have been decided. The relevant enactments at that time were ss. 29 to 31 of the Matrimonial Causes Act, 1857, but these were substantially to the same effect as s. 178 of the Judicature Act, 1925, as that has been revised by s. 4 of the Matrimonial Causes Act, 1937, which provides :

> (1) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged . . . (2) If the court is satisfied on the evidence that—(i) the case for the petition has been proved . . . the court shall pronounce a decree of divorce . . .

I need only take a few passages from the judgments. Cozens-Hardy, M.R., said ([1909] P. 123, 131) :

> What is the effect of a decree of judicial separation on the ground of cruelty ? It has the same force and the same consequences as a divorce *a mensa et thoro* under the old law (ss. 7 and 16), and it makes the wife a *feme sole* so far as property and contract and suing and being sued are concerned (ss. 25 and 26). Beyond this it has no absolute effect. It may perhaps operate by way of estoppel *inter partes,* so as to prevent the husband from thereafter denying that he has been guilty of cruelty, though I desire to express no opinion on that point. It cannot in any way estop the court. For the jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied. The utmost effect by way of estoppel which the order of March, 1906, can have is to prove desertion at that date, but not desertion for two years. If the order had been made on complaint of cruelty, and it had been adjudged that the matter of the complaint was true, the Divorce Court might perhaps have granted a divorce on proof of subsequent adultery.

The point of the last sentence, as is plain from the argument, is that at that time the general practice (but it was no more than a practice) of the Divorce Court was to accept the production of a decree for judicial separation on the ground of cruelty as proof of the charge on which it was based, but, though the Court of Appeal did not dissent from the propriety of that practice while at the same time holding that the matter was not concluded by the former decision, we are governed today by s. 6 of the Matrimonial Causes Act, 1937, which was drafted with *Harriman* v. *Harriman* (3) in mind. By sub-s. (2) the court may treat the decree of judicial separation, or the equivalent justices' order, as sufficient proof of the adultery, desertion or other ground on which it was granted, but shall not pronounce a decree of divorce without receiving evidence from the petitioner.

I am now going to refer to the well known passage in the judgment of Fletcher Moulton, L.J. After saying that s. 5 (*a*) bound the court loyally to obey the provisions by giving the separation order the effect in every respect of a decree of judicial separation on the ground of cruelty and to look on it as creating an estoppel between the parties as to the husband having been guilty of that offence to the same extent as a decree granted by the Divorce Court would do, he continued ([1909] P. 123, 142) :

> By s. 31 of the Matrimonial Causes Act, 1857, the relief is made dependent on the court being satisfied on the evidence that the case of the petitioner has been proved. " Proved " here means proved as a fact, and not merely proved *inter partes.* Hence no estoppels binding the parties are necessarily sufficient to entitle a party to such relief. The court is not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them. Hence the production of a decree for a judicial separation on the ground of cruelty is not as a matter of law sufficient to make it the judicial duty of the court to accept as a fact that the respondent has been guilty of such cruelty ; and if the circumstances under which the decree was obtained are such as to raise a doubt in the mind of the court as to whether the cruelty was in fact committed, it would be entitled and bound to require such additional evidence as should be sufficient to convince it of the fact. But, although this is so, the respect paid to a judicial determination of a fact between parties (which in civil actions is evidenced by its creating a binding estoppel) would, I should presume, in ordinary cases lead the court to consider the fact of the cruelty to be adequately established by the production of the decree.

FARWELL, L.J., says (*ibid.*, 144):

> If such a decree [for judicial separation] is available at all it is by virtue of the ordinary rules of evidence. I do not doubt that as between the parties the ordinary doctrine of estoppel applies, as was held by the Judge Ordinary in *Finney* v. *Finney* (4); but estoppel is only a rule of evidence, and the duty imposed on the judge by s. 29, which emphasises by express enactment the necessity for the court being satisfied as required by s. 31, is not restricted by any such rule. Neither the consent nor the admission of the parties justifies the court in granting a decree, although such consent or admission is acted on continually in ordinary civil suits, and, by parity of reasoning, no rule of evidence which prevents a party as against the other litigant from giving evidence of the truth can bind the court to shut its eyes, if it is not satisfied that all the truth is before it. It is plain that the King's Proctor, if he intervenes, can give evidence to shew that the decree for judicial separation (on the hearing of which he had no power to intervene) was improperly obtained, if it forms one of the grounds on which divorce is asked, and that he or any other person intervening between the decree *nisi* and the decree absolute can do the same; and it would be strange if the court cannot *mero motu* declare that it is not satisfied by the former decree, even although it may, as a general rule, think fit to act on it: the court is at liberty, but is not bound, to accept it.

I call attention to the words "by parity of reasoning." Later FARWELL, L.J., says (*ibid.*, 146):

> In my opinion BUCKNILL, J., was right in refusing to accept this order as evidence of cruelty; it is apparent on the face of it that the cruelty was not alleged or proved, and in my opinion he would have been free to require evidence of cruelty, even if the order had found cruelty on the face of it, if in the exercise of his duty under s. 29 he thought right to do so.

In my opinion, the result is that it is plain, at any rate in a case where it is sought to rely on a previous conviction of a particular offence in support of a petition for divorce based on the same facts, that there is no estoppel *per rem judicatam.* It is, however, said: How is this authority to be applied, since the only result of the passages that I have read is that, while the party is estopped, the court is obliged to satisfy itself? It is suggested that, even if the respondent is entitled to file an answer, as he clearly must be until the question of estoppel is pleaded, he cannot be allowed to contest the effect of the earlier judgment. That means that, although the party is there with his counsel and his witnesses, the court is to be obliged to treat the case as undefended and make such inquiries as it can, by reason of the duty imposed on it, without the assistance of cross-examination or the calling of witnesses for the respondent. I must say that it seems to me that that would be an extraordinary result of this legislation. Having asked the petitioner a few questions, the judge could not be prevented from calling the witnesses if he knew they were there. I really cannot believe that Parliament meant to reduce this procedure to such a farce as is suggested by preventing the court from assisting itself in the best way possible, *i.e.*, by having the assistance of the person best qualified to assist the court, *viz.*, the counsel who has the conduct of the case on behalf of the other party. It seems to me that when one has reached the point where the court is not bound to accept the earlier judgment as being conclusive of the commission of the offence charged, the only possible way to conduct the investigation is in the usual way of a contest *inter partes.* I was asked to afford some general advice as to the way in which a wife in such circumstances should present her case. To my mind, it is impossible for anyone to lay down any rule which would be of the slightest assistance because everything depends on the facts of the particular case, the extent to which the matter was investigated in the court below, and the parties present at the trial. So far as this case is concerned, counsel for the husband made it abundantly clear that he wished to fight the whole case on the ground that the Divisional Court was misled by the evidence of the wife and her witnesses. The course which counsel for the wife should follow is reasonably clear. I can only advise him to come prepared to prove his case in whatever way he thinks may be the most convincing way. I do not express, and cannot express, any opinion. It will be for the learned judge who hears this case to decide what form the trial should take. The only order, therefore, I can make is that this case stands adjourned to the next assizes.

Order accordingly.

Solicitors: *Eric Wolfe*, Ilkley (for the wife); *R. A. C. Symes & Co.*, Scunthorpe (for the husband.)

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

ROYSTON *v.* MINISTER OF PENSIONS.

[King's Bench Division (Denning, J.). April 6, 1948.]

Pension—Burden of proof—Disablement—Royal Warrant Concerning Retired Pay, Pensions, etc., 1943 (*Cmd.* 1943, No. 6489), *art.* 1 (4).

The claimant was discharged from the Auxiliary Territorial Service on compassionate grounds in September, 1940, and in 1944 she claimed a pension stating that she had received an injury to her spine in 1939, which she had reported and for which she went into hospital. The records contained no entry of the claimant having suffered any such injury or of her having spent any time in hospital for it :—

Held : the onus was on the claimant to prove that she had suffered a disablement, as defined in art. 1 (4) of the Royal Warrant Concerning Retired Pay, Pensions, etc., 1943, and it was only after a disablement had been proved that art. 4 (2), by which there was to be no onus on a claimant to prove the fulfilment of the conditions in respect of entitlement set out in art. 4 (1), came into operation. On the facts the claimant had failed to prove a disablement, and, therefore, she was not entitled to a pension.

[As to War Pensions, see HALSBURY, Hailsham Edn., Vol. 34, pp. 779, 780, paras. 1098, 1099, and Supplement ; and for Cases, see DIGEST, 2nd Supp., Royal Forces, Nos. *266b-266m*.]

Appeal by the claimant from a decision of a pensions appeal tribunal rejecting her claim to a pension in respect of disablement on the ground that she had failed to discharge the onus which was on her to prove that she had a disablement. Denning, J., now upheld the decision of the tribunal and dismissed the appeal. The facts appear in the judgment.

Crispin for the claimant.
H. L. Parker for the Minister.

DENNING, J. : The claimant was called up in the Auxiliary Territorial Service in November, 1939, at the age of 47 years. She left in September, 1940, on purely compassionate grounds. She was frail and not able to do her work. Four years later she put in a claim for a pension. She said that she had had an injury to her spine in 1939, which she reported and for which she went into hospital. The records have been searched, but they contain no entry regarding any such injury or relating to any time in hospital for it. There is nothing whatever to support the claimant's statement that she suffered an injury at that time. Investigations having been made and nothing whatever to support her story having been found, the pensions appeal tribunal, after hearing her, refused to entertain the claim on the ground that there had been no injury.

The question on which I gave leave to appeal is whether the tribunal were right in holding that there was an onus on the claimant to show a disablement. I am satisfied that there is an onus on a claimant to show a disablement. Once she shows a disablement, there is no onus on her to prove the fulfilment of the conditions in regard to entitlement set out in art. 4 (1) of the Royal Warrant Concerning Retired Pay, Pensions, etc., 1943, and the benefit of any reasonable doubt has to be given to her. That is provided by art. 4 (2), but art. 4 (2) does not come into operation unless she first shows a disablement, and, in art. 1 (4), "disablement" is defined as "physical or mental injury or damage, or loss of physical or mental capacity." I think, therefore, the tribunal were right in saying that the onus of proving a disablement was on her, and I think they were justified in concluding that she had not discharged that onus and that there was no injury such as she alleged. In those circumstances, the appeal is dismissed.

Appeal dismissed.

Solicitors : *Culross & Trelawny* (for the claimant) ; *Treasury Solicitor* (for the Minister of Pensions).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

DENNIS *v.* LONDON PASSENGER TRANSPORT BOARD.

[King's Bench Division (Denning, J.), April 12, 1948.]

Damages—Measure—Loss of wages—Equivalent amount received in pension and sick pay—Moral duty to repay—No legal obligation.

The plaintiff, who was injured through the negligence of the defendant, received no wages during the period of his disability, but the Minister of Pensions and his employers paid to him, in pension and sick pay, amounts which together equalled his wages.

Held: the amount of wages lost by the plaintiff should be included in the special damages awarded him although he was under only a moral, and not a legal, duty to refund that sum.

[As to Special Damage in Actions for Negligence, see HALSBURY, Hailsham Edn., p. 724, para. 1015.]

Case referred to:

(1) *Allen* v. *Waters & Co.* [1935] 1 K.B. 200; 104 L.J.K.B. 249; 152 L.T. 179; 99 J.P. 41; Digest Supp.

Action for damages for negligence. Liability was admitted and the sole question for determination was the amount of damages. The court ruled that although the plaintiff had received amounts, equivalent to the amount of wages he had lost, by way of pension from the Ministry of Pensions and sick pay from his employers, the amount of the loss of wages should be included in the damages to be awarded against the defendants.

P. S. Pitt for the plaintiff.
Monier-Williams for the defendants.

DENNING, J.: The plaintiff was employed by the London County Council as an ambulance attendant. On Jan. 1, 1944, a motor ambulance in which he was travelling was run into by a tramcar belonging to the defendants, and he was injured. The accident was admittedly due to the negligence of the driver of the tramcar, and the only question which I have to determine is that of damages.

From the date of the accident until the date on which he was fit for work the plaintiff received no wages, but he did receive approximately the like amount by way of pension from the Ministry of Pensions and sick pay from the London County Council. In a letter to the plaintiff the Ministry of Pensions, though not asserting that he is under a legal obligation to refund the moneys which they paid him, say he will be expected to refund the amount if he recovers compensation from a third party, and as to the sick pay the plaintiff says that the London County Council told him that, if he got compensation, he would be expected to repay it. The net result appears to be that the plaintiff received his wages from the London County Council and the Ministry of Pensions. They may have no legal claim to recover it from him, but, in those circumstances, is it to form part of the damages which the defendants have to pay?

The plaintiff tells me, through his counsel, that he is ready to undertake, if he recovers damages, to repay those two bodies, the London County Council and the Ministry of Pensions, the sums they have paid him, which he is under a moral obligation to do. The cardinal point to remember is that it is the defendants who are responsible for what has occurred. In my opinion, a wrongdoer is not to be allowed to reduce damages by the fact that other persons have made up to the plaintiff his wages, like the London County Council and the Ministry of Pensions in this case. The plaintiff has lost his wages. In point of law, therefore, *prima facie* he should have them paid by the wrongdoer. As they have been made up to him by other people who expect to be repaid I think it is proper that that sum should be included as damages, but subject to the direction that the amount paid to the plaintiff by the Ministry of Pensions and the London County Council shall be paid to those bodies out of the sums recovered. If I remember rightly, the court took the same course in *Allen* v. *Waters* (1) with regard to payments to a hospital.

Judgment for the plaintiff with costs.

Solicitors: *Kingsbury & Turner* (for the plaintiff); *A. H. Grainger* (for the defendants).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

ALLINGHAM AND ANOTHER *v.* MINISTER OF AGRICULTURE AND FISHERIES.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 12, 1948.]

Agriculture—Cultivation—Control—Directions—Delegation of Minister's power to county agricultural committee—Exercise of delegated power by county executive officer—Delegatus not potest delegare—Defence (General) Regulations, 1939 (*S.R. & O.*, 1939, *No.* 927), *regs.* 62 (1), 66.

By virtue of reg. 66 of the Defence (General) Regulations, 1939, the Minister of Agriculture and Fisheries delegated to a county war agricultural committee his powers, under reg. 62 (1), to give "directions with respect to the cultivation, management or use of land for agricultural purposes." The committee decided that eight acres of sugar beet should be grown by the occupiers of certain land, but left to its executive officer the selection of the field, which was required by the regulation to be specified in the notice to the occupier. The officer consulted a local sub-committee, appointed to make recommendations to the committee, and served a notice on the occupiers specifying the field to be so cultivated.

HELD: on the principle of *delegatus non potest delegare*, the committee could not delegate the power to determine the land to be cultivated to its officer, and, therefore, the notice was ineffective and non-compliance with it was not an offence.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, regs. 62 (1), and 66, see HALSBURY'S STATUTES, Vol. 39, pp. 1033, 1041.]

CASE STATED by Bedfordshire justices.

At a court of summary jurisdiction sitting at Biggleswade an information was preferred by John William Dallas, an authorised agent of the Minister of Agriculture and Fisheries, under the Defence (General) Regulations, 1939, charging the appellants with having failed to comply with a direction made on Apr. 11, 1947, under reg. 62 (1) of the regulations, directing them to grow and harvest eight acres of sugar beet for the 1947 season on part of a field numbered 412 on the ordnance survey map for the parish of Southill, contrary to reg. 92. The information was heard on Oct. 29, 1947, when the court convicted both appellants and fined them each £50 and ordered them each to pay £10 10*s.* costs. The appellants had contended *inter alia* that the direction was issued without the authority of the Bedfordshire War Agricultural Executive Committee, to whom the Minister had delegated his functions, the field to be so cultivated having been determined by the committee's executive officer on the recommendation of the Biggleswade district committee (a sub-committee appointed by the executive committee to make recommendations to it), and not approved by the Executive Committee. The appellants appealed. The court held that the war agricultural executive committee, having itself only delegated powers, had no power to delegate the selection of the field to be cultivated to its officer and allowed the appeal.

M. Grantham for the appellants.

Diplock, K.C., and *Quintin Hogg* for the Minister.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Bedford who convicted the two appellants of failing to comply with a direction, made on Apr. 11, 1947, under reg. 62 (1) of the Defence (General) Regulations, 1939, directing them to grow and harvest eight acres of sugar beet for the 1947 season on part of field numbered 412 on the ordnance survey map. The direction was given by the executive officer of the war agricultural executive committee, and the question is whether, in the circumstances found by the justices, the order was one which the farmers were bound to obey.

Under reg. 62 (1) the Minister of Agriculture is given power to "give such directions with respect to the cultivation, management or use of land for agricultural purposes as he thinks necessary" for certain purposes. The direction is to be given by notice relating to the land specified therein served on the person by whom the direction shall be complied with. It is to be observed that the words of the regulation are that the notice is to "relate to the land specified in the notice." In this case the war agricultural executive committee were made the agents or delegates of the Minister who delegated his powers to them, as he was entitled to do, under reg. 66 (1), which says :

> The Minister of Agriculture and Fisheries may by order provide for delegating, to such extent and subject to such restrictions as may be specified in the order, to any person or body of persons appointed or approved by him all or any of his functions under [any of the following regulations . . .]

Among those regulations is reg. 62. The war agricultural executive committee came to the conclusion that eight acres of sugar beet should be grown by the appellants for the 1947 season, and it, therefore, became necessary that a notice to that effect, relating to the land specified in the notice, should be served on the appellants. It is not enough to give a farmer a general notice saying : "You grow eight acres of sugar beet." The notice must say : "You grow eight acres of sugar beet on land which we specify in the notice." Having come to that conclusion, the committee said that this sugar beet was to be grown on a field to be named by their executive officer. In other words, they delegated to the executive officer the task of deciding the land which was to be the subject of the notice to be served. I can find no provision in any order having statutory effect or any regulation which gives the executive committee power to delegate that which the Minister has to decide and which he has power to delegate to the committee to decide for him. If he has delegated, as he has, his power of making decisions to the executive committee, it is the executive committee that must make the decision, and, on the ordinary principle of *delegatus non potest delegare*, they cannot delegate their power to some other person or body.

The executive officer, having been told by the committee to perform the functions which the committee ought to have performed for themselves, took the opinion of a sub-committee for the Biggleswade district. That sub-committee was set up under the provisions of the Cultivation of Lands Order, 1939, art. 5, which provided :

> A [war agricultural executive] committee may, subject to any directions given by the Minister, appoint such sub-committees for such purposes as the committee think fit. A sub-committee may consist either wholly or partly of persons not being members of the committee.

The Case finds that the war agricultural committee for the county did appoint this Biggleswade district committee as a sub-committee to act under the instructions of the executive committee and to make recommendations to the executive committee. Apparently, they made some recommendations to the executive officer and the executive officer accordingly made the order. I can find nothing in the regulations or the statute which enabled the executive officer to make the order. The real contention of the appellants is that they are entitled to have the decision of the executive committee and of no one else on this matter, and, subject to the power which it may be the committee possess - I say no more about that—to delegate to a committee, which they did not do in this case, I think that contention is right. It may be that if the executive officer had gone back to the executive committee and said that the Biggleswade district committee recommended them to make the order in respect of field No. 412, they would have acted on that recommendation, but in these days, when various bodies and various persons get wide powers given to them by a variety of regulations and Orders which are issued so frequently that it is very difficult for anybody to know whether they are obeying the law or not, it is extremely important that the bodies which are given these wide powers should act strictly in accordance with them and it is the duty of this court to see that they do so. In this case, it seems to me that the committee left to some one the duty of deciding that which the regulation, which has the force of a statute, requires them to decide for themselves.

In these circumstances, it seems to me that the point taken by the appellants is a good one. They were not bound to obey this order which was not the result of a decision of the county executive committee, but was given to them by the county executive officer acting on his own responsibility. In my opinion, this appeal should succeed.

HUMPHREYS, J. : I am of the same opinion. It seems to me that where the executive committee went wrong was in their original decision to issue a direction requiring the appellants to grow eight acres of sugar beet on a field to be named by their executive officer. If the direction had been : "On a field, selected by us, the location of which we shall in due course direct the executive officer to convey to you," there would have been no objection. It is clear, however, that what they were saying was: "We shall leave to the executive officer the decision as to what land you are to cultivate in a particular way." They had no power to do that, and I am not surprised that the executive officer, perhaps appreciating that he had no power to give any direction as to the use of the land, proceeded to take the views of the Biggleswade district committee on the matter. Instead of (as I think they might probably have done without objection) recommending to the executive committee that this particular field should be cultivated, the Biggleswade district committee seem to have arranged with the executive officer that he should convey their decision to the farmers, and that was done, the executive officer acting, not on behalf of the executive committee, but as the agent of the Biggleswade committee. In my opinion, that procedure was wrong. I agree with the judgment of my Lord.

PRITCHARD J.: I agree.

Appeal allowed with costs and convictions quashed.

Solicitors: *Batchelor, Pirkis & Fry*, agents for *Passingham & Hill*, Hitchin (for the appellants); *Official Solicitor, Ministry of Agriculture and Fisheries* (for the Minister.)

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

QUAINTWAYS RESTAURANT, LTD. *v.* BUDD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 8, 1948.]

Food Rationing—Catering establishment—Fats and cheese—" Use " in specified rationing period—Use, not for consumption by customers, but for manufacture of articles to be stored—Fats, Cheese and Tea (Rationing) (No. 2) Order, 1946 (*S.R. & O.*, 1946, *No.* 1116), *arts.* 8, 10 (*as amended by the Fats, Cheese and Tea* (*Rationing*) (*No.* 2) (*Amendment No.* 3) *Order*, 1946 (*S.R. & O.*, 1946, *No.* 2025)).

A catering company suffered a sudden falling off in trade in its restaurant, and, to avoid deterioration in its stocks of fats and cheese, it used them to make various articles of food which could be stored and kept in good condition. The quantities of cheese and fats so used, together with those consumed at meals in the restaurant, exceeded the amounts which might "be used in any specified period" in the establishment under arts. 8 and 10 of the Fats, Cheese and Tea (Rationing) (No. 2) Order, 1946 (as amended by the Fats, Cheese and Tea (Rationing) (No. 2) (Amendment No. 3) Order, 1946).

HELD: the word "used" in arts. 8 and 10 meant "used in any way" and not merely "consumed," and the company had, therefore, contravened the Order.

CASE STATED by Chester justices.

At a court of summary jurisdiction sitting at Chester three informations were laid by the respondent, the deputy food executive officer to the Chester City and Rural District Food Control Committee, against the appellants alleging that they, being a duly licensed catering establishment (i) in the eight-weekly rationing period from Feb. 2 to Mar. 29, 1947, inclusive, unlawfully used in the establishment a total quantity of cheese in excess of the quantity permitted, contrary to art. 10 of the Fats, Cheese and Tea (Rationing) (No. 2) Order, 1946; (ii) in the same period unlawfully used in the establishment a total quantity of fats in excess of the quantity permitted, contrary to art. 8 of the Order as amended by the Fats, Cheese and Tea (Rationing) (No. 2) (Amendment No. 3) Order, 1946; (iii) in the eight-weekly rationing period from Mar. 30 to May 24, 1947, inclusive, unlawfully used in the establishment a total quantity of fats in excess of the total quantity permitted, contrary to art. 8 of the Order, as amended by the Fats, Cheese and Tea (Rationing) (No. 2) (Amendment No. 3) Order, 1946. The informations were heard and determined on Sept. 29, 1947, when the court found the offences proved and ordered the appellants to pay a fine of £5 and costs on each information. The appellants contended that the cheese and fats had not been "used" within the meaning of the Order inasmuch as they had not been consumed by persons at or during or with meals in the restaurant during the specified periods, but (except for a small portion destroyed as unfit for human consumption) had merely changed their shape and appearance, having been processed into edible articles to prevent further deterioration, and still remained in the stock and custody of the appellants. The court held that "used" meant "used in any way" whether by consuming or otherwise and dismissed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

P. Curtis for the appellants.
H. L. Parker for the respondent.

LORD GODDARD, C.J., referred to the terms of the three informations, and continued: Very large amounts of cheese and fats were concerned in these alleged offences, and the justices, in only fining the appellants £5 on each information, have shown that in their opinion a technical offence had been committed. There is nothing against the appellants in the sense that any moral blame attaches to them.

The appellants own a large restaurant in Chester, and are entitled to receive for the purpose of supplying meals large quantities of cheese and fat. During the fuel crisis of 1947 their trade suddenly fell off to a considerable extent and in consequence there was a large accumulation of fats and cheese in their store. To prevent its going bad they "processed" it, that is to say, they used it in the manufacture of other articles, such as "welsh rarebit mixture, cheese savouries, puffs and straws, biscuit base, souffle base, puff paste and similar articles which would keep in store in air-tight containers." There seems to be no doubt that, in the opinion of the justices, the appellants acted with the best possible motives, to preserve the food instead of letting it go bad. On the other hand, however, as counsel for the respondent pointed out, if such conduct were allowed a loophole would exist in the Order. Although there was no intention of exceeding the ration or breaking the Order, a prosecution is necessary to show that such a thing must not happen again. The appellants are alleged to have violated art. 8, which provides:

> The total quantity of fats which may be used in any specified period—(*a*) in any catering establishment; or (*b*) in any institution for persons not residing therein, shall not exceed an amount calculated at the rate of 21/80 oz. in total (but so that not more than 3/7 of such amount shall be butter and not more than 1/7 of such amount shall be cooking fats) per person per meal served in or by the catering establishment or to such persons by the institution.

Counsel for the appellants argued that the word "used" must mean "consumed," and consumed in the catering establishment. I do not think the court can say that in an Order of this nature the word "used" is equivalent to the word "consumed," because people who carry on catering establishments use fats and cheese for making up other things. Taking the words which are greatly relied on by counsel, "per person per meal served," I think on a fair view of the whole of the article they only show that the number of meals served is the yardstick by which the use of the fat or cheese is to be measured.

It is impossible to construe the word "used" as "consumed" because a person can use fats in a period without consuming those fats in the period. It is impossible to say, if fats have been used in making cake, that the person still has the fats in stock because the cake has not been consumed. The word "used" must be given its ordinary meaning, and it follows that the Order prohibits the use of fats or cheese in excess of the permitted amounts for any purpose in the restaurant and is not equivalent to saying "consumed during that period." For these reasons I think the magistrates came to a correct decision and this appeal must be dismissed.

HUMPHREYS, J.: I agree and have nothing to add.

PRITCHARD, J.: I agree.

Appeal dismissed with costs.

Solicitors: *L. Bingham & Co.*, agents for *Ouseley-Smith & Co.*, Chester (for the appellants); *the Treasury Solicitor* (for the respondent).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

MODERN HOUSING (LEICESTER), LTD. AND ANOTHER v. GUNNING.

[King's Bench Division (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 13, 1948.]

Housing—Purchase price—Limitation—House constructed under building licence—House, garden, and approach to garage shown on plan—Sale of house and garden for licensed price, but extra sum charged for approach—Building Materials and Housing Act, 1945 (*c.* 20), *s.* 7 (1), (3).

In granting to the appellants a building licence, the local authority fixed the price at which the house might be sold at £1,140. The plan, which was required to be submitted to the authority with the application for the licence, was a block plan, and, in the case of the house in question, it showed a plot of land bearing on it a house with a garden in front of and behind it and a strip of land on one side leading to a part of the garden on which a garage could be built. The appellants sold the house together with all the land comprised in the plot, as marked on the plan, for £1,200, the agreement of sale stating that the price of the house and garden was £1,140 and the price of the extra strip of land was £60. Where a house has been constructed under the authority of a building licence which has limited the price for which the house may be sold, it is an offence against the Building Materials and Housing Act, 1945, s. 7 (1), to sell, or offer to sell, the house within four years for a price greater than the permitted price.

Held: the house was sold for a consideration which consisted of something other than the payment of a money price for the house (*i.e.*, the purchase of the additional land) and the total value of the consideration which was required to be taken as the price under s. 7 (3) of the Building Materials and Housing Act, 1945, was £1,200. There had, therefore, been a breach of the condition of the licence contrary to s. 7 (1) of the Act.

[For the Building Materials and Housing Act, 1945, s. 7, see HALSBURY'S STATUTES, Vol. 38, pp. 373-375.]

Case Stated by Leicestershire justices.

On an information preferred by the respondent on behalf of the Wigston Urban District Council the appellants, a building company and one of its directors, were convicted by the justices of an offence against the Building Materials and Housing Act, 1945, s. 7, by selling a piece of land and a house for a greater price than that permitted by the terms of the building licence. The Divisional Court now upheld the conviction. The facts appear in the judgment of the court delivered by Lord Goddard, C.J.

Vaughan, K.C., and *Stimson* for the appellants.
Marshall, K.C., *Squibb* and *Mrs. Yetta Frazer* for the respondent.

LORD GODDARD, C.J., delivered the following judgment of the court. This is a Case stated by justices for the county of Leicester, who convicted the appellants, Modern Housing (Leicester), Ltd., and David Sharples, for that they:

> . . . did unlawfully sell to Ernest Alfred Chesterton a piece of land and messuage known as No. 73, Roehampton Drive in the parish of Great Wigston in the county of Leicester for a greater price than the permitted price of £1,140 under the terms of the licence granted by the [Wigston Urban District Council] and dated Jan. 21, 1946, contrary to the Building Materials and Housing Act, 1945, s. 7.

The question that is really raised by the Case is whether the appellants have successfully evaded the provisions of the building licence which was granted to them and also the provisions of the Act of 1945. The justices have held that what they did was a device—I think they might almost have called it a dodge—which, in the opinion of the court, did not come off.

Where a local authority, in granting a licence to build a house, has fixed a maximum price at which the house can be sold and a builder takes advantage of the licence and builds under it, he commits an offence against s. 7 of the Act if within a period of four years from the passing of the Building Materials and Housing Act, 1945, he sells the house at more than the price mentioned in the licence. The court is then empowered to order him to repay the excess amount to the purchaser [s. 7 (1) (*a*), (7) (*a*)] and can inflict a penalty up to £100 [s. 7 (1) (*b*)].

Although we have listened to an interesting argument, based on various documents and plans, from counsel for the appellants, I think the matter really comes down to quite a small point. It appears that Modern Housing (Leicester), Ltd., of which Sharples was a director, were minded to build on some land which was originally the property of Sharples and which he had agreed to sell or had sold to the company, and they proposed to undertake the building of a group of houses, ordinarily called block building. Accordingly, they applied to the local authority for a licence, and, in the application form for the licence which they had to fill up, they gave as the brief constructional details, "of brick, slated roofs, and all as plans, etc., herewith attached." The notes which were attached to the application form informed the applicant for the licence that :

> A separate application must be made in respect of each house proposed to be built, unless the application relates to a group of houses on the same site, built to the same plan and subject to the same conditions as regards selling price, etc.

For a proper appreciation of this case and its real, determining feature, one has to see what were the plans which were submitted and on which it is found that the local authority granted the licence. The first plan that was submitted is a block plan showing the lay-out of the 20 houses which the company proposed to build. The house with which we are concerned is No. 7 on that plan, and that shows a house with a front garden or small courtyard in front and a fair-sized garden at the back. At the side is shown a side passage which would give access to a part of the garden and part of the garden is marked as showing the site where it would be possible for the tenant or purchaser, were he minded to do so, to build a garage. The plan shows the plot which the appellants were proposing to sell to any particular purchaser, with the house on it, and the land and the house would go together for the purposes of the value which could be imposed by the local authority. In addition to the plan of the plot, a plan and elevation of the proposed houses were put in, but the plan which had to be submitted was this block plan which clearly shows that which it was intended to sell to the prospective purchaser. There can be no question that that plan shows the whole of this plot, including the strip which leads from the garage site into the front garden and thus to the road.

The appellants entered into a building contract, by which they agreed to sell a freehold dwelling-house erected on the plot and an extra plot of land "co-extensive to the gable for the sum of £1,140 and £60 respectively," which would make a total of £1,200. The licence which they obtained provided that the house should be sold for £1,140. That must be taken to mean—as the justices have found, and there is no doubt that they were right in finding—that that £1,140 was fixed by the local authority after they had considered the application, which refers to "plans," and the two plans which were submitted. The detailed plan of the house with the elevation, and so forth, is in no sense a plan of the plot. It is only a plan of the house, and it shows certain dimensions which have been commented on by counsel for the appellants, but it does not show the garden. When one looks at the block plan, one finds that the whole property was one plot, and that that was what was sold, and the appellants cannot evade the terms of the licence by dividing the thing into two and saying : "I am charging £1,140 for the house and the garden, but I will reserve a little bit of the garden and charge £60 for it." That would obviously be a device to defeat the licence which is granted under the terms of the Act, and, indeed, in the opinion of the court, s. 7 (3) of this Act is designed exactly to deal with that state of affairs. Section 7 (3) provides :

> Where a house is sold for a consideration which consists wholly or partly of something other than the payment of a money price for the house, and it appears to the court that the whole of the consideration is capable of being expressed in terms of such a price, the court shall assess the total value of the consideration upon the assumption that the transaction is carried out in accordance with its terms, and the price shall be deemed to be such sum as, if paid at the time of the sale, would in the opinion of the court represent a benefit equivalent to the said total value.

It is clear that a part of the consideration was the purchase of this land. The "said total value" here is £1,200, and therefore, in selling this property for

£1,200 the appellants clearly have gone outside the terms of the licence. Accordingly, in our opinion, the justices came to a perfectly proper decision and the appeal is dismissed.

Appeal dismissed with costs.

Solicitors: *Wilberforce Allen & Bryant*, agents for *A. H. Headley*, Leicester (for the appellants); *Lees & Co.* (for the respondent).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

ELKINGTON *v.* KESLEY.

[King's Bench Division (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 14th, 1948.]

Food and Drugs—Proceedings against third party—Dismissal of informations—Case stated at request of prosecutor—Inclusion of third party essential—Food and Drugs Act, 1938 (*c.* 56), *s.* 83 (1).

Justices—Procedure—Adjournment of case for hearing by different bench—Party prejudiced by evidence.

The respondent was charged with selling for human consumption milk to which water had been added contrary to the Food and Drugs Act, 1938, s. 24, and he brought before the court, under s. 83 (1) of the Act, a third party to whose act or default he alleged that the contravention of s. 24 had been due. At the hearing by the justices, the respondent revealed that he had been summoned on previous occasions because of milk supplied to him by the third party. Thereupon the magistrates dismissed the summons against the defendant on the ground that their minds had been prejudiced by the admission and they also dismissed the summons against the third party. On a Case Stated by the justices at the request of the prosecution against the defendant only:—

Held: (i) even if their minds had been prejudiced, the justices should not have dismissed the summons, but should have adjourned the case for it to be heard by a different bench.

(ii) the court would not now send the case back to the justices because, the summons against the third party having been dismissed and he not having been made a party to the Case Stated, the defendant could not again bring the third party before the justices and would, therefore, be debarred from pursuing his defence under s. 83. The appeal would, therefore, have to be dismissed.

Per Lord Goddard, C.J.: Where the prosecution ask for a Case to be stated against a defendant who has taken advantage of the procedure prescribed by s. 83 (1) of the Food and Drugs Act, 1938, it is essential that the third party should be joined as a party to the Case if the result of the Case may be a remission to the justices for re-hearing or with a direction to convict, because otherwise the defendant would lose his right to proceed against the third party on the re-hearing.

[For the Food and Drugs Act, 1938, s. 83, see HALSBURY'S STATUTES, Vol. 31, pp. 305, 306.]

Case referred to:

(1) *R.* v. *Derby Recorder, Ex p. Spalton*, [1944] 1 All E.R. 721; [1944] 1 K.B. 611; 113 L.J.K.B. 556; 171 L.T. 222; 108 J.P. 193; 2nd Digest Supp.

Case Stated by Kent justices.

At a court of summary jurisdiction sitting at Tonbridge, two informations were preferred by the appellant, an inspector of weights and measures and sampling officer under the Food and Drugs Act, 1938, charging the respondent with having sold for human consumption certain milk to which had been added water, contrary to s. 24 of the Act. At the same court of summary jurisdiction an information was preferred under s. 83 (1) of the Act of 1938 by the respondent against one E. Noel Wicks alleging that the contraventions of s. 24 of the Act by the respondent were due to the act or default of the said E. Noel Wicks. By consent all the informations were heard together on Nov. 4, 1947, when the court dismissed them on the ground that an admission that on three previous occasions he had been convicted of similar offences which had been elicited from the respondent during his evidence had prejudiced the court in the hearing of the cases. The Case for the Divisional Court was stated by the magistrates against the respondent only. The Divisional Court dismissed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

Vernon Gattie for the appellant.
John Lawrence for the respondent.
Waddy for the third party.

LORD GODDARD, C.J.: This appeal raises some curious points which are somewhat unusual in a case of this description, and one point of practice which is of very considerable importance. The respondent took advantage, as he was entitled to do, of the procedure prescribed by the Food and Drugs Act, 1938, s. 83 (1), and brought before the court the man who had supplied the milk to him. Section 83 provides:

> (1) A person against whom proceedings are brought under this Act shall, upon information duly laid by him and on giving to the prosecution not less than three clear days' notice of his intention, be entitled to have any person to whose act or default he alleges that the contravention of the provisions in question was due brought before the court in the proceedings, and, if, after the contravention has been proved, the original defendant proves that the contravention was due to the act or default of that other person, that other person may be convicted of the offence, and, if the original defendant further proves that he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence. (2) Where a defendant seeks to avail himself of the provisions of the preceding sub-section—(*a*) the prosecution, as well as the person whom the defendant charges with the offence, shall have the right to cross-examine him, if he gives evidence, and any witness called by him in support of his pleas, and to call rebutting evidence; (*b*) the court may make such order as it thinks fit for the payment of costs by any party to the proceedings to any other party thereto.

If a defendant desires to avail himself of the defence which is given him by this section, he must first lay an information against the third party. He must give the prosecution not less than three clear days' notice of his intention, so that the prosecutor knows that, not only will there be a case as between himself and the defendant, but the defendant will also be bringing before the court the person who can be conveniently referred to as the third party. The defendant must bring the third party before the court, otherwise he would have no defence under the section although he might satisfy the justices that it was the fault of the third party and that he himself had used due diligence. The prosecutor can cross-examine the third party and, I suppose, can give evidence against him. At any rate, he can call rebutting evidence, as it is called in the statute, which must mean evidence against the third party, and he can get costs against the third party. The result of the case may be that either the original defendant, or the third party, or both, may be convicted. The defendant may fail to prove that the third party is the person really responsible for the contravention, or the third party may satisfy the court that he was not, and that may be partly because of the cross-examination of the prosecutor or for any other reason. On the other hand, the third party may be convicted and the defendant acquitted if he shows, not only that the contravention was the act of the third party, but also that he himself used due diligence to secure that the provisions of the Act were complied with, or both may be convicted.

In this case the respondent having brought the third party before the court, all three parties were represented, cross-examination took place, and the respondent was called as a witness. In the course of the respondent's examination-in-chief he said: "I have not always been satisfied with the milk from Wicks." The solicitor for the prosecutor cross-examined on that statement, and the first reply he got was: "I have had trouble with him before." He was asked what kind of trouble, and finally it came out: "The same sort of trouble as I am in this morning." That seems to me to be an innocuous answer because, standing by itself, it means no more than this: "On a previous occasion I have been summoned because of milk which has been supplied by Wicks, and, therefore, I have reason to be discontented." The cross-examination seems to me to have been perfectly legitimate up to this point, and I do not think that anything had been stated which could be said to be prejudicial one way or the other.

However, the matter did not rest there because then the respondent was cross-examined by the solicitor for the third party. Once the third party had been brought before the court by the defendant, it would have been a great hardship if he were not entitled to cross-examine the respondent to credit and on every other relevant issue, including, whether he had not been previously convicted of selling watered milk, because it might form the foundation for the suggestion by the third party : " You are saying I watered the milk. I say you watered it when you got it from me and after I had parted with it, and you have done it before." One cannot possibly say that that cross-examination was not legitimate. The reason why the law prohibits one generally from cross-examining about previous convictions is because those previous convictions, as a rule, are not relevant, but it may be—and in this case one certainly cannot say that it was not—that the previous conviction was a relevant matter in the proceedings. If a man has been previously convicted of selling watered milk which he has obtained from the supplier who supplied him on the occasion in respect of which he is now before the court, he can clearly be cross-examined to show that he has taken no steps to see that that bad supplier has been dealt with or to ensure that he was not still being given watered milk. On the occasion in question I should think it would be open to a court to say : " You have had two previous lessons and you cannot say you exercised due diligence." To crown it all, in the present case the respondent's own solicitor in re-examination, for some reason which seemed good to him—and I am not saying it was not right ; I do not know what point he desired to make—brought out that the respondent had been previously convicted on three occasions. Those being the circumstances, the respondent cannot complain of that.

The justices were then asked to dismiss the summonses on the ground that their minds had been prejudiced. I do not think the minds of the justices ought to have been prejudiced in the least. It seems to me that it was legitimate for them to know all these matters, but, even assuming that some evidence was given which ought not to have been given and it had prejudiced the minds of the justices, that was no ground for dismissing the summonses. They could have remedied that by having the case heard before a different bench on a subsequent occasion. Having dismissed the summons against the respondent on a ground which was no proper ground, they had no option but to dismiss the summons against the third party. In my opinion, in this matter the decision of the justices was wrong.

The prosecution asked for a Case to be stated. The only person against whom it is stated is the respondent. If there were no question of a third party in the matter we should certainly send the Case back to the justices with the intimation that there was nothing irregular in what had happened during the hearing before them, and that, as they had found a contravention of the Act, it was their duty to convict. If, however, we do that here, we should deprive the respondent of the opportunity of raising his defence under s. 83 (1), because the third party is not before this court, the Case not having been stated against him, and we cannot keep alive the proceedings against the third party by ordering the Case to go back. If the respondent now tried to bring the third party before the court, the third party would at once plead *autrefois acquit.* Where the prosecution ask for a Case against a defendant who has taken advantage of s. 83 (1), it is essential that the prosecution should join the third party as a party to the Case if the result of the Case may be a remission to the justices for re-hearing or with a direction to convict, because otherwise the defendant will lose his right to proceed against the third party on the re-hearing. One reason why this is necessary is that, as I have pointed out in my analysis of the section, once the third party procedure, to use a convenient expression, has been adopted, the case really becomes a case between three parties. The prosecution are proceeding against the defendant and against the third party and can get a conviction against one or other or both. All three parties are before the court and the proceeding is one. In some cases it may not be necessary to join both the defendant and the third party in the Case Stated because, if the appeal were allowed, the effect would not be injurious to both the defendant and the third party, but only to one of them. If a case were dismissed by the justices on the ground that samples had not been properly taken, and a Case were stated on the ground that the justices were wrong in so holding, it is obvious that, if this court took the view that the appeal should be allowed and the case re-heard by the justices, unless both the defendant and the third party were before the court on the re-hearing, the defendant would have lost his chance of establishing the defence which s. 83 (1) gives him. If, however, before the justices the case against the defendant is dismissed, but the third party is convicted, and the prosecution wish to appeal on the ground that the justices were wrong in holding that the defendant had used all due diligence, the third party would not be a necessary party to the appeal, for he has been convicted and the only question then would be whether or not the defendant could be convicted as well. If it were the third party who appealed, it would depend on the circumstances of the case who should be parties. He would certainly have to serve the prosecutor, and I am inclined to think that as a rule he would also have to serve the defendant.

The magistrates have dismissed these summonses on wrong grounds. If we send the Case back, the justices would be debarred from considering, and the defendant would be debarred from putting forward, the defence provided by s. 83 (1), because one of the necessities of that defence is that he should have the third person before the court. In the opinion, therefore, which I have formed with some reluctance, the only thing to do is to say that the justices were wrong in acting as they did and we should be doing an injustice to the respondent if we sent the Case back. Therefore, the appeal will be formally dismissed without costs.

HUMPHREYS, J.: I agree with the result proposed by my Lord, and with the reasons which he has given for that decision. I also entirely agree with the observations which he has made as to the mistake which the justices, no doubt with the best intentions, made in dismissing these summonses, and I agree that the ground they have given for dismissing the summonses is no ground at all. I suggested in the course of the argument that the reasonable course for them to have taken would have been, if they really felt that their minds had been prejudiced by what had taken place, to say that they would not adjudicate on the case. It is absurd to say that the prejudicing of their minds could be a reason for deciding a case in a particular way. It never can be.

I only add something of my own because counsel for the appellant suggested that there was something in a judgment which I delivered as one of the three judges who heard *R.* v. *Derby Recorder* (1), which indicated that, in my view, in such circumstances as arose in the present matter it was unnecessary to serve one of the parties with a notice of appeal to quarter sessions. In that case the medical officer of health, Dr. Lilico, had laid an information against a person called Spalton for selling milk to the prejudice of the purchaser. Spalton, in turn, laid an information against a person of the same name, Doris Spalton, who traded as the Derbyshire Farmers Daïry, alleging that the offence was her fault. She, in her turn, laid an information against the Minister of Food, saying that it was the act or default of the Minister which accounted for the milk not being of the nature and quality demanded to the prejudice of the purchaser. All those matters were heard together, and I expressed the view, which I venture to repeat, that, in those circumstances, what was contemplated by the language of s. 83 was that there was one set of proceedings and one set of proceedings only, in which, besides the prosecutor there were two and there might be three or half-a-dozen different persons being both defendant and prosecutor, and that, in my opinion, in such a case all those persons would be parties to the proceedings. Then the question arose, the original defendant having been acquitted and one of the third parties having been convicted and desiring to appeal, on whom the notice of appeal ought to be served. The statute requiring that it should be served on the "other party," who was the other party or who were the other parties? I agreed with the other members of the court that the prosecutor was clearly a party to the proceedings who ought to have been served, and I added that, on the facts of that case, I did not think that the original defendant, against whom the information had been dismissed by the court, and who had, therefore, no further interest in the matter, had any right to be served with the notice of appeal. I do not think that decision has any bearing on the facts of the present case.

PRITCHARD, J.: For the reasons given by my Lord, to which I do not desire to add, I agree that this appeal ought to be dismissed without any order as to costs.

Appeal dismissed. No order as to costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. L. Platts*, county solicitor, Maidstone (for the prosecutor); *Langton & Passmore*, agents for *Walker, Templer & Thomson*, Tonbridge (for the defendant); *Bracher, Son & Miskin*, Maidstone (for the third party.)

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

Re PURNCHARD'S WILL TRUSTS. PUBLIC TRUSTEE *v.* PELLY AND OTHERS.

[Chancery Division (Jenkins, J.), March 18, April 7, 1948.]

Wills—Construction—" All my stocks and shares "—Inclusion of interests in loan capital or funded indebtedness of foreign governments, municipalities and railway companies.

By a holograph will, dated Dec. 9, 1926, the testator gave a life interest in " all my possessions " to his wife, and, subject thereto, he gave all his freehold property and the contents therein to F.E., and " all my stocks and shares " to a hospital. No legacies were given and there was no residuary gift. The testator died in 1932 and his widow died in 1945. F.E. predeceased the testator, and, accordingly, on the wife's death the freehold property and its contents passed as on an intestacy. Apart from the freehold property and its contents, the testator's estate consisted of cash in the bank and elsewhere, out of which his debts and funeral expenses were paid, and the following investments: (*a*) preference and ordinary shares and preference stock in limited companies; (*b*) preference and ordinary shares and debenture stock of electricity supply companies; (*c*) proprietary stocks in railway companies; (*d*) debenture stocks in limited companies; (*e*) British and dominion or colonial government stocks and Brighton corporation stocks; (*f*) bonds, notes and certificates representing interests in the funded indebtedness or loan capital of various foreign governments and municipalities and of railway companies carrying on business abroad. The question was whether all, or some only, and, if so, which, of these investments passed to the hospital on the widow's death in the gift of " all my stocks and shares ":—

Held: the scheme of the will and the surrounding circumstances called for the widest construction of the gift of " all my stocks and shares "; on the true construction of the will, the testator's intention was to make a complete disposition of all his possessions after the death of his wife; the expression " all my stocks and shares " was not confined to shares and stock in proprietary capital, but was used in the comprehensive sense to denote all forms of investment commonly dealt in on stock exchanges; and, accordingly, the gift operated as a gift of all the investments forming part of the testator's estate, including the interests in various kinds of loan capital or funded indebtedness.

Re Everett, Prince v. *Hunt* ([1944] 2 All E.R. 19), *distinguished.*

[As to Bequests of Stocks and Shares, see HALSBURY, Hailsham Edn., Vol. 34, p. 260, para. 311, and Supplement; and for Cases, see DIGEST, Vol. 34, pp. 702-705, Nos. *5441-5476.*]

Cases referred to:

(1) *Re Everett, Prince* v. *Hunt*, [1944] 2 All E.R. 19; [1944] Ch. 176; 113 L.J.Ch. 81; 170 L.T. 178; 2nd Digest Supp.

(2) *Perrin* v. *Morgan*, [1943] 1 All E.R. 187; [1943] A.C. 399; 112 L.J.Ch. 81; 168 L.T. 177; 2nd Digest Supp.

Adjourned Summons to determine whether a gift by the testator of " all my stocks and shares " included all the investments owned by the testator at the date of his death. Jenkins, J., held that it did. The facts appear in the judgment.

Hubert A. Rose for the Public Trustee.
Rawlence for next of kin (interested on an intestacy).
Raymond H. Walton for the Royal Sussex County Hospital.

Cur. adv. vult.

Apr. 7. **JENKINS, J.,** read the following judgment. The testator in this case, Mr. William Bennett Purnchard, made a short holograph will dated Dec. 9, 1926, in the following terms:

> I devise and bequeath all my possessions whatever and wherever to my dear wife Alice Mary for her benefit and comfort during her lifetime and at my dear wife's death I transfer and give to my brother-in-law Frank Eastwood of Highclere Clifford Road New Barnet Herts his heir or assigns my freehold residence No. 17 Arundel Road Kemp Town Brighton Sussex and all the contents therein contained and also my leasehold dwelling-house No. 2 Chilworth Street Paddington London, W., and further I devise and bequeath all my stocks and shares to the Royal Sussex County Hospital Eastern Road Kemp Town Brighton Sussex for their benefit and use.

The testator died on Feb. 23, 1932, and letters of administration to his estate with the above-mentioned will annexed were granted to the Public Trustee on Aug. 8 in the same year. The testator's wife survived him and died on Jan. 15, 1945, but his brother-in-law, Frank Edward Eastwood, (referred to in the will as Frank Eastwood) died in his lifetime. It follows that, as the will contains no residuary gift, the freehold property and its contents and the leasehold property specifically given to the brother-in-law subject to the widow's life interest were undisposed of as from the date of her death. Accordingly, on the death of the widow, the freehold property and its contents passed as on an intestacy, and the leasehold property would have followed the same destination but for the fact that the term for which it was held expired in 1938.

The only other disposition made by the will on the death of the widow is the gift of all the testator's stocks and shares to the Royal Sussex County Hospital, and the question which I have to determine is, in substance, whether all, or some only, and, if so, which, of the investments owned by the testator at the date of his death as set out in the six parts of the schedule to the originating summons passed under that gift, the alternative as to any of them which did not so pass being an intestacy in view of the absence of any residuary bequest. In considering this question I am, I think, entitled to have regard to the nature of the various assets of which the testator's estate consisted at the time of his death. Those assets, according to the affidavit in support of the summons, were: (i) the freehold property and its contents and leasehold property mentioned in the will; (ii) cash at the bank and elsewhere (out of which the testator's debts and funeral and testamentary expenses were paid); and (iii) the investments specified in the six parts of the schedule to the originating summons. The investments so specified comprise: (*a*) Part I: preference and ordinary shares and (in one instance) preference stock in a number of limited companies; (*b*) Part II: preference and ordinary shares and (in one instance) debenture stock of a number of electricity supply companies; (*c*) Part III: proprietary stocks of various classes in a number of railway companies; (*d*) Part IV: debenture stocks in two limited companies; (*e*) Part V: British and dominion or colonial government stocks and three holdings of different issues of Brighton Corporation stocks; (*f*) Part VI: bonds, notes and certificates representing interests in the funded indebtedness or loan capital of various foreign governments and municipalities, and of various railway companies, some, I think, incorporated here but all carrying on business abroad

Looking at the will in the light of these facts regarding the composition of the testator's estate, I am, I think, justified in inferring that the testator, having given his wife a life interest in all his possessions, intended to make a complete disposition of those same possessions after her death, and conceived that he would be doing so if he gave his freehold property and its contents and his leasehold property to his brother-in-law and all his stocks and shares to the hospital. It is true that, in so viewing the position, he would have been overlooking the probable inclusion in his estate at his death of a certain amount of cash at the bank and elsewhere, though conceivably he may have assumed that any such amount would not be more than sufficient to pay his funeral and testamentary expenses and debts. I do not regard this omission as displacing the inference

I have drawn regarding his intention to dispose of the whole of his possessions after his wife's death and his belief that he was doing so by the language which he used. Moreover, apart from the omission to which I have referred, that belief was well-founded, except in so far as the gift of " all my stocks and shares " may be found, on examination of the meaning of that expression, to be incapable of passing all of the investments specified in the schedule to the originating summons. Of course, if a testator uses language which on its true construction necessarily falls short of his intention, then his intention must *pro tanto* be defeated, but it is equally clear that, if his intention can be collected from the will as a whole, particular expressions must be construed so as to give effect to it so far as it is possible to achieve that result without doing violence to the language used. I am, therefore, of opinion that in the present case the gift of " all my stocks and shares " should receive the widest construction of which it is properly capable.

Considering the scope of a gift in these terms as a matter free from authority, I confess I should regard it as including at least all the testator's stocks strictly so called (whether loan or proprietary) and also all the testator's shares strictly so called. On this view, all the investments specified in the first five parts of the schedule to the summons would, at all events, pass, since there is not a single investment in any of these parts which is not described with perfect accuracy by one or other of the designations " stock " and " shares." The area of doubt would thus be narrowed down to the investments specified in pt. VI of the schedule, which certainly are not shares or proprietary stock, and, although they are interests in various kinds of loan capital or funded indebtedness and in these respects resemble loan stock, cannot in point of form be accurately described as stock of the latter description. I was, however, referred to the recent case of *Re Everett, Prince* v. *Hunt* (1), in which Cohen, J., had before him the will of a testatrix who bequeathed a number of pecuniary and specific legacies, directed her trustees to sell her freehold premises and all her stocks and shares and to divide the net proceeds between four named persons, and made a residuary gift. The learned judge held ([1944] 2 All E.R. 19, 20) that the expression " all my stocks and shares " in the will then before him was confined to " stocks and shares of limited companies," that being, in his view, the natural meaning of the expression " stocks and shares." He was fortified in that conclusion by the fact that in the case before him the effect of construing " all my stocks and shares " as meaning " all my investments " would be to defeat the pecuniary legacies, but there is no doubt that he did found himself primarily on the view that the natural meaning of the expression " stocks and shares " was " stocks and shares of limited companies," which natural meaning he found nothing in the circumstances to extend. It is submitted in the present case on behalf of those interested on an intestacy that I should follow *Re Everett* (1) and attribute the same meaning to the gift of " all my stocks and shares " in the very different will now before me. The effect of so doing would, apparently, be to produce an intestacy as regards all investments specified in the schedule to the originating summons which do not answer the description of shares or stock in proprietary capital (as opposed to loan capital or funded indebtedness)—for I think that is the real distinction drawn in *Re Everett* (1)—and thus to defeat the testator's intention to the very substantial extent represented by the debenture stock specified in pt. II of the schedule, the debenture stocks specified in pt. IV (totalling £4,200 in nominal value), the British and dominion and colonial government and Brighton Corporation stocks specified in pt. V (totalling several thousand pounds in nominal value), and the bonds, notes, etc., specified in pt. VI, the nominal value of which is also considerable. I cannot regard *Re Everett* (1) as laying down, and it plainly was not intended to lay down, any general rule as to the meaning of a gift of " all my stocks and shares " in other wills so widely different in form and surrounding circumstances from the will then before the court as the will of the present testator is. On the contrary, the learned judge, in the course of his judgment, said ([1944] 2 All E.R. 19, 20) that the matter " is not free from ambiguity "—an observation with which I respectfully concur. Here, there are no legacies to be considered, and there is no residuary gift. Moreover, as I have already indicated, the scheme of the will and the surrounding circumstances seem to me to call for the widest construction of the gift of " all my stocks and shares " which can properly be assigned to that expression, and I regard myself as free, and, indeed, bound, to construe it accordingly.

What then is the meaning of the gift of " all my stocks and shares " in this particular will ? In every-day language, such as the testator was using in this holograph will, the expression, " stocks and shares," is, I think, quite commonly used as a convenient, compendious and comprehensive term to denote all forms of investment commonly dealt in on stock exchanges, such as are sometimes also compendiously referred to as " stock exchange investments " without any intention of distinguishing between, or excluding any of, the various kinds of investment falling within this wide and general category. It is in this sense members of stock exchanges commonly describe themselves as " stock and share brokers." In this sense also the testator might well have been described by anyone seeing the list of investments set out in the schedule to the originating summons as possessed of substantial capital in stocks and shares without any intention of excluding from consideration, for instance, the investments specified in pt. VI of the schedule because those investments, considered individually, cannot with strict accuracy be described as " stock." Support for this usage is, moreover, to be found at a higher level than that of common speech. In *Perrin* v. *Morgan* (2) LORD ROMER, in discussing the rule under which the word " money " in wills had come to be construed as including, in addition to cash in hand, certain choses in action by means of which cash is readily procurable, said ([1943] 1 All E.R. 187, 198) :

> It includes, for instance, balances due to the testator on current or deposit account at his bank. A testator does not of course possess any of the cash that is at the bank. But people commonly speak of the balances due to them from the bank as their money at the bank, and the rule can be justified on this ground. But people just as commonly speak of their money in the funds or their money in this or that company or concern, and why all stocks and shares such as usually form the bulk of a testator's personal property should not also be included is what I have never been able to understand. I can see no intelligible reason for excluding them when the rule was opened so as to admit a testator's balance on deposit account. But such seems to be the law, and, when a testator is found to be using the word " money " for the purpose of distinguishing one item of his property from the remainder, the word *prima facie* bears the meaning attributed to it by the rule. A testator nevertheless may by his will when properly construed show an intention not to use the word " money " as defined by the rule, but to include in it his stock exchange investments or even the whole of his residuary personal estate.

I think in this passage LORD ROMER is clearly using the expression " all stocks and shares " in the comprehensive sense to which I have referred, and, indeed, as a synonym for the expression " stock exchange investments " which he uses a few lines later.

The conclusion to which I have come, therefore, is that on the true construction of this particular will, construed in the light of the relevant surrounding circumstances, the testator used the expression " all my stocks and shares " in the comprehensive sense above indicated, and that the gift in question, accordingly, operated as a gift of all the investments specified in the six parts of the schedule to the originating summons, including (in cases in which there has been any change of investment since the testator's death) the investments now representing the same.

Declaration accordingly.

Solicitors : *Rose, Johnson & Hicks*, agents for *A. C. Woolley & Bevis*, Brighton (for the Public Trustee) ; *Burton & Ramsden* (for next of kin) ; *Farrer & Co.* (for the Royal Sussex County Hospital).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

R. *v.* NOWELL.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 19, 1948.]

Evidence — Confession — Admissibility — Inducement — Driver of motor vehicle charged with being drunk—Advice by doctor to permit medical examination.
Road Traffic—Driving while under influence of drink—Evidence of police doctor —Independent professional man—Road Traffic Act, 1930 (*c.* 43), *s.* 15 (1).

A motorist was arrested on a charge, under s. 15 (1) of the Road Traffic Act, 1930, of driving a motor car while under the influence of drink. He was taken to a police station where, following the normal procedure, a police doctor was called. The motorist at first refused to be examined, but eventually, after being told that it might be to his advantage, he underwent an examination as a result of which he was certified as being in an unfit state to drive a car owing to his consumption of alcohol. The motorist appealed against his conviction under s. 15 (1), the substantial ground of appeal being that the police doctor's evidence was inadmissible.

HELD : the law relating to the exclusion of confessions made as a result of persuasion, promises or threats did not apply and the evidence was admissible.

Per cur. : In England a police doctor does not, as may be the case in Scotland, act " as the hand of the police." His evidence should, therefore, be accepted as that of a professional man giving independent expert evidence with a desire to assist the court.

[AS TO ADMISSIBILITY OF A CONFESSION ARISING FROM INDUCEMENTS, see HALSBURY, Hailsham, Edn., Vol. 9, p. 203, para. 291 ; and FOR CASES, see DIGEST, Vol. 14, pp. 417-426, Nos. *4358-4498*.]

Cases referred to :
(1) *Reid* v. *Nixon, Dumigan* v. *Brown,* 1948 Sessions Notes 17.

APPEAL against convictions of driving while under the influence of drink and dangerous driving, contrary to ss. 11 and 15 of the Road Traffic Act, 1930. The substantive ground of appeal was that the evidence of a police doctor who examined the appellant was inadmissible. The appeal was dismissed. The facts appear in the judgment of the court.

E. Garth Moore and J. MacGregor for the appellant.
Seaton for the Crown.

HUMPHREYS, J. [delivering the judgment of the court] : The appellant was convicted at Cambridgeshire Quarter Sessions, under s. 15 (1) of the Road Traffic Act, 1930, of driving a motor car while under the influence of drink to such an extent as to make him incapable of having proper control of the vehicle, and, on the same facts and in relation to the same matter, of dangerous driving, under s. 11 (1) of the Act. On the first charge he was fined £50 and was disqualified for 12 months for holding a licence to drive a motor car, while on the second charge he was fined the nominal sum of £1. He now appeals on what are described as questions of law from those convictions.

The appellant was seen by police officers to drive his car on the wrong side of the road and without lights at night. On examination it appeared to the officers that he was drunk and they took him to the police station on a charge under s. 15 (1) of the Act. At the police station the ordinary procedure was carried out, *i.e.*, the person in charge of the police station was told what the charge was, and he then informed the appellant that a doctor would be sent for to examine him. That was the result of a general order which was issued to the police forces in England many years ago in order that there might be no complaint (as there had frequently been thitherto) that, when a man was charged by a policeman with being drunk and denied that he was drunk, the only evidence other than his own was that of policemen who were likely to support each other. An order was, therefore, given that, on every occasion when a man was charged with being drunk and seriously denied that that was the fact, a doctor should be sent for if possible. In this case, therefore, Dr. Brown, the police doctor, attended and examined the appellant who was told more than once that, if he wished, he could have present a doctor of his own and he was asked to give the name of a doctor who would come. He said that he had never had a doctor in his life, but it now appears that he had been attended by a Dr. Simpson, the doctor who was eventually called. As, however, the appellant did not at that time give the name of a doctor, the police doctor examined him and certified that, owing to his consumption of alcohol, he was in an unfit state to drive a motor car and was properly charged with that offence.

It is argued that the evidence which the police doctor gave was inadmissible on a ground which the court finds it a little difficult to follow. It is said that the doctor asked the appellant several times to let him examine him. The appellant, apparently, did not wish to be examined, but the doctor was a little persistent and explained to the appellant that it might be in his own interest that a doctor should be allowed to examine him. The appellant then agreed to be examined, but, to repeat the significant expression which he himself used in evidence at the trial, he was "very awkward about it." The evidence was that he was singing in the police station and would not stop. The doctor thought he was not really in a condition to say whether he would be examined or not, but eventually he agreed to be examined and was examined. Counsel for the appellant asks us to say that that is such conduct as to render the doctor's evidence inadmissible because the doctor improperly examined a man who was refusing to be examined. It is not suggested that the doctor used force to examine the appellant who all the time was protesting against the examination. When such a case arises, we will deal with the question whether the evidence of the medical man can be accepted or not. In the present case the doctor from beginning to end behaved perfectly reasonably in the interests of the person he was examining, and the mere fact that at one time he said: "It may be better for you" or "It may be to your advantage that I should examine you," cannot be regarded as an inducement to do something so as to bring into operation the law which excludes confessions made as the result of persuasion, promises or threats.

[HIS LORDSHIP then dealt with the other grounds of appeal, announced that the decision of the court was that the appeal failed, and continued:] I should add that during the argument we were referred, by counsel for the appellant, to the Scottish case, *Reid* v. *Nixon, Dumigan* v. *Brown* (1). In reading the opinion of the court in that case, the LORD JUSTICE-GENERAL made a number of general observations as to the principles on which police officers and doctors should act in examining persons who are charged with such an offence as this. According to the opinion, the LORD ADVOCATE had conceded that in all such cases the police surgeon or other doctor summoned by the police to conduct an examination was acting as the hand of the police and not as an independent medical referee. This court can only say that it does not agree that that state of things exists in this country, whether it exists in Scotland or not. Our view is that the evidence of a doctor, whether he be a police surgeon or anyone else, should be accepted, unless the doctor himself shows that it ought not to be, as the evidence of a professional man giving independent expert evidence with no other desire than to assist the court.

Appeal dismissed with costs.

Solicitors: *Waterhouse & Co.*, agents for *Few & Kester*, Cambridge (for the appellant); *Vizard, Oldham, Crowder & Cash*, agents for *Wild & Hewitson*, Cambridge (for the Crown).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

Re MARRYAT (*deceased*). WESTMINSTER BANK. LTD. *v.* HOBCROFT.

Distinguished. Re BEDFORD (*decd.*). [1951] 1 All E.R. 1093.

[Chancery Division (Jenkins, J.), February 19, 20, 1948.]

Will—Construction—Gift to employees " who shall have been in the service of " a limited company " for a period of five years and upwards "—Employment at the date of testator's death—Inclusion of service with testator before formation of company—Need for period to be continuous—Inclusion of war service—Inclusion of apprentice in term " employee."

By his will, dated Dec. 19, 1938, a testator, who died on June 22, 1944, provided by cl. 12 : " I bequeath to each employee of Marryat and Place, Ltd. . . . who shall have been in the service of such company at my death for a period of five years and upwards and shall not then be under notice given by them or by the company to quit such service the sum of £10 for each year of such service in excess of five years but not exceeding in any event in any one case a legacy of £200." The company had been formed in 1933 to take over and carry on the business formerly carried on by the testator himself under the style " Marryat & Place."

Held : (i) no employee could qualify under cl. 12 unless he was actually in the employment of the company at the date of the death of the testator.

(ii) there was nothing in the will to justify the court in construing " Marryat & Place, Ltd." as meaning anything else than the existing limited company of that name, or " the service of such company " as meaning anything else than the service of Marryat & Place, Ltd. ; the terms of the gift were capable of application with literal accuracy to the facts and extrinsic evidence was not admissible to give the words a different meaning from that primarily apparent ; and, therefore, the references in cl. 12 to the service of Marryat & Place, Ltd., could not be construed as including the service of the testator as the predecessor in business of that company.

(iii) the words " a period of five years " meant a continuous period of 5 years, and not an aggregate of lesser periods amounting to five years.

Tyler v. *London & India Docks Joint Committee*, (1892) (9 T.L.R. 11), and *Re Lawson, Wardley* v. *Bringloe* ([1914] 1 Ch. 682 ; 110 L.T. 573), *applied.*

Re Drake, Drake v. *Green* ([1921] 2 Ch. 99 ; 125 L.T. 461), *considered.*

(iv) the question whether a period of war service should be included for the purpose of cl. 12 depended on whether there was any agreement between the company and the employee concerned that the employment should continue during and notwithstanding the war service, and, on the facts, apart from the case of any particular employee to whom special considerations might be applicable, there was no sufficient reason for the inclusion of such service.

Re Drake, Drake v. *Green* ([1921] 2 Ch. 99 ; 125 L.T. 461), *applied.*

(v) apprentices of the testator, who completed their apprenticeship periods by working for the company and were paid by the company at the rate provided for in their apprenticeship deeds, were entitled to count the period of any such apprenticeship so worked for the purposes of cl. 12.

Pomphrey v. *Southwark Press* ([1901] 1 K.B. 86 ; 83 L.T. 468), *applied.*

Horan v. *Hayhoe* ([1904] 1 K.B. 288 ; 90 L.T. 12), *distinguished.*

[As to Description of Donees, see HALSBURY, Hailsham Edn., Vol. 34, pp. 323-325, paras. 373, 374 ; and for Cases, see DIGEST, Vol. 44, pp. 899-903, Nos. *7584-7640*.]

Cases referred to :

(1) *Re Lawson, Wardley* v. *Bringloe*, [1914] 1 Ch. 682 ; 83 L.J.Ch. 519 ; 110 L.T. 573 ; 44 Digest 900, *7593*.

(2) *Re Drake, Drake* v. *Green*, [1921] 2 Ch. 99 ; 90 L.J.Ch. 381 ; 125 L.T. 461 ; 44 Digest 900, *7602*.

(3) *Tyler* v. *London & India Docks Joint Committee*, (1892), 9 T.L.R. 11 ; 34 Digest 59, *355*.

(4) *Re Cole, Cole* v. *Cole*, [1919] 1 Ch. 218 ; 88 L.J.Ch. 82 ; 120 L.T. 374 ; 44 Digest 472, *2912*.

(5) *Marshall* v. *Glanville*, [1917] 2 K.B. 87 ; 86 L.J.K.B. 767 ; 116 L.T. 560 ; 34 Digest 62, *379*.

(6) *Re Feather, Harrison* v. *Tapsell*, [1945] 1 All E.R. 552; [1945] Ch. 343; 115 L.J.Ch. 6; 172 L.T. 308; 2nd Digest Supp.
(7) *Horan* v. *Hayhoe*, [1904] 1 K.B. 288; 73 L.J.K.B. 133; 90 L.T. 12; 68 J.P. 107; 34 Digest 502, *4145*.
(8) *Pomphrey* v. *Southwark Press*, [1901] 1 K.B. 86; 70 L.J.Q.B. 48; 83 L.T. 468; 65 J.P. 148; 34 Digest 421, *3414*.

ADJOURNED SUMMONS as to the construction of a will. The facts appear A in the judgment.

Winterbotham for the plaintiff.
Danckwerts for persons claiming under cl. 12 of the will.
Wilfred M. Hunt for residuary legatees.
Hubert A. Rose for other residuary legatees.

JENKINS, J.: This summons raises a number of questions as to the B effect of a gift in the will of the testator to the employees of a company, called Marryat & Place, Ltd., which was formed in February, 1933, to take over and carry on the business of electrical engineers formerly carried on by the testator himself under the style of Marryat & Place. The will is dated Dec. 19, 1938, and, at the date when it was made, the testator was some 68 years of age. He died on June 22, 1944, and on Dec. 5, 1944, his will was proved by Westminster Bank, Ltd., as executor. The relevant provisions of the will C are contained in cl. 12, which is as follows:—

> I bequeath to each employee of Marryat & Place, Ltd. . . . who shall have been in the service of such company at my death for a period of 5 years and upwards and shall not then be under notice given by them or by the company to quit such service the sum of £10 for each year of such service in excess of 5 years but not exceeding in any event in any one case a legacy of £200.

D I will deal, first, with the question whether, to qualify as an object of the gift, it is necessary for an employee to have been in the employment of the company at the date of the death of the testator. *Prima facie*, under cl. 12, no employee could qualify unless he was in the employment of the company, and, accordingly, a member of the class of beneficiaries designated by the testator, at the date of the testator's death, that being the date at which the will came into operation. This conclusion is reinforced by the provision "and shall not then be under E notice given by them or by the company to quit such service . . ." The testator can hardly have intended to include employees who had actually quitted the service of the company before his death while excluding employees who were still in such service at his death on account of the fact that they were then under notice to quit. It seems clear, therefore, that no employee could qualify unless he was in the employment of the company at the date of the death of the testator, and I so decide.

F The next question arises from the fact that the business carried on by the company was that formerly carried on by the testator under the style of "Marryat & Place" and taken over from him by the company on its formation in February, 1933. The business continued without a break and the people employed in it by the testator remained as employees of the company. The testator took a kindly interest in the employees at all times, and he seems G to have made no distinction between service under himself as proprietor of the business and service with the company after the transfer. For example, he used to make presents of gold watches to employees in recognition of long service, and for this purpose he appears to have treated service with the company and service with himself as its predecessor in business as one and the same. It is said that these circumstances are sufficient to justify me in holding—and I am, accordingly, invited to hold—that cl. 12 is to be construed so as to include H service with the testator as the company's predecessor in business as well as service with the company itself. In other words, I am invited to place a special interpretation on the language of cl. 12, by reference to extrinsic evidence. That process is to be applied only exceptionally and with the greatest caution in the construction of a will. If an ambiguity arises on the application to the facts of the case of the terms of a will, in themselves apparently unambiguous, the court may have recourse to extrinsic evidence to resolve the ambiguity, but the class of cases in which this course is admissible is confined to very narrow limits. Where, as in the present case, no ambiguity arises—for the terms of the gift are capable of application with literal accuracy to the facts of the case—a court of construction is not entitled to remodel its terms on the ground that the evidence gives rise to a possibility, or even a probability, that the expressed terms of the gift are not such as to give effect to the testator's real intention or makes it appear that a gift in different terms would have been fairer or more reasonable. I find nothing here to justify me in construing "Marryat & Place, Ltd.", as meaning anything else than the existing limited company of that name, or "the service of such company" as meaning anything else than the service of Marryat & Place, Ltd. It is pointed out that the formation of the company took place only just over 5 years before the date of the will, so that no employee could have been entitled at all if the testator had died at once, because none would have completed a full year in excess of the qualifying period of five years in the service of the company. It is further pointed out that the individual maximum of £200 could in any case only have been reached if the testator had reached the age of 88. These considerations may be enough to raise a doubt in one's mind whether the testator did not really intend to include service with himself as the company's predecessor in business as well as service with the company, but a mere doubt is not enough to over-ride the plain language he has used. It may be that he did not expect to die within a short period of the making of his will. It may be that he thought he might live to 90, and, therefore, considered it would be as well to provide for an individual maximum of £200. It may be that he advisedly confined his bounty to service with the limited company, thinking that the total sum involved might otherwise be larger than he cared to devote to this object. I, therefore, find myself unable to hold that the references in cl. 12 of the will to the service of Marryat & Place, Ltd., are to be construed as including the service of the testator as the predecessor in business of that company.

The next question is, in effect, whether "service for a period of 5 years and upwards" connotes continuous service for 5 years and upwards, or whether it is satisfied by a series of disconnected periods, none exceeding five years, but amounting in the aggregate to a period of 5 years and upwards. There is some authority on this question to which I ought to refer. *Re Lawson* (1) deals with the will of a testator who died in 1912 and bequeathed to each of his "domestic servants" who should have been in his service for 2 years before his death the amount of one year's wages, free of duty. One of the claimants for this legacy was B. a certified male nurse and masseur, who was first engaged in 1907 by the receiver in lunacy of the testator's estate as an assistant attendant on the testator at a weekly wage of a guinea. He did not sleep in the house, but he took some of his meals there. From November, 1910, till the testator's death, with one break, he was engaged on night duty, 12 hours at a time, at a salary of two guineas a week paid every fourth week. Owing to the strain of this attendance B. was obliged to take a holiday of 4 months in 1911 with the consent of the receiver, and during his absence he received no salary. While in attendance on the testator he was free to undertake other work and he did so to a limited extent. On a summons by the executors of the testator to determine the question whether B. was entitled to the legacy, it was held that B. was a domestic servant, the term "domestic" being equivalent to "household," and that, although the service must be continuous for the period named, that did not involve service from day to day, and the suspension of the service, with the consent of the master, did not disentitle B. to the legacy claimed. In the course of his judgment, EVE, J., said ([1914] 1 Ch. 686) :

> Upon the second point *Mr. Draper* is no doubt quite right when he says that in order to comply with the condition attached to the bequest it is incumbent on the servant to shew that his service has been a continuous one for the period named by the testator. He cannot fulfil the condition by proving discontinuous periods of service amounting in the aggregate to 2 years. But even so, that does not, I think, involve the necessity of actual daily service for the whole period. It cannot be that if, owing to ill-health or for any other reasonable cause, the servant absents himself for a time and suspends his services with the full authority and consent of the employer, the continuity of the relationship of master and servant is thereby broken. It is true that in this case, in the circumstances I have mentioned, no payment was made to the servant while his absence continued, but I do not think this element is of itself conclusive, coupled as it was with the arrangement that he was to return to his duties as soon as his health was restored. The result is that, in my opinion, the service of

the respondent was of such a nature as to qualify him to claim, and I think he is entitled to be paid, a legacy as a domestic servant of the testator.

The *ratio decidendi*, therefore, was that continuous service for the period named was required, but that absence of the character and in the circumstances there in question involved no break in the requisite continuity of service. *Re Lawson* (1), therefore, provides authority in favour of the view that in the present case I ought to construe service " for a period of 5 years and upwards " as meaning continuous service for such a period. Moreover, there is here a specific reference to " a period," which is not to be found in the bequest in *Re Lawson* (1) and which reinforces the conclusion that the stipulated number of years must form a continuous period. On the other hand, in *Re Drake* (2) a testator, who died in 1919, by his will, after giving a pecuniary legacy to two of his indoor servants, bequeathed to each other of his "indoor and outdoor servants " who should have been in his service for ten years before his death the sum of £200 in addition to any moneys owing to them respectively by him at his decease, and to each other of his " indoor and outdoor servants " who should have been in his service for 5 years, but less than 10 years, " the amount of one year's wages " in addition to any other moneys owing to them by him at his decease. LAWRENCE, J., held that in the case of certain employees, whose employment had been interrupted by military service, the period of their military service could not be deemed service with the testator, but that their service with the testator before and after their military service could be aggregated in computing the qualifying period of the bequest. The conclusion reached in *Re Drake* (2) on the question whether the stipulated number of years service must be continuous was thus the exact opposite of the view taken by EVE, J., in *Re Lawson* (1). The relevant passage in the judgment of LAWRENCE, J., in *Re Drake* (2) was as follows ([1921] 2 Ch. 107) :

> The only point remaining to be dealt with is whether the period of service before the servant joined the colours can be aggregated with the period of service after he came back and was re-engaged, for the purpose of making up the ten years or five years, as the case may be, under the will. In my view, the language of the will justifies me in holding that these periods can be aggregated. All that the will requires is that a servant should have been in the testator's service for upwards of ten years or five years prior to his death. I think that the language of the will does not compel me to hold that the service must necessarily have been continuous, but is wide enough to include service in which there has been a break. I therefore, decide that the period of service prior to the service in His Majesty's Forces ought to be taken into account in computing the qualifying periods under the will.

I was also referred to *Tyler* v. *London & India Docks Joint Committee* (3) where an employee of the defendants, in an action for wrongful dismissal, claimed to be entitled to a certain pension. The only passage in the statement of facts to which I need refer is taken from the rules as to contributions by employees to the superannuation fund, namely (9 T.L.R. 11) :

> 3 . . . each officer or employee . . . shall receive annually such a sum as shall be equal to one-sixtieth part of the amount of his salary or wages at the date of his superannuation or retirement for every year fully ended during which he shall have been in the service of the company. 4. If any officer or employee shall be superannuated from the service of the company at the prescribed age, after he has been in such service for a less period than ten years, the company may . . . pay such officer or employee a superannuation allowance . . . or may give him in lieu of such allowance . . . a gratuity . . .

The question, so far as material for the present purpose, was whether the defendant had been in the service of the company for a less period than 10 years. If so, the company could only be compelled to pay him a gratuity as opposed to the pension to which he would otherwise be entitled. He had, in fact, been in the service of the company for two periods with a break. The two periods added up to 17 years, but neither amounted by itself to 10 years. It was contended, on his behalf, that by his two distinct periods of service amounting in the aggregate to 17 years he had for the purposes of the rules been in the service of the company for a period which was not less than 10 years, and was, therefore, entitled to a pension. LORD ESHER, M.R., said, in his judgment (*ibid.*):

> But the question as to whether or not they had the option of giving him only a gratuity depended upon whether he had been in their service according to r. 4 " for

a period not less than ten years" [*sic*: see *ante*]. Such a period must mean ten continuous years, and therefore they had exercised an option which they fully possessed of giving him only a gratuity.

That seems to be clear authority for the view that a stipulation as to service for a period of so many years connotes a continuous period of so many years service. Having regard to the decision of the Court of Appeal in *Tyler* v. *London & India Docks Joint Committee* (3), which is a decision on the same side as *Re Lawson* (1), and to the fact that cl. 12 of the present will expressly requires service for "a period" of so many years, as opposed to service for so many years *simpliciter* (in this respect resembling *Tyler* v. *London & India Docks Joint Committee* (3), and differing from both *Re Lawson* (1) and *Re Drake* (2)), my proper course is to hold that the provision here in question requires service for a continuous period of 5 years and upwards down to the date of the testator's death. Moreover, if the matter was free from authority, I should adopt the same construction, as it seems to me to be reasonably plain from the language here used that a single, or continuous, period is intended.

So far, therefore, an employee, who was in the service of Marryat & Place, Ltd., at the date of the death of the testator and had been in such service for a continuous period of over five years, is entitled, under cl. 12, to a sum of £10 for each year of such service in excess of 5 years, up to a maximum in any one case of £200, which, however, cannot have been attained by any employee in view of the date of the testator's death as compared with that of the formation of the limited company. The next question arises from the fact that many of these employees had gone on war service. Is any period during which they were on war service to be treated as a period of service with the company for the purposes of cl. 12? There is some authority on this point also. I look again at *Re Drake* (2), where Lawrence, J., said ([1921] 2 Ch. 106) :

> The next point which I have to decide arises in this way. Some of the servants joined the colours during the war, and were absent from the testator's service for varying periods. The question is whether the period of their military service can be counted in the ten years or five years, as the case may be, for the purpose of qualifying them for the legacies given by the will. It is argued by *Mr. Owen Thompson* that these servants continued in the service of the testator, notwithstanding that they were serving with H.M. Forces, and in support of his argument he relies upon the decision in *Re Cole* (4). There Sargant, J., held, under special circumstances, that a gentleman had not ceased to be in the employ of a company, although he had voluntarily enlisted and was still serving in His Majesty's Forces. But in my opinion the facts of that case are altogether different from the facts we have here. In that case the learned judge concluded as a fact that the employment by the company continued, although there was a temporary dispensation by the directors under which the legatee was not bound to render actual service to the company during the time he was employed in His Majesty's Forces. In the present case I can come to no such conclusion. The persons concerned were servants employed at a weekly wage. Some of them had voluntarily enlisted, and others were compelled to join the colours. In all cases they left the testator's service with a promise by the testator to re-engage them on their return should they so desire. In these circumstances I regret to find myself quite unable to hold that while these men were serving in His Majesty's Forces they were in the testator's service, and that, after all, is the only point to be determined on this part of the case. I therefore most reluctantly feel compelled to make a declaration that the time during which the servants served in His Majesty's Forces, cannot be counted towards the length of their service with the testator.

That decision indicates that *prima facie* where an employee leaves his employment under a given employer for service in the forces or other full time employment he ceases to be in the service of such employer, though the facts of any particular case may be such as to exclude this general rule.

Marshall v. *Glanville* (5), where the question arose under a contract of service, is a decision which proceeds on similar reasoning. The facts of that case are that the defendants, a firm of drapers, appointed the plaintiff as their representative for the Midlands, North of England, and Scotland, under an agreement which was terminable by six months notice on either side. On July 12, 1916, the plaintiff joined the Royal Flying Corps. Four days later he would have been compelled to join the forces by virtue of the Military Service Acts, and it was held that the agreement was subject to the implied term that it should cease to be binding if future performance became unlawful, and that, performance having become unlawful by virtue of the Military Service Acts on July

12 or four days later, the agreement was then finally determined and not merely suspended. ROWLATT, J., in his judgment, said ([1917] 2 K.B. 90):

> The plaintiff was in the employment of the defendants. According to the finding of the county court judge he was called up for military service on July 12 or 16. *Mr. Moyses* contended that this did not terminate but only suspended the contracts of employment. I cannot agree with that contention. The effect of the Military Service Act, 1916, was to take the plaintiff out of the employment of the defendants. He could no longer execute their orders or go about their business and they could no longer employ him. For the present and for an indefinite period in the future he is out of their employment. The position is incapable of further statement.

A contrary conclusion was reached in *Re Cole* (4) referred to and distinguished by LAWRENCE, J., in *Re Drake* (2). In that case a testator gave a legacy of shares in a company to each of his three sons who should, before attaining 20, enter the employment of a named company and remain therein until the age of 33. In 1913 one of the sons, who was born in 1895, before attaining the age of 20, entered the company's employment, but in September, 1914, he voluntarily, and, with the consent of the company's directors, joined His Majesty's Forces, from which he had not obtained his discharge. It was held that the son had not ceased to be in the employment of the company, although from the time when he entered the army he had not actively served the company. The facts are further stated as follows ([1919] 1 Ch. 219):

> At the age of 18 Brian S. Cole entered the service of the company as a clerk at a nominal salary of £1 5*s.* 0*d.* a month (afterwards raised to £2 10*s.* 0*d.* a month), and he continued in this service until Sept. 15, 1914, when he voluntarily enlisted, with the approval of the directors, in His Majesty's Forces, in which he had since continuously served. The evidence showed that, although during his absence on duty the directors, in view of the fortune to which he was contingently entitled, did not continue payment of his salary, yet neither they nor he at any time intended or desired to terminate his service with the company, and that both intended that those services should be resumed as soon as he obtained his discharge.

On those facts SARGANT, J., found himself able to hold that the defendant in question remained in the employment of the company, notwithstanding that he had left the company for the purposes of military service. In the course of his judgment he said (*ibid.*, 223):

> Now it seems to me that the question whether he is in the employment of the company is not the same thing as the question whether he is in fact rendering actual service to the company. Suppose that he had fallen ill, and had had to be away for a year, or two, or three years. Under those circumstances, the company might be justified in dismissing him, and very likely would dismiss him, and in that case he would certainly cease to remain in the company's employment. But, on the other hand, it is quite possible that the company, valuing his services, would desire to retain him in its employment, and would make arrangements under which that employment should continue, although no actual services were rendered. And whether or not they paid him a salary during that time would not be in any way conclusive; it would only be one of the *indicia* from which one might gather whether the employment did continue or did not. Here, whether I look at the affidavit of Mr. Brian Spearing Cole himself, or at the affidavit made by the directors of the company, or at the terms of a written agreement entered into by Mr. Cole and the company a few weeks ago, just prior to his attaining the age of 23 years, it seems to me quite clear that the intention, both of the company, by its directors, and of Mr. Brian Cole, was that the employment should continue, but that there should be a temporary dispensation of obligation to render service under the contract of employment.

This reasoning, founded on the facts of the particular case, enabled the learned judge to hold that the individual concerned when he joined the army did not cease to be in the employ of the company.

Finally, in *Re Feather* (6) COHEN, J., reached the same conclusion with respect to service in the recent war. In that case the testator, by his will dated Oct. 14, 1937, bequeathed to T. £2,000 "if still in my employ and not under notice." T. was employed by the testator until Aug. 3, 1940, when he was called up and joined the army. The testator then agreed to pay T. £2 a week and to allow his wife to live in a cottage rent free. It was arranged that T., when on leave, should help the testator, and, in fact, he did so, being paid extra for the work he then did. The testator died in 1943, and the summons asked whether T. was entitled to his legacy. One of the executors made an affidavit in which he stated that the testator had told him, when the question of T.'s legacy was raised, that T. was still in his employment, notwithstanding the call up. Whether this evidence was admissible was disputed. It was held that on the evidence T. was still in the testator's employ at his death, and was, accordingly, entitled to the legacy. Both *Re Cole* (4) and *Re Drake* (2) were referred to. I do not think I need read at length from the judgment of COHEN, J. He makes it perfectly plain that his conclusion that the legatee in question remained in the testator's employment depended on the facts of the particular case showing the intention of the testator that the employment should continue.

The facts here fall far short of showing any agreement between the company and the employees indicating that the employees were to continue in the service of the company notwithstanding their war service. The most one can say is that the testator and the company kept in touch with the employees who were on service, and, in particular, with the apprentices, to each of whom the testator used to give 7*s.* 6*d.* every 3 months, and that the testator and the company had every intention of taking back into the service of the company any old employees who might desire to return on release from war service. These facts fall far short of what is required to take the case out of the general rule in *Re Drake* (2). Accordingly (subject to the possible exception of any particular case in which special circumstances comparable to those in *Re Cole* (4) and *Re Feather* (6) could be shown to have existed, though no such particular cases are suggested in the evidence before me), I hold, with regret, that there is no sufficient ground to justify the inclusion of war service for the purposes of cl. 12. I see no distinction between an employee who went direct from the company's employment to full time war service and one who started on part time war service and was afterwards taken on full time war service. As soon as an employee in the latter category went on full time war service, his employment with the company terminated and he ceased to be in the service of the company.

The only remaining question arose from the fact that, before the incorporation of the company, the testator used to take apprentices to learn the trade, and that practice continued after the formation of the company. The testator was the master and they were his apprentices. The normal period of apprenticeship was five years. After the formation of the company, the apprentices previously apprenticed to the testator worked for the company and were paid by the company at a rate provided for in the apprenticeship deed. The question arose whether the period of any such apprenticeship was to be reckoned as a period of service with the company for the purpose of cl. 12. This is a point of some technicality. I have come, on the whole, to the conclusion that these apprentices, while thus working for the company, were in the service of the company within the meaning of cl. 12. I appreciate the distinction between the relations of master and apprentice and those of master and servant, that the obligations are of a different character, and that, so far as the former relationship was concerned, the testator and not the company was the master. On the other hand, the apprentices worked for the company alongside the general body of employees of the company. *De facto*, they were in the service of the company. I was referred to *Horan* v. *Hayhoe* (7) which was a decision that an apprentice is not a servant for the purposes of the Revenue Act, 1869, though he is employed by the master. The case, arising, as it did, under a taxing Act, was, however, one in which a strict and narrow construction of the word "servant" was appropriate. I was also referred to a passage in HALSBURY'S LAWS OF ENGLAND, 2nd ed., Vol. 34, p. 482, para. 560, where the expression "contract of service or apprenticeship" appears. Parties to both forms of contract are included in the term "workman" within the Workmen's Compensation Act, 1925: *ibid.*, p. 802, para. 1138. There, again, one finds apprentices regarded as employees. I was referred to one workmen's compensation case, *Pomphrey* v. *Southwark Press* (8), the facts of which are far removed from those of the present case, but which does, I think, bear out the conception of an apprentice as being employed by and working for an employer, although, as was pointed out in the course of the argument, the relation of master and apprentice is different from that of master and servant. It seems to me that, for the purpose of construing this will, I am justified in holding that the apprentices of the testator, who worked for the company during a period of apprenticeship, are entitled to include the period during which they so worked in reckoning the period during which they had been in the service of the company at the death of the testator. *Declaration accordingly.* *Costs of all parties out of the estate in due course of administration.*

Solicitors: *Bentleys, Stokes & Lowless*, agents for *D. G. Verney, Brandreth & Iles*, Southend-on-Sea; *Bulcraig & Davis.*

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

HUTTON *v.* WATLING AND ANOTHER.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Cohen, L.JJ.), April 15, 1948.]

Evidence—Variation of written contract by oral evidence—Sale of business—Construction.

A typewritten document relating to the sale of a business was signed by the vendors over a 6*d*. stamp and the signatures were witnessed. The document, which opened formally with: "To sale of business between Mr. and Mrs. W., on the one part, hereinafter called the vendors, and Mrs. H., on the other part, hereinafter called the purchaser," acknowledged the receipt of the purchase price of the business, and then set out a number of clauses containing onerous covenants by the vendors, including an option clause in the following terms: "In the event of purchaser wishing at any future date to purchase property in which the business is situated, she has the option of purchase at a price not exceeding £450." In an action for specific performance of the agreement it was admitted that a letter from the purchaser to the vendors was a valid exercise of the option, if the option was valid and enforceable, but the vendors invited the court to say that the document was a mere informal memorandum of the agreement between the parties and to admit parol evidence of the true terms of the contract, and they contended that the option clause was an independent stipulation which formed no part of the agreement and was unenforceable for want of consideration:—

HELD: on a true construction, the document was intended by the signatories and had been represented to the purchaser to be a true record of the contract and was accepted by the purchaser as such, and, therefore, parol evidence to prove an antecedent oral agreement different in its terms was inadmissible and the covenants, including the option clause, must be read as part of the consideration for the purchase price.

Decision of JENKINS, J. ([1947] 2 All E.R. 641), *affirmed.*

[AS TO EXCLUSION OF EXTRINSIC EVIDENCE TO CONTRADICT OR VARY DOCUMENTS, see HALSBURY, Hailsham Edn., Vol. x, p. 265, para. 331; and FOR CASES, see DIGEST, Vol. 17, pp. 305, 312, Nos. *1176-1236*.]

Cases referred to:

(1) *Roe* v. *Naylor (R. A.), Ltd.*, (1918), 87 L.J.K.B. 958; 119 L.T. 359; 22 Digest 68, *397*.

(2) *L'Estrange* v. *Graucob (F.), Ltd.*, [1934] 2 K.B. 394; 103 L.J.K.B. 730; 152 L.T. 164; Digest Supp.

APPEAL by the vendors from an order of JENKINS, J., dated Nov. 3, 1947, and reported [1947] 2 All E.R. 641, granting specific performance of an option clause in a document relating to the purchase of a business. The facts appear in the judgment of LORD GREENE, M.R., The appeal was dismissed.

J. F. Bowyer for the vendors.

Jopling for the purchaser.

LORD GREENE, M.R.: The vendors appeal against an order for specific performance made against them by JENKINS, J. To the claim for specific performance there remains one objection only, *viz.*, that raised in this court, there being no appeal from the decision of JENKINS, J., in so far as it disposes of a defence based on the rule against perpetuities. The option, which, assuming it is a binding option, was duly exercised, is contained in a badly constructed document dated Sept. 6, 1937. That document relates to the purchase of a business by the purchaser from the vendors. It has a number of paragraphs, one of which contains the alleged option in these terms:

> In the event of purchaser wishing at any future date to purchase property in which the business is situated, she has the option of purchase at a price not exceeding £450.

The document is typewritten. It is stamped with a sixpenny adhesive stamp over which there appear the signatures of the vendors, which are witnessed by a Mr. Williams. On the face of it the document appears to be intended by the signatories to record a transaction of a contractual nature. It starts off in the first paragraph with the words :

> To sale of business between Mr. and Mrs. A. Watling, on the one part, hereinafter called the vendors, and Mrs. M. Hutton, on the other part, hereinafter called the purchaser.

That is a very formal beginning and does not suggest that the document is some sort of informal memorandum. The vendors and the purchaser are defined, and the very use of the words "vendors" and "purchaser" suggests a contract. Then it sets out :

> The purchase price of the goodwill of the business to be £22 10*s*. 0*d*., *plus* stock and fixtures at valuation at time of entry. Our signatures as appended hereon being proof and acceptance of monies in complete payment of same.

According to the defence as pleaded, this document is only a receipt for money paid under an oral agreement to purchase goodwill, stock and fixtures. All the following paragraphs, which contain, in terms of agreement, a number of important and, indeed, rather onerous promises by the vendors, including the option clause, are said by counsel for the vendors to be mere surplusage which the vendors voluntarily introduced into this record with the *bona fide* intention of allowing the purchaser to take advantage of them, but with no intention of being, or of leading her to understand that they intended to be, contractually bound to carry them into effect.

The first thing we have to do is to construe this document in order to understand its nature. The second paragraph is said by counsel for the vendors to record a completed transaction in the sense that £22 10*s*. 0*d*. had already been paid, the stock and fixtures had been valued, and the paragraph records the payment of the total sum concerned. In that respect the document operates as a receipt, but so does any conveyance which acknowledges the payment of the purchase price which was fixed by the contract. It appears to me that the second paragraph has no more than that affect. £22 10*s*. 0*d*. is paid as part of the purchase price on a contract of sale, and receipt of it is acknowledged. That, says counsel for the vendors, completed the transaction which was entered into by an oral agreement several days before. The money was paid, so the vendors say, on the same day as this agreement was entered into and there the matter ended. Counsel says the oral agreement contained none of the terms set out in the document. Those terms, in addition to the option clause which I have read, may be summarised as follows. The vendors, for their heirs and assigns "agree not to in any circumstances open or purchase any existing business to do business therefrom round or in the area of the present business . . . while the present purchaser, or her heirs and assigns, does business there." That, from the point of view of the purchaser, is obviously a clause of great importance, because it protects her from the competition of the vendors. It purports to protect not only her but her heirs and assigns, whatever that may mean. The next paragraph agrees "that while the purchaser pays her rent weekly, *i.e.*, 16*s*. 6*d*. a week, this sum including town rates, she shall enjoy her business without any interruption whatsoever from the vendors as landlords. Furthermore, the vendors agree to keep the premises in good living order." That, again, is a very onerous covenant by the vendors, and it records the fact that the purchaser is a weekly tenant at 16*s*. 6*d*. a week. Under that weekly tenancy she has presumably been paying rent—the contrary is not suggested —ever since Sept. 6, 1937, and it is curious that the vendors, having signed this document and handed it to her, should now turn round and say : "Although you have been paying rent at 16*s*. 6*d*., and your obligation to pay it is referred to in this document, we are now going to assert that the whole document is completely valueless." The next clause is : "In the event of better business being obtained, we shall not make demands for increased rent." That is simply saying : "If you do well, we shall not put your rent up." Then comes the option clause, and there follows a clause that, in the event of a sale of the freehold or the reversion without the agreement of the purchaser, the vendors agree, if the purchaser is evicted, to pay compensation of not less than £50, "this amount not to include stock and fixtures." There again is a very beneficial undertaking for the purchaser. There is a reference to the possibility of the purchaser wishing to sell at some future date and the vendors agree not to incommode her if a suitable tenant is found.

The true construction of a document means no more than that the court puts on it the true meaning, and the true meaning is the meaning which the party to whom the document was handed or who is relying on it would put on it as an ordinary intelligent person construing the words in a proper way in the light of the relevant circumstances. This document, on the face of it, A was intended to be handed to the purchaser, and it is produced by the purchaser. Indeed, the whole tenor of the document indicates that it is to be the purchaser's document. I ask myself: When the purchaser received that document what did she think it meant as an ordinary reasonable person, intelligently understanding the English language in the light of the relevant circumstances? It appears to me that she could only have understood that the vendors were deliberately and solemnly recording the terms of an agreement B into which they were prepared to enter, or, indeed, into which they had entered. Even if the purchase money had been paid before this document was actually signed, the only inference, it seems to me, on the true construction of it, is that, on the faith of the handing over of the document, £22 10*s.* 0*d.* *plus* the amount of the valuation was paid, but, quite apart from that, there is an agreement to pay rent of 16*s.* 6*d.* per week. I should have thought, as I have said, that it was quite impossible for the vendors to turn round now and say: "Although C the document which we handed to you on Sept. 6, 1937, clearly purports to record the agreed terms between us and although you have remained in possession of the premises and paid the rent without any attempt on our part to quarrel with what we said or to go back on what we said, at this distance of time we can now turn round and say that this was not a matter for which there was any consideration." The technical ground on which counsel for the vendors D relies is this, and I do not think I should dispute the technical correctness of his proposition. He says: If the document is held to be merely a memorandum and not intended to comprise the terms of a contract, it is always admissible to show what the true terms were. On the true construction of this document, it is capable of being interpreted as a mere memorandum of an informal nature and that is sufficient to let in evidence of what the true contract was. That contract, he argues, did not include the terms to which I have referred, and, in E particular, does not include the option. He concedes that if, on the true construction of this document, it is to be interpreted as containing the contractual terms and as being a true and complete record of those terms between the parties, he could not call evidence of an antecedent agreement, the object of which would be to vary or deduce something from those terms. In my opinion, once the document is construed and understood it is clearly only susceptible of the interpretation that it was intended by the signatories to be, and was F represented to the purchaser to be, a true record of the contract and was accepted by the purchaser as such. Once that is ascertained, it appears to me that the idea of letting in parol evidence to prove an antecedent oral agreement different in its terms falls by reason of the ordinary rule. It was that which JENKINS, J., held, and, in my opinion, he was perfectly right.

The case which counsel for the vendors relied on is *Roe* v. *Naylor* (1), decided G in this court. That case appears to me clearly to be entirely different from the present. There the purchaser asserted a parol agreement made with the vendors through their traveller for the purchase of certain timber. That agreement having been entered into, the vendors, through their traveller, delivered a sold note which purported to state the terms of the contract, but the sold note contained something which was not a part of the terms of the oral contract. The purchaser never read that term, much less did he ever H assent to it, and it was held that he was not bound by it. That is as different as any case can be, I should have thought with all respect to the argument, from the present case. There was a verbal agreement and the vendors attempted to put on the purchaser a term which was no part of the oral agreement, a term to which the purchaser had never agreed and which he never subsequently accepted. In those circumstances, it was impossible for the vendors to hold the purchaser to that term. Here the case is exactly the reverse. The vendors are not trying in any way to put a term on the purchaser which the purchaser has never agreed. They are purporting to record in a solemn manner the terms of an agreement containing terms not beneficial to themselves, but disadvantageous to themselves. To that they put their signatures, and they assert in the language of the document itself that that was the contract. It seems to me that is a totally different case from *Roe* v. *Naylor* (1). There is another case which counsel for the vendors referred to, a decision of a Divisional Court in *L'Estrange* v. *F. Graucob, Ltd.* (2). There it was not suggested that there was any contract save that contained in an order form. The order form contained a clause excluding warranties. The purchaser signed the form without reading the clause. He was, however, naturally held bound by what he had signed, although he did not realise that he had signed a document containing that particular clause. MAUGHAM, L.J., in his judgment, said ([1934] 2 K.B. 394, 406) :

> In a case of this nature it is possible that the document signed by a contracting party may not be the contract, but merely a memorandum in writing of a preceding verbal contract between the parties, and if in this case it appeared that the document in question was only a memorandum of a previous contract which had not contained the clause excluding all conditions and warranties, the plaintiff might have relied upon the case of *Roe* v. *Naylor* (1) and contended successfully that, as the clause was not a part of the contract, she was not bound by it.

The imaginary case that MAUGHAM, L.J., was considering was one like *Roe* v. *Naylor* (1), which I have just explained. If, however, the other party to the alleged contract, interpreting the document as a reasonably intelligent person in the light of the relevant circumstances, would naturally take it as being of a contractual nature, that concludes the matter and it is not possible to call oral evidence to prove that it was a mere memorandum. In the result, the appeal, in my opinion, must be dismissed.

SOMERVELL, L.J. : I agree. Counsel for the vendors submitted that the document in question should be construed as setting up, first and on the one hand, the terms of the purchase already concluded by the payment of the sums mentioned, and, secondly and on the other hand, covenants including the option entered into on which this case turns, a provision independent of the purchase and subsequent to it and unsupported by any consideration so far as the document is concerned because, on this view, the purchase price has nothing to do with the subsequent contract. I do not think the document is capable of that construction. I think that the covenants in question must be read as part of the consideration for the purchase price. I come to that conclusion on two grounds, first, on the form of the heading which has already been read and, on the face of it, seems to refer to everything which follows, and, secondly, the way in which the paragraphs follow each other and the purchaser and the vendors are spoken of throughout the document. That is so far as form is concerned. I also come to the same conclusion on the subject-matter. One can imagine a document in which one finds, half way through, a term dealing with some totally different matter from that which appears to be its main subject. But that is not so here. What do these covenants deal with ? They deal with this sort of question : Are you going to start a business next door next week ? Are you going to turn me out next week ? Are you going to put up the rent if I do well ? Who is to keep the premises in order ? If you sell the reversion and I am evicted, what is to happen then ? Those are all matters intimately connected with the transaction of sale and purchase which was taking place between the parties, and, indeed, some of them seem to be matters which it is impossible to believe were not the subject of contractual terms but were left to voluntary covenants of no legal validity entered into by the vendors subsequent to the transaction. For these reasons, I think the document is incapable of the construction which it is necessary for counsel for the vendors to satisfy me it can bear before the rest of the points arise. I agree that the appeal should be dismissed.

COHEN, L.J. : I also agree and have nothing to add to the reasons given by the learned judge in the court below and my brethren in this court.

Appeal dismissed with costs.

Solicitors : *Pritchard, Sons, Partington & Holland*, agents for *Allan G. Hawkins & Co.*, King's Lynn (for the vendors) ; *Metcalfe, Copeman & Pettefar* (for the purchaser).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BOROUGH BILLPOSTING CO., LTD. *v.* MANCHESTER CORPORATION.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 13, 1948.]

Advertisement—Advertising sign of sheet metal fixed to wall of old theatre—"Wooden or other structure or erection"—Manchester Corporation Act, 1891 (*c.* ccvii), *s.* 18 (1).

By the Manchester Corporation Act, 1891, s. 18 (1), which is included in a part of the Act dealing with matters relating to buildings, it is (with certain exceptions) unlawful "to erect or set up in the city in any place any wooden or other structure or erection of a movable or temporary character" except under licence from the corporation. The appellants fixed to the wall of a building in Manchester an advertising sign consisting of a sheet of metal, 60ft. long, on which the advertisement was painted and which was nailed to a wooden frame which, in turn, was fixed to the wall by means of nails driven into plugs in the wall and by wall hooks. The legs of the frame rested on wooden steps and the bottom of the sign was 2ft. above ground level.

HELD: the advertising sign was not a "wooden or other structure or erection" within the meaning of s. 18, which applied only to structures in the nature of buildings.

Royle v. *Orme,* (1932) (96 J.P. 468, 471), *applied.*

[AS TO HOARDINGS AND ADVERTISEMENTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 518-521, paras. 1099-1105; and FOR CASES, see DIGEST, Vol. 38, pp. 178, 179, Nos. *201-204.*]

Case referred to:

(1) *Royle* v. *Orme,* (1932), 96 J.P. 468; Digest Supp.

CASE STATED by the Recorder of Manchester.

Manchester Corporation refused to grant to the appellants a licence in respect of an advertising sign of sheet metal, 60ft. long, which the appellants had fixed to the wall of an old theatre in Manchester, and, purporting to act under the Manchester Corporation Act, 1891, s. 18, which forbids any "structure or erection" to be set up in the city except under licence, the corporation ordered the appellants to remove the sign. The appellants appealed to quarter sessions from the order of the corporation on the ground that the advertising sign was not a "structure" within the meaning of s. 18 of the Act, but the appeal was dismissed with costs. The appellants appealed to the High Court and the Divisional Court now allowed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

Mais for the appellants.

W. G. Morris for the Manchester Corporation.

LORD GODDARD, C.J.: This is a Case stated by the learned Recorder of Manchester on an appeal brought by the appellants against an order of Manchester Corporation directing them to remove an advertisement which they had put up in the middle of the city. The corporation purported to act under the Manchester Corporation Act, 1891, s. 18, which is in the part of the Act which is headed "Buildings," and, indeed, immediately follows that cross-heading. Section 18 (1) provides:

> It shall not be lawful for any person to erect or set up in the city in any place any wooden or other structure or erection of a movable or temporary character (unless the same falls within the exceptions hereinafter set forth in this section) without a licence in writing first had and obtained from the corporation for the erection or setting up of such structure or erection and every such licence may contain such conditions with respect to such structure or erection and the time during which it is to be permitted to continue as the corporation may think expedient . . .

Then follows the provision for a penalty. Section 18 (2) provides that a licence shall not be required:

> . . . in the case of any wooden or other structure or erection of a movable or temporary character erected for use during the construction alteration or repair of any building unless the same is not taken down or removed immediately after the completion of

such construction alteration or repair or in the case of any wooden or other structure or erection erected for the purpose of protecting or of preventing the acquisition of rights of light.

By s. 18 (3) :

> The following buildings and works shall be exempt from the operation of this section : (A) Buildings expressly exempt from the operation of the Acts or byelaws for the time being in force within the city with respect to new buildings and any tent or stand not remaining for more than 7 days : (B) Structures or erections erected or set up upon the premises of any canal dock or railway company and used for the purposes of or in connection with the traffic of such canal dock or railway under the provisions of any Act of Parliament.

The sections which follow in this part of the Act deal with matters relating strictly to buildings. The marginal note to s. 19 summarises the position : " Limiting period during which approval of plans to remain in force." Section 20 deals with : " Projections from buildings to be subject to approval whether the same constitute annoyance or obstruction or not." Section 21 amends s. 19 of the Manchester Improvement Act, 1871, which relates to buildings in relation to streets, and s. 22 deals with provisions with regard to water closets in houses and such like matters. It is to be noted that, in another part of the Act which is prefaced by the cross-heading " Miscellaneous," are s. 31, which refers to matters of public entertainment, and s. 32, which deals with " Regulations as to advertising on bridges, vehicles, etc.," so that, if this matter depended merely on whether or not the advertisement was desirable or not, one would have to look at s. 32 to find out whether the corporation had any power to prohibit it. They would not have any such power, for s. 32 only deals with certain limited classes of advertisements, *i.e.*, with existing or future advertisements on railway or canal bridges or viaducts, and with a vehicle exclusively or principally used for the purpose of displaying advertisements. It also contains various provisions with regard to sky-signs, and it is admitted that the advertisement in this case is not a sky-sign. It is really an advertisement hoarding.

Section 56 of the Act gives a right of appeal to quarter sessions against any determination of the corporation, which would include a determination of the nature to which they came in this case. The learned recorder has stated a Case for the opinion of this court. We are, of course, concerned only with any question of law that arises, and not with the reasons why the corporation acted as they did. The only question of law that arises is whether this advertisement, affixed in the way it is, is a structure within the meaning of s. 18 (1). The facts found by the learned recorder are (*a*) that the sign advertises football pools and :

> . . . is made of sheet metal 60ft. long ; (*b*) that the advertisement is painted directly on to the sheet metal ; (*c*) that the sheet of metal is nailed to a wooden frame which in turn is fixed to the front wall of the building by means of nails driven into plugs in the wall and by wall hooks ; (*d*) that the legs of the frame rest on some steps and the bottom of the sign is 2ft. above ground level.

Certain openings or apertures in the back of the wall on which this sign is fixed, which at one time contained doors or windows have been boarded up, with the object of reducing the wind pressure against the back of the advertisement, but this fact does not seem to me to affect the question one way or the other.

By way of upholding the order of the learned recorder, it is contended on behalf of the corporation that the wooden frame is a structure, and, therefore, under s. 18 the corporation were entitled to order it to be removed. I am bound to say that my mind has fluctuated somewhat in the course of this argument, and, as the ordinary meaning of " structure " is something that has been constructed, I was at first inclined to think that this frame which is nailed to the wall was a " wooden or other structure," and for some purposes it undoubtedly would be. The question, however, is whether we ought to hold that it is a structure within the meaning of s. 18, which is one of the group of sections which deal with buildings in the ordinary sense. It seems to me clear that when the Manchester Corporation Act, 1891, was passed, ss. 18 to 22 were intended to deal with structures in the nature of buildings, otherwise this provision in regard to structures would be in the part of the Act headed " Miscellaneous " and not in that headed " Buildings." It certainly was not intended to deal with advertisements because the section which deals with advertisements and the power of the corporation over advertisements is s. 32. Speaking for myself, I feel that it would be wrong to hold that a mere frame which is put on to a wall is a "wooden or other structure" within the meaning of a section which is dealing with buildings and is in a part of the Act which is dealing with buildings. Moreover, there can be no doubt that, if this sheet of metal, 60ft. long by, I suppose, 6 or 7ft. high, had merely been bolted on to the wall of the building, no one could have contended that it was a structure. It is said to be a structure merely because, instead of its being nailed direct to the wall, a wooden frame is put on to the wall and the advertisement is nailed to the wooden frame. I cannot say that this is a wooden or other structure within the meaning of s. 18.

Counsel for the appellants called our attention to certain cases decided under the provisions of the London Building Act, 1894, but I think they are somewhat conflicting. There have been certain dissenting judgments, and some of the judges in the later cases have said that, but for the earlier decisions, they would have decided differently. The cases, indeed, are somewhat difficult to understand, and it is not clear whether they were not merely decisions on questions of fact, but *Royle* v. *Orme* (1) decided in 1932, is so similar to the present matter that I think we should be disregarding it if we now upheld the learned recorder's order. In *Royle* v. *Orme* (1) the defendant was summoned:

> . . . for erecting and maintaining for advertising purposes a *hoarding or similar structure* in contravention of a byelaw made under the Advertisements Regulation Act, 1907, s. 2, prohibiting the erection or maintenance for advertising purposes of any hoarding or similar structure exceeding 12ft. in height. The alleged hoarding or structure consisted of rectangular panels or advertisement boards measuring approximately 20ft. in length horizontally and 10ft. in height vertically and attached to the wall of a building. On these panels picture posters were pasted. Although the panels did not themselves exceed 12ft. in height they were fixed in such a position on the wall as to be more than 12ft. above ground level.

LORD HEWART, C.J., in giving his judgment, upheld the finding of the justices entirely on the point that the byelaw dealt with the height of the panel itself and did not, therefore, take into account the height which the panel was from the ground. As the panel did not exceed 12ft., he held that no offence had been committed. AVORY, J., agreed with the view of LORD HEWART, C.J., on that point, and then said (96 J.P. 468, 471):

> In my opinion, the framed panels were not hoardings or similar structures within the meaning of this byelaw, and, further, if they were hoardings, or similar structures, neither of them exceeded 12ft. in height. In my opinion, these byelaws are intended to apply to some independent structure and not to the wall of a house, and the byelaws have no application to advertisements affixed to the wall of a house. Whether it is desirable that there should be power to control advertisements affixed to the wall of a house is quite a different matter. We have not to deal with it. I am satisfied that they are intended to apply, as I have said, to an independent hoarding which is erected on the ground, and not to a case like the present where advertisements are fixed to a wall.

HUMPHREYS, J., who was a party to that judgment, said (*ibid.*):

> I think, apart from any other difficulties, that it would have been impossible for the justices to have convicted in this case on the basis of the wall itself being a hoarding or similar structure, and it was not true, as one information alleges, that the respondent erected, and, as the other information alleges, that he maintained the structure affixed to the wall of a house.

In that case the words which the court had to consider, and on which AVORY, J., based his judgment, were "hoarding or similar structure," and I suppose one might say, if one was looking at the case very meticulously, that he was deciding that a frame fixed to a house was not similar to a hoarding, but I think that is taking too narrow a view of the decision because he said that, in his opinion, the byelaw was intended to apply to an independent structure and not to the wall of a house. When one compares the facts of *Royle* v. *Orme* (1) with the facts in this case, the only difference is that in *Royle* v. *Orme* (1) the advertisements were inside the frame and in this case they are nailed to the outside of the frame. Though I can conceive that two different views may be taken on the matter, I prefer to base my judgment mainly on the fact that s. 18 does not apply to this case, and that, therefore, it is not legitimate to use s. 18, which I am satisfied was intended to apply to an entirely different class of case, to regulate advertisements and supply what I may call a hiatus in the Act. For these reasons I think that the decision of the learned recorder and the decision of the corporation cannot be upheld, because they have acted under a section which, in my opinion, does not give them power to act as they did. They have no power to order the taking down of this advertisement under s. 18, and, therefore, this appeal must be allowed.

HUMPHREYS, J.: The learned recorder of Manchester has asked us to answer this question:

> Whether this advertisement sign was a "wooden or other structure or erection of a movable or temporary character" within the meaning of s. 18 of the Manchester Corporation Act, 1891.

We can only uphold the learned recorder if we take the view which he adopted, *viz.*, that it is right to say that the erection in question comes within s. 18 of the Act. That section deals with a person who has erected or set up:

> . . . in the city in any place any wooden or other structure or erection of a movable or temporary character . . .

As my Lord has said, the section is in the part of the Act headed "Buildings," and is dealing with buildings, and this advertisement is not a building, but a sign. Primarily, I should certainly take the view that the opening words of s. 18 (1) do not apply to a mere sheet of metal which is temporarily put across a wall, and I think that the case for the corporation must depend on a finding that the method of affixing that sheet of metal to the wall made the whole thing a structure. That is what is found here. I do not wish to add much, because my Lord has expressed, in far more felicitous terms than I should be likely to use, the view, which I also hold, that, in interpreting s. 18, one must look with great care at the Act. The section forbids something in the nature of a temporary building, and, when one looks at the exceptions—"the buildings and works," to use the language of s. 18 (3), which are exempted from the operation of the section—one finds that what is excepted are "buildings" which are exempt from the operation of the Act or the byelaws in force in the city and "structures or erections" set up on the premises of a canal, dock or railway company. I think, therefore, that it may be fairly said that the framer of the section must be taken to have had in mind buildings and erections such as may well be found in connection with some building scheme or operation and not something which is merely a metal advertisement which is said to become a structure or a building or an erection, within the language of s. 18, because it happens to be fastened to a wooden frame to keep it in place. Apart from that matter, I agree with my Lord that *Royle* v. *Orme* (1) is of some assistance in construing this section. The offence dealt with in that case was not precisely similar to the one in this case because the defendant there was summoned for erecting and maintaining for advertising purposes a hoarding or similar structure, but I think the words of AVORY, J., in giving his judgment, are to be noted, and, in my opinion, agreed with, when he said (96 J.P. 468, 471):

> In my opinion, these byelaws are intended to apply to some independent structure and not to the wall of a house, and the byelaws have no application to advertisements affixed to the wall of a house.

Here, also, I think that the language of s. 18 is intended to apply to buildings and not to a mere advertisement affixed to a wall of a building as this is. For these reasons, glad though I should have been if I had found it possible to uphold the order of the learned recorder and the action of the corporation, I agree with the judgment of my Lord that this appeal must succeed.

PRITCHARD, J.: I agree.

Appeal allowed with costs.

Solicitors: *Hall, Brydon, Harvey & Egerton* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *P. B. Dingle*, town clerk, Manchester (for the corporation).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Affirmed. H.L. [1949] 2 All E.R. 621.

KAHLER *v.* MIDLAND BANK, LTD.

[COURT OF APPEAL (Scott, Asquith and Evershed, L.JJ.), March 15, 16, 17, 18, April 19, 1948.]

Bankers—Deposit of securities—Canadian securities held by Czech bank in safe custody for customer—Deposit by Czech bank with London bank—Right of customer of Czech bank to demand delivery from London bank without consent of Czech bank—Release, or transfer into another name, of foreign securities in safe custody prohibited by Czechoslovak exchange control regulations.

In 1938, the plaintiff, who was at that time a Czechoslovak national resident in Prague, became a customer of the Z. bank in Prague, and a number of his securities (including 800 share certificates, equivalent to bearer securities, in a Canadian company) were deposited with the bank for safe custody. On Jan. 16, 1939, the Z. bank wrote to the defendants, the Midland Bank, Ltd., in London, asking them to " receive for our account . . . and place . . . into our depot with your . . . selves, crediting us for same under advice to us," certain shares, including 1,164 shares in the Canadian company, 800 of which were those held by the Z. bank in safe custody for the plaintiff. The Z. bank did not, however, refer to the plaintiff in this letter, nor did they state that they were holding the shares on behalf of a third party. On the printed form, amended in typescript, sent by the defendants to the Z. bank on Feb. 6, 1939, acknowledging the latter's instructions, the defendants referred to the Z. bank as their " customer " in the transaction and there was no reference to the plaintiff. After the occupation of Czechoslovakia by the German forces in March, 1939, the plaintiff wished to leave the country and, to obtain a permit to leave, he was compelled by the Germans to hand over to them all his assets in Czechoslovakia, including his rights in regard to the Canadian shares. To effect this, his account was transferred from the Z. bank to the B. bank, which was under German control, and on Apr. 17, 1939, the Z. bank wrote to the defendants asking them to withdraw from the Z. bank's securities account with the defendants 800 of the Canadian shares and to place them " into the depot of " the B. bank with the defendants. The letter of Apr. 17, 1939, went on to state : " This transfer is made by order and for account of the owner of these shares, Mr. V. K. [*i.e.*, the plaintiff] who transfers his securities account from our bank to [the B. bank]. The ownership of the shares remains unchanged." On receipt of this letter, the defendants, on May 11, 1939, sent to the B. bank, advising them of the " receipt for your account " of the shares described, a form similar to the one sent to the Z. bank on Feb. 6, but the form of May 11 contained the name of the plaintiff as the " owner." The defendants did not communicate with the plaintiff at all. In May, 1946, the plaintiff's rights *vis-a-vis* the B. bank were restored by the Czechoslovak authorities, but under the Czechoslovak law (similar exchange control regulations having been in operation in that country at all material times) any transfer of foreign securities from or to a Czech resident without the permission of the Czechoslovak National Bank was unlawful (the word " transfer " being defined in the relevant Act as including release, or transfer into another name, of securities in safe custody). The plaintiff had ceased to be a Czech resident, as he had left Czechoslovakia about Apr. 1, 1939, but the B. bank was a Czech resident for the purposes of the regulation. In an action by the plaintiff asking for an order on the defendants to hand over the shares to him, the plaintiff based his claim (*a*) *ex contractu*, and (*b*), alternatively, *in rem*, on the ground that he was absolutely entitled to the shares. The defendants contended that there was no contract between them and the plaintiff, because the B. bank, and not the plaintiff, was their customer, and that it would not be consistent with their contract with the bank or with proper banking practice to hand over the shares to the plaintiff except with the consent of the B. bank, which was not a party to the proceedings and which was unable, under the Czechoslovak exchange control regulations, to give its consent.

HELD : (i) the transactions between the defendants and the Z. and B. banks did not create any direct contract between the plaintiff and the defendants, as the contract between the Z. bank and the defendants was one between principals, and the contract between the defendants and the B. bank was of the same character, notwithstanding the reference to the plaintiff as the "owner" of the shares on the form sent by the defendants to the B. bank on May 11, 1939.

(ii) to succeed in his claim *in rem*, the plaintiff must prove, not merely that he was absolutely entitled beneficially to the shares, but also that he was entitled to possession of the certificates, and, as the defendants, under the contract of bailment, held the certificates for the account of the B. bank, the consent of that bank was necessary to the plaintiff's possession, unless the plaintiff could show that the absence of such consent could be disregarded in an English court; and, since the consent of the B. bank could not be given without contravening the Czechoslovak exchange control regulations and since the plaintiff must have been aware of this fact from the first, the plaintiff had failed to establish such right to the securities as to entitle him, notwithstanding the absence of consent on the part of the B. bank, to an order for delivery of them to him.

[As to Safe Custody of Securities, see HALSBURY, Hailsham Edn., Vol. 1, pp. 850-852, paras. 1380-1382; and for Cases, see DIGEST, Vol. 3, pp. 256, 257, Nos. *760-766*.

As to Position of Sub-Agent, see HALSBURY, Hailsham Edn., Vol. 1, pp. 227, 228, paras. 392-394; and for Cases, see DIGEST, Vol. 1, pp. 391-393, Nos. *943-962*.]

Cases referred to:

(1) *Calico Printers' Assocn., Ltd.* v. *Barclays Bank*, (1931), 145 L.T. 51; 36 Com. Cas. 197; Digest Supp.

(2) *Giblin* v. *M'Mullen*, (1868), L.R. 2 P.C. 317; 5 Moo. P.C.C.N.S. 434; 38 L.J.P.C. 25; 21 L.T. 214; 3 Digest 256, *761*.

Appeal by the defendants from a decision of Macnaghten, J., dated June 4, 1947.

The plaintiff claimed to be absolutely entitled to certain share certificates which the defendants held for safe custody in the dossier of the Bohemian Discount Bank and Society of Credit, a Czechoslovak banking company, and he asked for an order on the defendants to hand over the securities to him. The defendants resisted the order on the ground that their contract was not with the plaintiff but with the Czech bank and, therefore, it was inconsistent with the terms of their contract and with banking practice to hand over the securities to the plaintiff except with the consent of the Czech bank. Macnaghten, J., gave judgment for the plaintiff. The defendants appealed from his decision and the Court of Appeal now allowed the appeal. The facts appear in the judgment of Evershed, L.J.

H. L. Parker and *J. G. Foster* for the defendants.

Salmon, K.C., and *D. C. L. Potter* for the plaintiff.

Cur. adv. vult.

Apr. 19. The following judgment of

EVERSHED, L.J. (was read by Asquith, L.J.): This appeal relates to 800 ordinary shares of no par value in a Canadian company known as the Brazilian Traction Light and Power Co., Ltd. The shares are registered in the name of Samuel Montagu & Co., but, in accordance with common practice relating to shares of this character, a form of transfer indorsed on the share certificate having been executed in blank by Samuel Montagu & Co., the share certificates have at all material times been for practical purposes equivalent to bearer securities. The action was started in July, 1939, but all proceedings were suspended during the period of the second world war. In July, 1939, the share certificates were held by the defendants for safe custody in the "depot" or dossier of a Czechoslovak banking company known as the Bohemian Discount Bank and Society of Credit (hereinafter referred to as the Bohemian Bank), which has at all material times carried on business exclusively in Czechoslovakia, and they have been so held ever since. The circumstances in which the shares came to be so held will be examined in detail hereafter. The plaintiff claims that the shares are his own absolute property, and he asks, therefore, for an order on the defendants to hand the shares over to him. It is, indeed, admitted by the defendants that neither they nor the Bohemian Bank have any charge or lien in respect of the shares or any proprietary interest in or claim on them of any kind, but it is said by the defendants that, whatever be the proprietary or beneficial interest of the plaintiff in the shares, they, the defendants, cannot consistently with the terms of the contract by which they say they are bound to their customer, the Bohemian bank, and consistently with proper banking practice hand over the shares to the plaintiff save with the consent of the Bohemian Bank and that that bank (which is not a party to the present proceedings) is unwilling to give its consent and cannot, indeed, do so without infringing the Czechoslovak exchange control regulations which have been in force and binding on the Bohemian Bank since a date prior to the issue of the writ in the action.

As will be apparent from the brief summary which I have given, the case has involved many points of difficulty, including questions in regard to the nature and effect of the exchange control regulations which, under the strained economic conditions under which the world lives, have in one form or another been imposed by most of the nations and are an essential feature of the so-called " Bretton Woods Agreements " to which I must later make some further reference. Put in its simplest form, the claim of the plaintiff is put alternatively (*a*) *ex contractu*, and (*b*) *in rem* : *i.e.*, the plaintiff claims (i) that, as a result of the various transactions to be later described, there came into existence and now subsists a direct contractual relationship between the defendants and the plaintiff, in the nature of a bailment, whereby the defendants became, and are, directly accountable to the plaintiff for the shares, or, at least, directly so accountable subject only to any lien or similar proprietary claim which the Bohemian Bank might have, that bank being, in the absence of any such claim, a mere nominee for the plaintiff, and that such contract is one governed entirely by English law and unaffected accordingly by the local currency or " revenue " laws of Czechoslovakia ; and (ii) alternatively, that, whatever the contractual relationship, the plaintiff has, by his evidence, or by the defendants' admissions, proved that the shares are his absolute property free from any claim or interest in any other party or any claim or interest to which English law will have regard, and that he is, accordingly, entitled to have the shares delivered to him. The learned judge in the court below decided those issues in the plaintiff's favour, and from that decision the defendants now appeal. In the circumstances of the case it is not surprising that no authority has been cited to us which covers the facts of the present dispute. It is, in my judgment, necessary to examine carefully what were those facts and to arrive at a conclusion as to what were the relationships which, according to English law, emerged from those facts between the various parties concerned in the transactions.

It will be convenient to deal first with the Czechoslovak exchange control regulations to which I have already alluded, for, although the regulations proved in the case were those comprised in the Czechoslovak Act, No. 92 of 1946, it was also proved that regulations of a substantially similar character were in operation at all material times. It must, however, be observed that there is no evidence that the defendants were at any time prior to the writ in the action aware of the existence or character of the regulations. A translation of the relevant paragraphs of the Czechoslovak Act, No. 92 of 1946, forms document 10 of the documents before the court. For present purposes it is sufficient to state the effect of the Act as follows—that without the permission of the Czechoslovak National Bank any transfer of foreign securities from a Czech resident to a Czech non-resident, or from a Czech resident to a Czech resident, or from a Czech non-resident to a Czech resident is unlawful, and is a " punishable," *i.e.*, a criminal act, by Czechoslovak law. The word " transfer " is, in effect, defined by para. 17 (*a*) of the Act to include a transfer of ownership, or transfer by way of pledge, or for any other reason, or by whatever way, *e.g.*, by book transfer, placing into safe custody, transfer of securities in safe custody into another name, or release. Counsel for the plaintiff has, accordingly, as I understand him, conceded that the delivery of the securities by the defendants to the plaintiff without the permission of the Czechoslovak National Bank would be within the intendment of the Czechoslovak currency laws, if either the defendants or the plaintiff were Czech residents. Equally, it is clear that any transfer by or out of the name of the Bohemian Bank or any release by the Bohemian Bank of the shares without the permission of the Czechoslovak National Bank would be, and would at all material times have been, a punishable act on the part of the Bohemian Bank which is, and always was, admittedly a Czech resident for the purposes of the regulations. The plaintiff, however, left his native country about Apr. 1, 1939, and beyond question he has now long since ceased to be a Czech resident. Both the plaintiff and defendants are, therefore, now "Czech non-residents."

I turn now to examine the history of the case. The story opens with a letter dated Dec. 28, 1938, and written to the plaintiff, then resident in Prague, by another Czechoslovak banking institution, known as the Zivnostenska Bank. That letter is as follows:

> We beg to inform you that by order of the firm of Petschek and Spol in Prague, we are crediting you with the undermentioned securities in the deposit account which we recently opened for you, namely . . .

There then follows a very considerable list of securities. The list comprised a number of shares described as "domiciled in New York, Amsterdam, Tel Aviv and London" respectively, and included among the last the 800 Brazilian Traction Co. shares which are the subject of the present claim. The letter concludes:

> . . . and we desire to say that you will have the aforesaid securities deposited with us for safe custody.

The next document is a letter dated Jan. 16, 1939, from the Zivnostenska Bank in Prague to the defendants in London, which is as follows:

> We beg to inform you that you will receive for our account from Messrs. Samuel Montagu & Co., London, by order of the firm Petschek & Co., Banking House in Prague, 1164 shares Brazilian Traction, and 25 shares, Sidro. Kindly take over these shares and place them into our depot with your good selves, crediting us for same under advice to us. Moreover, please inform us of the maturity dates of the coupons attached to these shares.

It is conceded that the 1,164 Brazilian Traction Co. shares therein mentioned included the 800 shares, the subject of this action. Nothing is known as regards the beneficial ownership of the remaining 364 of such shares. It was proved in the case that the Zivnostenska Bank was, and had been for some time prior to January, 1939, a "customer" of the defendants, who, by way of acknowledgment of the former bank's instructions, sent to the Zivnostenska Bank a printed form slightly amended in typescript. That form bore the heading at the right-hand top corner, "Customers' Position," and the bank's name was inserted under the description "Customer" at the top left-hand corner. The form referred to the "instructions" of Jan. 16, 1939, *i.e.*, the document of that date which I have read, and specified the securities (under the general description of "American certificates") as having been received "by order of Messrs. Petschek & Co., Prague." There was a space on the form opposite the word "rubric," which was left blank. It seems clear from the later documents in the case that, had the Zivnostenska Bank informed the defendants that it, the Zivnostenska Bank, was itself purporting to hold the shares in safe custody for some third party or third parties, the name or names of the third party or third parties would, or would probably, have been inserted by the defendants in the space opposite to the word "rubric."

I pause here to inquire what were the legal relationships created at this stage between the plaintiff, the Zivnostenska Bank, and the defendants. It is said by counsel for the plaintiff that, as regards the 800 shares in question, the Zivnostenska Bank in its communications with the defendants was acting as agent for an undisclosed principal, *viz.*, the plaintiff, and, accordingly, that the plaintiff, on establishing his identity as the principal of the Zivnostenska Bank as regards the 800 shares, could, and would, have placed himself in direct contractual relationship with the defendants, and that the contract would have been governed by English law. On the other hand, counsel for the defendants has argued that no such direct contract was established between the plaintiff and the defendants or was capable of being so established by the transactions described. According to his argument there were two distinct contracts, *viz.*, (i) a contract between the plaintiff and the Zivnostenska Bank, between customer and banker, evidenced by the latter's letter of Dec. 28, 1938, governed by Czech law and relating to the numerous securities mentioned in the letter, including the 800 shares in question; and (ii) a contract of "sub-agency" between the Zivnostenska Bank and the defendants whose customer it was, evidenced by the Zivnostenska Bank's letter of Jan. 16, 1939, and the defendants' acceptance of the Zivnostenska Bank's instructions by despatch of the printed form dated Feb. 6, 1939, and relating to a parcel of 1,164 Brazilian Traction Co. shares including the relevant 800. It is immaterial to the argument of counsel for the defendants whether the proper law of the second contract was English or Czech. In my judgment, the contention of counsel for the defendants is correct. I do not think that the transactions which I have described created, or were intended or effective to create, any direct contract between the plaintiff and defendants. The Zivnostenska Bank were the bankers and agents of the plaintiff. They made themselves responsible to the plaintiff for the safe custody of the 800 Brazilian Traction Co. shares. Where the certificates had physically been prior to the opening of the story in the present case is not known, but it is reasonably clear from their description and characteristics that they had been, and for practical purposes had to remain, in England or elsewhere outside Czechoslovakia. In the circumstances, the Zivnostenska Bank, having made itself responsible to the plaintiff for the safe custody of the shares, must necessarily, as it seems to me, have made some arrangement of its own so as to secure it in the fulfilment of its obligations. If the plaintiff was himself aware (as I think he must clearly have been) of the actual location of the certificates, it must have been in his contemplation that such an arrangement would be made by his bankers and agents. In any case there is, in my judgment, nothing from which the court may infer any authority to the Zivnostenska Bank, or any intention on its part, to contract with the defendants on the plaintiff's behalf. The legal relationships created were, in my view, analogous to those created in *Calico Printers' Association, Ltd.* v. *Barclays Bank* (1), to which we were referred by counsel for the defendants.

I come now to the second and vital stage in the history. As is well known, in March, 1939, Hitler seized Czechoslovakia by force and what subsequently occurred in regard to the subject-matter of this action was the direct consequence of the anti-Jewish activities of the Nazi forces. Before, however, referring to these activities, I turn to the documents themselves and particularly to the letter of Apr. 17, 1939, from the Zivnostenska Bank to the defendants on which counsel for the plaintiff most strongly relies. That letter, omitting formal parts, was as follows :

> By the present we beg to request you to withdraw from our securities account with your good selves, 800 shares Brazilian Traction Light and Power Co. ordinary capital stock, no par value, using for this purpose the shares which were credited to our above account on Feb. 6, 1939 . . . and to place same into the depot of the Bohemian Discount Bank and Society of Credit, Prague, with your good selves. This transfer is made by order and for account of the owner of these shares, Mr. Viktor Kahler, Prague 11, Vaclav. nam. 55, who transfers his securities account from our bank to the Bohemian Discount Bank and Society of Credit, Prague. The ownership of the above shares remains unchanged. While crediting you for these shares on the securities account, we remain . . .

On receipt of this letter the defendants sent on May 11 to the Bohemian Bank a form similar to that which they had sent to the Zivnostenska Bank on Feb. 6. The name of the Bohemian Bank appears at the top left-hand corner of the form. Though the word " customer " does not in this case appear on the form, it was proved in evidence that the Bohemian Bank, like the Zivnostenska Bank, had for some time prior to the matters now being described been a customer of the defendants, but the most substantial difference between the form dated Feb. 6 and that dated May 11 lay in this, that in the latter, the space opposite the word " rubric " had been filled in by the name and address (in Prague) of the plaintiff. Further, the word " owner " had been substituted in typescript for the word " rubric " in print—though the French equivalent (this form being throughout bilingual), " rubrique," remained. The number of shares specified on the form was, of course, 800 only—the serial numbers given being those relating to the last 800 of the 1,160 registered in the name of Samuel Montagu & Co., which formed part of the total number of 1,164 shares covered by the form of Feb. 6. By the terms of the form the defendants advised the Bohemian Bank of the " Receipt for your account " of the shares described. It has been necessary to set out the details of the documents for much may turn on their precise character and the exact terms used. It should be noted that all documents passing between the defendants and either of the Czech banks appear (apart from parts of the second printed form which were, as already stated, in French) to have been in the English language.

Counsel for the plaintiff has in this court founded his first alternative claim on the letter of Apr. 17, and by our leave his statement of claim has been amended in order that that claim should be clearly raised. According to the argument, the letter must, on its true interpretation, be taken as constituting instructions given by the Zivnostenska Bank as agent for the plaintiff, a named principal, to transfer the shares in question from the depot or dossier of the Zivnostenska Bank and to hold them for and on behalf of the plaintiff, albeit in the depot or dossier of the Bohemian Bank, the placing of the shares in the latter depot being in the circumstances no more than an affixing, as it were, of a label to the securities designated and not—at least, in the absence of evidence of some lien or other proprietary interest—affecting the absolute right to the shares of the plaintiff or the defendants' direct obligations in respect of the shares to the plaintiff. Counsel for the plaintiff further added that if (as, indeed, in the light of the events occurring at that time was at least possible) the Zivnostenska Bank had no authority in fact from the plaintiff to write the letter on his behalf, then the plaintiff has since ratified the agency which the Zivnostenska Bank had purported to exercise. There was some question in regard to this alleged ratification, and, particularly, in regard to the document selected for the purpose in the amended statement of claim, but, on the view I take, it is unnecessary to pursue this aspect of the case.

It will be observed that, if the argument of counsel for the plaintiff is well founded, then the legal relationships created by the transactions of April and May substantially differ from those which, if I have correctly analysed them, were created by the transactions of January and February. The real question, therefore, is, to my mind: What was the purpose and what is the effect of the last two sentences in the letter of Apr. 17:

> This transfer is made by order and for account of the owner of these shares, Mr. Viktor Kahler . . . who transfers his securities account from our bank to the Bohemian Bank . . . The ownership of the above shares remains unchanged . . .

and of the reference in the form dated May 11 to the plaintiff as "owner" of the shares? In my judgment, notwithstanding the markedly distinguishing characteristics to which I have referred, the transactions of April and May, 1939, were substantially of the same character as those of the earlier months and were no more than their predecessors intended, and they were not effective to create a direct contractual relationship between the plaintiff and the defendants. It is to be observed that by the letter of Apr. 17, the Zivnostenska Bank was instructing the defendants to transfer part only of the Brazilian Traction Co. shares which they held for the Zivnostenska Bank. It was obviously necessary that the shares should be distinguished and identified. No doubt, by the terms of the letter of Apr. 17, the defendants were informed in the plainest terms that the plaintiff was the beneficial owner of the shares and the defendants themselves acknowledged that fact on the face of the form which they sent to the Bohemian Bank on May 11. Whether or no the defendants knew or supposed prior to their receipt of the letter of Apr. 17, that their customer, the Zivnostenska Bank, was not itself the proprietor of the 1,164 shares in the Brazilian Traction Co., there can be no doubt that thereafter they knew that the Zivnostenska Bank had in respect of 800 of those shares acted as agent for the plaintiff, and further knew (or believed) that the Bohemian Bank had taken the place of the Zivnostenska Bank in that capacity. But does it follow that, as a result, the defendants became contractually bound to the plaintiff? I have come to the conclusion that the answer is in the negative. Having regard to the circumstances in which the Zivnostenska Bank, having made itself liable to the defendants in December, 1938, transferred its agency for the plaintiff to the Bohemian Bank (to which I presently refer), I can well understand that the Zivnostenska Bank was anxious to record with the defendants the true ownership of the shares in question. I am, however, still unable to conclude that any contract came into existence between the plaintiff and the defendants. So far as the evidence goes, the plaintiff was not a customer of, or otherwise known to, the defendants, and it is to be noted that the defendants did not, though given his address, communicate in any way with the plaintiff by way of acknowledgment of their suggested contractual obligations or otherwise. They did, on the other hand, communicate immediately with the Bohemian Bank. They sent a form substantially similar to that which they had in the previous February sent to the Zivnostenska Bank, advising the Bohemian Bank of the receipt " for your account " of the shares in question. In my judgment, the reference on the form to the plaintiff as " owner " of the shares cannot be so construed as to make the defendants' communication with the Bohemian Bank one intended to be made with a mere agent or trustee on behalf of a principal. It follows, in my judgment, that, as a result of the transactions now under consideration, there came into existence a contract, in reference to the 800 shares in question, between the defendants and the Bohemian Bank of the same character as, and so as to take the place of, the earlier contract between the defendants and the Zivnostenska Bank, a contract in each case between principals, between banker and customer. I think that by their despatch of the form of May 11, the defendants acknowledged to the Bohemian Bank their contractual liability to that bank, and that such acknowledgement was tacitly accepted or assented to by the Bohemian Bank. As regards the relationship between the plaintiff and the Bohemian Bank, it is quite clear that it was, in fact, imposed on the plaintiff by the German occupying forces, but it is, to my mind, none the less clear that such relationship came into existence (taking the place of the earlier relationship between the plaintiff and the Zivnostenska Bank) and was, indeed, used by the Germans for their own purposes.

I have so far dealt with the matter on the basis of the documents themselves, supplemented only by the evidence of the defendants' assistant manager given at the trial. My conclusion is, in my judgment, confirmed when regard is had to the circumstances surrounding the sending of the letter of Apr. 17. In the first place, there existed at that time—as must have been well known to the plaintiff and to the two Czech banks—the Czechoslovak currency regulations, to which I have already referred and which make unlawful (*inter alia*) any " transfers of [foreign] securities in safe custody into another name " or any " releases " of such securities, save with the permission of the Czechoslovak National Bank. Secondly, as appears from certain evidence sworn by the plaintiff in the earlier stages of the action, which was admitted by the defendants and to which it seems clear that we are entitled to refer, the transactions of April, 1939, were parts of the steps which the plaintiff was compelled by the occupying German forces to take in order to effect his escape from Czechoslovakia, for being of the Jewish " race," the plaintiff was compelled by the Germans, as a condition of obtaining a permit to leave his native country (as he did about Apr. 1, 1939), to put into the hands or power of the Germans all that he had in that country, including his rights in regard to the 800 shares in question. At that time the Bohemian Bank appears to have been under the control or domination of the Germans, and as a result of the transfer from the Zivnostenska Bank to the Bohemian Bank, for which, no doubt, any necessary permission was without difficulty secured, and of further consequential steps taken, including the execution by the plaintiff of a document in the nature of a power of attorney, the Bohemian Bank ceased to act in regard to the shares as agents or bailee for the plaintiff but held them instead for an account called " *Vermogensamt* " —*i.e.*, for the German authorities. If counsel for the plaintiff is right in his argument on this part of the case, it must follow that, apart from any English legislation which might then have affected the matter, the plaintiff could, the moment he had left Czechoslovakia (as he was being permitted by the Germans to do), have given instructions to the defendants to transfer the shares into his own name or otherwise deal with them according to his instructions. It is, no doubt, possible that the confiscatory steps then taken by the Germans had so futile an effect, but I confess I find the conclusion highly improbable. On the other hand, when regard is had to the intention which lay behind the measures taken, the facts to which I have referred support, in my judgment, the conclusion at which I have arrived. I add further that, if I am wrong in my analysis of the legal relationship created by the transactions of April and May, 1939, and if, contrary to my view, the defendants became directly bound by contract to the plaintiff, it does not, in my judgment, necessarily follow that the plaintiff would be entitled to succeed on this ground. To do so he would still, as it seems to me, have to show that, as his counsel contended, the Bohemian Bank were and are in the circumstances no more than bare trustees for him. On the assumption of a direct contract between the plaintiff and the defendants, the question still remains : What was the object and what was the effect of the provision in the contract that the defendants should hold the shares for the account of the Bohemian Bank ? It is conceded by counsel for the plaintiff that the plaintiff's right to call for delivery of the securities to himself would A be subject to any lien or proprietary claim on the part of the Bohemian Bank. Although, on the view I take, it is unnecessary to express any concluded opinion, I think that it is at the least arguable that the qualification to the plaintiff's right to delivery should be stated on the broader ground, namely, subject to the consent of the Bohemian Bank, and that the Bohemian Bank has not been shown to have been or to be bound so to consent. For the reasons which I have given, the plaintiff is not, therefore, in my judgment, entitled to succeed B on his claim based on contract.

There still remains, however, the plaintiff's alternative formulation of his claim, which I have called his claim *in rem*, based on the proposition that, whatever the contractual relations between any of the persons concerned, the plaintiff has, on the evidence in the case, proved that he is absolutely entitled beneficially to the shares and entitled, accordingly, to their delivery to himself. It was C on this ground, as I follow him, that MACNAGHTEN, J., decided in the plaintiff's favour. MACNAGHTEN, J., said :

> As the matter stands the Midland Bank disclaims any right, title or interest in the shares. So far as is known, the Bohemian Discount Bank of Prague claims no right, title or interest in the shares. The National Bank of Czechoslovakia claims no right, title or interest in the shares. Everybody concedes that they belong to the plaintiff and to him alone. Therefore, the only question is whether this idea that the Midland D Bank ought not to hand over the shares to the person who admittedly is the owner is really well founded, or whether they are prohibited from so doing by the law of Czechoslovakia which is now expressed in Act No. 92 of 1946, and which I am told is similar to the law which prevailed in 1938 and 1939.

The learned judge later concluded that para. 17 of the Czechoslovak Act, No. 92 of 1946, had no application to the transaction in question in the case before him. With all respect to the learned judge, I find myself unable to agree E with him. I venture to think that he has somewhat overstated the effect of the admission made by the defendants. No question arises as to any claim or interest to or in the shares on the part of the defendants themselves, and it is the fact that the defendants admitted " that the plaintiff is not obliged or indebted to the Bohemian . . . Bank and the Bohemian . . . Bank has no claim to or lien upon " the 800 shares. But, though requested to do so, the defendants did not admit that they held the certificates on the plaintiff's behalf F or that such certificates were the plaintiff's property.

In my judgment, to succeed on this formulation of his case, the plaintiff must prove not merely that he is absolutely entitled beneficially to the shares, but also that he is entitled to possession of the certificates. Put another way, the plaintiff must, in my judgment, show, if the consent of the Bohemian Bank is necessary to his possession of the certificates (as it is, since the defendants G hold them for the account of that bank), either that the Bohemian Bank is bound to give such consent or that the absence of such consent may, on the facts of the case, be disregarded in an English court. It is on this matter, this requirement as regards the right to possession, that, as it seems to me, the plaintiff fails. As I have earlier stated, the Bohemian Bank came under German compulsion in April, 1939, to hold the securities for an account " *Vermogensamt*," *i.e.*, on behalf of the German authorities. As appears, however, H from the Bohemian Bank's letter to the plaintiff's solicitors, dated May 7, 1946, the plaintiff's rights *vis-a-vis* the Bohemian Bank were in that month restored by the Czechoslovak authorities. Since that date the Bohemian bank has, in regard to the shares, been the " agent " or bailee of the plaintiff just as the Zivnostenska Bank had been his " agent " or bailee before the transfer of April, 1939, but it is to be noted that from the date of the Zivnostenska Bank's original letter of Dec. 28, 1938, onwards, it must have been known to, and contemplated by, the plaintiff as well as by both the Zivnostenska Bank and the Bohemian

Bank that the Czechoslovak currency regulations would prevent any transfer of the securities into the plaintiff's own name without the permission of the Czechoslovak National Bank. I think that the plaintiff must have known or contemplated from the first that a transfer of the securities into his own name would require the necessary permission under the Czechoslovak currency regulations and, accordingly, that the consent of his Prague bankers would in no circumstances be a mere formality. I agree with the learned judge that the A defendants are not bound by—in the sense of being in any way subject to—Czechoslovak law, but I cannot agree with him that, therefore, the Czechoslovak currency regulations have no application to the present case. It is, indeed, conceded that, save with the necessary permission, the Bohemian Bank could not consent to the transfer of the securities in the defendants' books from its own name to that of the plaintiff without a contravention on its part of the regulation to which the bank is subject, and, in my judgment, recognition of this fact B does not amount to an enforcement of the "revenue laws" of another country. Assuming in the plaintiff's favour that the currency regulations in question can properly be described as "revenue laws," it is, it seems to me, necessary for the plaintiff to show that the English courts will not in any circumstances "have regard to" such laws, even though it is not in any proper sense of the term "enforcing" them. Such a claim, in my judgment, goes far beyond the C familiar proposition stated in DICEY'S CONFLICT OF LAWS, 5th ed., p. 657, and is not sanctioned by any authority binding on us. In my judgment, therefore, the plaintiff on this part of the case fails to establish such title and right to the securities in question as entitles him, notwithstanding the absence of consent on the part of the Bohemian Bank, to an order for delivery up to himself.

An interesting argument was addressed to us on the scope and effect of the D Bretton Woods Agreements Order in Council, 1946 (S.R. & O., 1946, No. 36) [made under s. 3 of the Bretton Woods Agreements Act, 1945], which gave the effect of law in England to certain parts of the Final Act of the United Nations Monetary and Financial Conference, 1944, commonly known as the Bretton Woods Agreements. The argument turned largely on the interpretation to be given to the term "Exchange contracts" found in the Articles of Agreement of the International Monetary Fund, art. VIII, s. 2 (*b*). The term is not defined E in the Agreement—or in the Order in Council—but provision is made by art. XVIII of the Agreement to the effect that any question of interpretation of the provisions of the Agreement arising as therein stated should be submitted to the executive directors of the International Monetary Fund. On the view I take of the case, it is unnecessary for me to express any view on the argument referred to, and, having regard particularly to the interpretation provisions of F the Agreement itself, it is, I think, undesirable that I should do so. For the reasons which I have attempted to state, I think that this appeal should be allowed and that the plaintiff's claim in the action ought to be dismissed.

ASQUITH, L.J.: Perhaps I may add on my own account that my Lord, I gather, as well as myself, fully concur in this judgment. I have had the advantage of reading certain further observations of SCOTT, L.J., which my Lord is about to read, and I fully concur with them.

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SCOTT, L.J. read the following judgment. I agree entirely with the judgment of EVERSHED, L.J., which has just been read, and it is only on account of the importance of the case to bankers that I read the analysis of the legal position which I had already written from a slightly different angle. The first step is to ascertain the contractual relationship between Kahler and the Zivnostenska Bank. Kahler became its customer in 1938, as stated in the bank's H letter of Dec. 28, 1938, the bank having, apparently, acquired the banking business of his previous Czech bankers, Petschek & Spol. The list of his securities shows that many were then held in safe custody for his bankers at places outside Czechoslovakia, namely, in New York, Amsterdam, Tel Aviv and London. They continued to be so held by the Zivnostenska Bank till the following April. As between him and the Zivnostenska Bank, and, later, as between him and the Bohemian Bank (*i.e.*, between him and each of those banks successively), the securities were held on a contract of bailment. I gather that he also had an account at the Zivnostenska Bank. If so, the bailment would in

English law be one for reward, but, even if he had no current account and the bank were only a gratuitous bailee, its contractual duty would be to take the same care of the securities as a reasonably prudent and careful man would take of his own : *Giblin* v. *M'Mullen* (2). Under that contract the bank made itself responsible for the safe custody of the securities, wherever they might be physically. The Canadian shares in question were not then in the safe custody of the Midland Bank, but, as we have already pointed out, they were so deposited at the instance of the Zivnostenska Bank, as stated in that bank's A
letter to the Midland Bank, of Jan. 16, 1939, with the request that they should be " placed into *our* depot with your good selves, crediting *us* for same under advice to us," and that they should be " informed of the maturity dates of the coupons." I see no evidence that in that contract the plaintiff had any part, and still less that he had authorised the Zivnostenska Bank as his agent to make a contract between him and the Midland Bank. The only implication which the known facts justify is that the Zivnostenska Bank had his full authority B
to use their own discretion as to how, or by whom, they performed their contract of safe custody with him. In my view, it was as customer of the Midland Bank that the Zivnostenska Bank notified the latter that Samuel Montagu & Co. would hand the shares to them. The Midland Bank, by taking the delivery, accepted the offer and engaged itself to the Zivnostenska Bank as its customer. That analysis of the transaction is confirmed by the quotation from the Midland Bank's own securities book, naming the Zivnostenska Bank as its customer, C
without even the mention of any owner's name in the space left against the word " rubric " on the printed form. The reference to " Date advised," as on Feb. 6, 1939, is presumably to the date of the Midland Bank's acknowledgment. To that contract there were just the two parties—the customer (*i.e.*, the Zivnostenska Bank) and the banker (*i.e.*, the Midland Bank), and the only relevant aspect of the transaction is that the banker thereby came under contract D
not to part with the certificates without the customer's express instructions. Up to this point I can see no materiality in considering whether Czech law is the same as, or different from, English law, even if evidence had been given on that aspect, which it was not. For the reasons stated by my brother Evershed, the contractual relationship between the plaintiff and the Bohemian Bank, was, in my judgment, the same as the contractual relationship between the plaintiff and the Zivnostenska Bank, the Bohemian Bank having stepped into E
the shoes of the Zivnostenska Bank. In so far, therefore, as the plaintiff sues the Midland Bank in contract, that legal conclusion entitles the defendants to judgment.

It remains to consider the action in detinue, with its variant claims, of which the only material one is for delivery up. Had the Zivnostenska Bank remained the plaintiff's banker in Czechsolovakia, it would have been a sufficient defence for the Midland Bank to allege and prove that the Zivnostenska Bank, as its F
customer, had not demanded delivery, nor authorised it. But when the Zivnostenska Bank went out of the picture and possession of the plaintiff's 800 shares was transferred by it to the Bohemian Bank in consequence of the demand of the German authorities, the Bohemian Bank, as I have already said, stepped into the shoes of the Zivnostenska Bank for all purposes, both of the contract of deposit, which had obtained between the plaintiff as customer and the G
Zivnostenska Bank as banker, and also of the contract between the Zivnostenska Bank as customer and the Midland Bank as banker. It is necessary, therefore, to consider what answer to the claim in detinue the Midland Bank would have had if the Zivnostenska Bank had continued to be the plaintiff's banker bailee. That question can only be answered by answering a further question : What answer would the Zivnostenska Bank have had to a demand by the plaintiff for his certificates ? Obviously none, apart from the exchange control regula- H
tions of Czechoslovakia which were statute law binding on the Zivnostenska Bank, as banker, *vis-a-vis* their customer, the plaintiff. If they could not lawfully in Czech law have acted on a demand by him to them to hand over possession through their agents in London, *a fortiori* the Midland Bank could not have given up that possession, for, as far as they were concerned, the Zivnostenska Bank was their bailor, subject to Czech law, and the bank's customer, the owner of the shares, could not lawfully compel them to give a consent which would be a criminal offence in Czechoslovakia. But if that was

the true legal position of the Zivnostenska Bank, what difference did the transfer of its rights and liabilities as the plaintiff's bailee to the Bohemian Bank make ? None, for *ex hypothesi* that bank was just as much under the mandatory provisions of Czech law as the Zivnostenska Bank. In addition, an executive control was by Czech law imposed on both banks, namely, the prohibition of any such action as was and is demanded by the plaintiff except with the consent of the Czech National Bank, which, it is common ground, would not have been forthcoming. The inability of any bank in Czechoslovakia to give such consent as *ex hypothesi* was, and still is, a condition precedent to the consent by the Midland Bank's customer, the Bohemian Bank, as bailor, to the delivery out of the custody of the Midland Bank to anybody else whomsoever, is a conclusive defence to the action of detinue.

In the result, the Czech Government may be regarded in two capacities, either of which defeats the plaintiff's claim. The first is that the Bohemian Bank, which alone is potentially competent under its contract with the Midland Bank to relieve the latter of its duty of safe custody, cannot give the necessary consent because it would be breaking the law of Czechoslovakia if it did. The second is that the Czech Government has by its legislation conferred on itself in regard to possession of the shares a title paramount to the title of the plaintiff as owner. If the above reasoning is well founded, it follows that the appeal succeeds, whether the action is on a contract or in detinue.

No application has been made to us by either party in connection with recent events in the State of Czechoslovakia. No question is, therefore, before the court thereon. I agree with the order proposed by EVERSHED, L.J.

Appeal allowed with costs.

Solicitors : *Simmons & Simmons* (for the defendants) ; *Herbert Smith & Co.* (for the plaintiff).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Applied. *Re* SCHINTZ'S TRUSTS. [1951] 1 All E.R. 10

Re EDWARDS' WILL TRUSTS.
DALGLEISH *v.* LEIGHTON.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Cohen, L.JJ.), April 12, 13, 1948.]

Will—Construction—Disposal of residue by reference to settlement of even date—Incorporation of settlement in will—Effect of failure of one clause in settlement on another clause.

On Oct. 16, 1936, the testator executed a settlement which, after appointing a managing trustee and a custodian trustee, provided as follows : "(2) The trust fund and the income thereof shall be held upon trust to pay the income and to transfer the capital or any part or parts thereof *in specie* or otherwise to such persons or for such purposes as the settlor shall by any memorandum under his hand direct and in default of such direction upon trust to pay or transfer the same or any part thereof to such persons and for such purposes as the managing trustee shall in his absolute and uncontrolled discretion think fit. (3) Subject to the provisions of the preceding clause the trust fund and the income thereof shall be held upon trust to pay one half of the income of the trust fund to . . . the wife of the settlor during her life and subject thereto the trust fund and the income thereof shall be held in trust for all or any of the children or child of the settlor who being male attain the age of 21 years or being female attain that age or marry if more than one in equal shares." On the same day the testator made a will which, after appointing as executor the managing trustee under the settlement, provided as follows : "I give all my property . . . to the trustees of a settlement dated Oct. 16, 1936 . . . to be held by them upon the trusts and subject to the powers and provisions therein declared and contained so far as such trusts powers and provisions are subsisting and capable of taking effect." JENKINS, J., held that the provisions of cl. 2 of the settlement could not be validly imported into the will nor could a memorandum which the testator had executed between the date of his will and the date of his death, and that cl. 3 of the settlement fell with cl. 2, with the result that there was an intestacy of the residuary estate. On appeal:—

Held: (i) the settlement was a document which could be identified, and, therefore, could be incorporated into the will.

Re Jones, Jones v. *Jones*, ([1942] 1 All E.R. 642), *distinguished.*

(ii) the words "subject to the provisions of the preceding clause" in cl. 3 were apt to meet an attempt to deal with the property under cl. 2 which failed, not from any lack of intention on the part of the testator or any insufficiency of language, but because some rule of law made it incapable of achievement, and, consequently, cl. 3 operated on the whole of the residuary estate.

Dictum of Lord Selborne, L.C., in *Webb* v. *Sadler* (1873) (8 Ch. App. 419, 426), *applied.*

Decision of Jenkins, J. ([1947] 2 All E.R. 521), *reversed on latter point.*

[As to Incorporation of Other Documents in a Will, see HALSBURY, Hailsham Edn., Vol. 34, p. 167, para. 219; and for Cases, see DIGEST, Vol. 44, pp. 237-245, Nos. *624-712*.]

Cases referred to:

(1) *Re Jones, Jones* v. *Jones*, [1942] 1 All E.R. 642; [1942] Ch. 328; 111 L.J.Ch. 193; 167 L.T. 84; 2nd Digest Supp.

(2) *Re Finch & Chew's Contract*, [1903] 2 Ch. 486; 72 L.J.Ch. 690; 89 L.T. 162; 43 Digest 603, *501*.

(3) *Webb* v. *Sadler*, (1873), 8 Ch. App. 419; 42 L.J.Ch. 498; 28 L.T. 388; 37 Digest 408, *181*.

Appeal of defendants (a son and two grandchildren claiming under cl. 3 of the settlement) from an order of Jenkins, J., dated July 25, 1947, and reported [1947] 2 All E.R. 521.

The learned judge had held that a clause in a settlement, intended by the testator to be incorporated in his will, fell with another clause in the settlement which could not validly be imported into the will, with the result that there was an intestacy of the residuary estate. The appeal was allowed. The facts appear in the judgment of Lord Greene, M.R.

Pascoe Hayward, K.C., and *Wilfrid Hunt* for the son and two grandchildren claiming under cl. 3 of the settlement.

Sir Andrew Clark, K.C., and *Milner Holland, K.C.*, for the widow claiming under an intestacy.

M. J. Albery for the trustee.

E. I. Goulding for another son of the testator.

LORD GREENE, M.R.: The testator in this case has set a problem which has some novelty so far as my experience is concerned. He appears to have been minded to give himself a power of testamentary disposition wider in extent and more elastic than that which the law allows under the Wills Act, 1837. He executed a settlement, dated Oct. 16, 1936. Under it he appointed a managing trustee and a custodian trustee, a piece of machinery which he could scarcely have thought necessary to deal with the very small sum, *viz.*, £100, which he was settling. The settlement was obviously intended as a framework into which some subsequent directions in regard to his property might be inserted at a later date. The relevant clauses of that settlement for present purposes are cll. 2 and 3. Clause 2 is:

> The trust fund and the income thereof shall be held upon trust to pay the income and to transfer the capital or any part or parts thereof *in specie* or otherwise to such persons or for such purposes as the settlor shall by any memorandum under his hand direct and in default of such direction upon trust to pay or transfer the same or any part thereof to such persons and for such purposes as the managing trustee shall in his absolute and uncontrolled discretion think fit.

Clause 3 is:

> Subject to the provisions of the preceding clause the trust fund and the income thereof shall be held upon trust to pay one half of the income of the trust fund to Maria Mercedes Edwards the wife of the settlor during her life and subject thereto the trust fund and the income thereof shall be held in trust for all or any of the children or child of the settlor who being male attain the age of 21 years or being female attain that age or marry if more than one in equal shares.

As a disposition *inter vivos* that document calls for no special comment. The difficulty has arisen because the testator has used it as a framework into which to insert his testamentary wishes. He did it in this way. He made a will dated Oct. 16, 1936, *i.e.*, the same day as the settlement. He appointed as his executor the gentleman whom he had made managing trustee under the settlement, and by cl. 2 he provided this:

> I give all my property subject to and after payment of my funeral and testamentary expenses and debts to the trustees of a settlement dated Oct. 16, 1936 . . . to be held by them upon the trusts and subject to the powers and provisions therein declared and contained so far as such trusts powers and provisions are subsisting and capable of taking effect.

In those attempts to use the rather special provisions of the settlement as part of the machinery for carrying out his testamentary wishes, the testator, I have no doubt without realising it, fell into a trap because he had failed to direct his mind to the provisions of the Wills Act, 1837.

Various questions arose before the learned judge. His answers to them I may state quite shortly. The provisions of cl. 2 of the settlement could not be validly imported into the will nor could a memorandum which the testator had executed between the date of his will and the date of his death. The memorandum was dated Dec. 21, 1937, and by it he directed the trustees of the settlement to raise out of the proceeds and subject to the trusts of the settlement sums amounting to many thousands of pounds, the settlement at that date comprising exactly £100. When executing the memorandum he, no doubt, contemplated that by the effect of his will the available funds would be there. That memorandum, for reasons to which I need not refer, was invalid as a testamentary document or as an expression of testamentary wishes. Those decisions of the learned judge are not contested in this court. The sole question before us arises in this way. There being no means of giving legal effect to the direction in cl. 2 of the settlement as part of the testamentary wishes of the testator, what is the effect of that on the directions in cl. 3 of the settlement which, together with cl. 2, the testator clearly intended by his will to be incorporated in his testamentary disposition. The learned judge has held that cl. 3 falls with cl. 2, with the result that there is an intestacy of the residuary estate. The contrary view is that cl. 3 of the settlement forms a valid part of the will and its validity is not affected in any way by the circumstances that the powers which the testator wished to reserve to himself by means of cl. 2 of the settlement are incapable of being exercised.

The argument has not lacked subtlety, but, speaking for myself, I think that a rather more simple approach to the problem will lead to the correct result. The testator makes clear what his testamentary wishes are. He directs that those concerned with the administration of his estate shall turn to the settlement to find what those wishes are. The identification of that document is a simple matter. There is no question what the document is, and there is no rule of law which makes it impossible to lead evidence to identify it. I say that at the outset, because reliance has been placed on a decision of Simonds, J., in *Re Jones* (1). That was a case in which the testator directed payment of a legacy to trustees "appointed or to be appointed under special declaration of trust for the benefit of Tettenhall College or otherwise as therein contained executed by me bearing even date with this my last will and testament or any substitution therefor or modification thereof or addition thereto which I may hereafter execute." In the very gift itself the testator was endeavouring to reserve power to himself to modify or alter the gift at some later date by a subsequent instrument not executed in accordance with the Wills Act, 1837. Simonds, J., pointed out that, whereas in the case of a document in existence it is always possible to lead evidence to identify the document, in the case before him it never would be possible to lead evidence to identify any subsequent document. On that ground he held that, if effect were given to the direction, it would be equivalent to giving a power to change a testamentary disposition by an unexecuted codicil in violation of the Wills Act, 1837, and, therefore, that the gift failed for uncertainty. That seems to me to be a different case from that which we have here. This settlement was a document which can be identified and there is no rule of law to the contrary. It can, accordingly, be incorporated as a piece of writing into the testamentary disposition. Indeed, if the settlement, instead of being a thing having value and force in itself, had been merely a memorandum previously executed to which, in his will, the testator referred, it could have been admitted to probate as a testamentary instrument. The question then would have arisen: What provisions in this instrument are valid and what are invalid ?

In other words, I start with the proposition that the incorporation of this document into the will is a permissible and easy matter. When I say incorporation, I refer to what I may call the mechanical act of incorporation by reading the language of the document into the will itself. The effect is that we have now got to a stage where there is a document, part of the directions in which cannot operate any more than they could operate if they had been contained, as in *Re Jones* (1), in the will itself. The presence of that invalid provision in *Re Jones* (1) did not involve that it was to be struck out of the probate and treated as not being part of the will at all, nor do I see any reason why the invalidity of a provision contained in this settlement should be any reason for excluding it from the testamentary directions of the deceased. The result of his having in that identifiable document included something which the law does not allow to have effect is a matter to be considered after probate when the question of the validity of his testamentary dispositions arises. The result, therefore, is that we have here, so to speak, a composite will consisting of a combination of the provisions of the actual will itself *plus* those of the settlement.

Having got to that stage the only question which remains is how, if at all, are the provisions contained in cl. 3 of the settlement affected by the failure of those contained in cl. 2 because the law does not allow them to take effect. It is argued that the language of cl. 3 of the settlement, on its true interpretation, shows the testator's meaning to have been that the provisions of cl. 3 should only come into operation when the powers conferred by cl. 2 should be exhausted. It is true, no doubt, that we are dealing with a residuary gift. It is also true that cl. 2 of the settlement was intended by the testator to operate, and could only operate, by means of some other act of his own. It is not a case where the testator by his will gives to a third person a power which for some reason or other is invalid, a power which, of course, could be exercised only after his death. He is contemplating here that at his death there may be in existence some direction by himself under cl. 2 of the settlement which will have the effect of removing the whole or part of the residue from the operation of cl. 3. Now, says *Sir Andrew Clark*, we know that that memorandum was executed, but we must not look at it, and, as a memorandum was executed and we cannot tell what it contains, the result is that cl. 3 cannot be given any operation because we do not know how much there is left on which the testator intended cl. 3 to operate. While appreciating the distinction which he draws, it is, I think, really a distinction in form rather than of substance, and for my part I cannot see any real ground such as *Sir Andrew Clark* put forward for distinguishing the substantial point in this case from the substantial point in a case where the testator gives by his will a power of appointment to somebody, which, for some reason or another, *e.g.*, the law of remoteness, turns out to be invalid. I read the words " subject to the provisions of the preceding clause " at the beginning of cl. 3 in what appears to me to be their natural meaning, *viz.*, in so far as under the provisions of the preceding clause the residuary estate shall not have been effectively dealt with. It covers, I think, not merely effectively dealt with in fact, but also effectively dealt with in law, and, in so far as an attempt under cl. 2 to deal with the property fails, not from any lack of intention on the part of the testator or any insufficiency of language, but because some rule of law makes it incapable of achievement, then I think the words " subject to the provisions of the preceding clause " are apt to meet such a case. If there has been no effective disposition of the residue under cl. 2, which as a matter of law there could not be, cl. 3 has its natural effect.

That seems to me to be the simple answer to this problem. The argument, which found favour with the learned judge—and I should like to say, as we understand it, that the point was not argued so fully as it was argued before us—appears on analysis to be that, on the true construction of the directions for incorporation contained in the will—that is, the directions for incorporation of the trusts of the settlement—they must be construed as meaning that it is to be either the whole settlement or nothing that is to be incorporated. That would be putting the problem of construction, so to speak, back a stage because then we should be construing, not the document as incorporated, but the directions for the incorporation. The learned judge took the view, and *Sir Andrew Clark* urged before us, that the directions for incorporation must be read as meaning the whole settlement and nothing but the settlement, and that, in so far as the law prevented the effective incorporation of any part of A the settlement, all the directions for incorporation fell to the ground. I do not take that view. It seems to me that the directions for incorporation are directions to read into the will the entirety of a document which the testator, no doubt, thought would be effective, but if, on writing them into the will, it turns out that part of them is invalid from some rule of law, as in the present case, I cannot read the testator's directions as meaning that, therefore, the whole process of incorporation must be abandoned. I think that the effect of it is B that so much of the settlement as can validly have operation as part of a testamentary disposition is left to have its proper operation according to its true construction. I have formed that view quite apart from a point which appears to me to confirm it, and that is that in cl. 2 of the will, after the direction as to how the residuary estate is to be held on the trusts of the settlement, appear the words "so far as such trusts powers and provisions are subsisting and C capable of having effect." I see no reason myself for reading those words as not extending to a case where some of the trusts are invalid through a rule of law. The position is that when the settlement is written into the will there is a string of trusts, some of them capable but some incapable of taking effect. It is true, I think, that this form of phrase generally operates in the common case where some trusts in the document referred to have expired through the effluxion of time, the extinction of a family, the birth of children, or something of that D kind, which may make certain trusts incapable of taking effect, but I do not read the words as limited to that class of case. I think a trust which is prevented from operating by a rule of law can be fairly described as a trust which is not subsisting and capable of taking effect. As I have said, I come to the same conclusion without reference to those words, but I think their presence confirms the view that I have taken. In my opinion, the judgment of the learned judge must be reversed on this point and an appropriate declaration E made.

SOMERVELL, L.J.: I agree.

COHEN, L.J.: I agree, but as we are differing from the learned judge in the court below I will state shortly my reasons for coming to that conclusion. *Mr. Pascoe Hayward* invites us to reverse the decision of the learned judge F on this point on two grounds, first, that, as a matter of construction of the will, one must only read into the will the unobjectionable trusts declared by the settlement in view of the concluding words of cl. 2 of the will to which my Lord has referred "so far as such trusts powers and provisions are subsisting and capable of taking effect." The result of that would be to incorporate into the will only the trusts declared by cl. 3 of the settlement. Alternatively, G he said, one must read the whole settlement into the will and then construe it, and as a matter of construction cl. 3 is intended to operate on so much of the residue as shall not be effectively disposed of by a direction or disposition under cl. 2 of the settlement. The first point was, apparently, not taken in the court below. At any rate, there would appear to have been no reference to the case on which reliance was placed in this court, namely, *Re Finch and Chew's Contract* (2). While not in the least differing from what my Lord has said as to the effect H of the material words, speaking for myself I do not think that the will can be construed in this sense and I prefer the second argument advanced by *Mr. Pascoe Hayward.* I think, as the learned judge thought, that one must read into the will the whole of the relevant provisions of the settlement and then construe them. Where I differ from the learned judge is in his ultimate conclusion on the matter of construction. As my Lord has pointed out, the learned judge had not the advantage of a full argument on this point nor was his attention called to the authorities to which our attention has been directed. He states his reasons very shortly in these terms ([1947] 2 All E.R. 529):

> It remains to consider what is the position as regards the trust by reference to cl. 3 of the settlement. I have been invited to hold that, even if the trusts by reference to cl. 2 are abortive so far as the residuary estate is concerned, yet it is open to me to hold that there is a valid trust by reference to cl. 3. It seems to me that it would be wrong for me to come to any such conclusion. It is clear that the testator's intention was to incorporate as part of the trusts of his will the whole of the trusts subsisting under the settlement, including the trusts of any memorandum he might have executed or might thereafter execute. That was his intention. That intention fails, for the reasons I have stated. It seems to me impossible for the court to substitute another intention and, by rejecting that part of the disposition which is bad, arrive at some residual disposition which can be held to be good, because, by so doing, the court would be making a new will for the testator and would be doing something which there is no ground to suppose was his intention at all . . .

It is with the last sentence that, with respect, I quarrel. It seems to me to be a *non sequitur*. Granted that it was the testator's intention to incorporate as part of the trusts of his will the whole of the trusts under a settlement, including trusts in any memorandum he might have executed after the date of the will. Granted that that intention fails for the reasons which JENKINS, J., gave, but it does not seem to me to follow that, by giving effect to cl. 3, we are making a new will for the testator in any sense whatsoever. The question is: In what event did the testator intend cl. 3 to operate ? That depends on the words "subject to the provisions of the preceding clause." For the reasons that my Lord has given, I think those words mean "subject to any effective disposition under the preceding clause." I am supported in that view by some observations of LORD SELBORNE, L.C., in *Webb* v. *Sadler* (3). That, it is true, was a case where what was under consideration was solely the provisions of a single document, but I do not think that any distinction in principle can be drawn between a case where the court has only to construe a single document and one where two documents are involved, the testator directing the terms of the second document to be read into his will. What LORD SELBORNE said was this (8 Ch. App. 419, 426):

> Then the next question is, whether the subsequent appointments, "in default of and subject to any such limitation or appointment" containing dispositions in favour of the son, are so connected with the void power that the void power failing they fail also. It seems to me that such a construction would be expressly contrary to the declared intention. The declared intention is, that unless estates that would displace this gift to the son are created in favour of other persons by means of the power, then the son is to take under this part of the instrument; and if the power is void, then no such estate could be created, and the event never could arise which alone was meant to prevent the gift in favour of the son taking effect. The words "and subject to" confirm this view. If it had been intended to create a charge, and the gift made to the son were "subject to the charge," then, if the charge did not arise, the son would have taken it free from that charge.

Applying the principle of that passage to the documents with which we are concerned, as I read cl. 3 the declared intention of this testator is that, unless effective dispositions are made which would cut down the gift of the trust fund and the income thereof in favour of his widow and his children, then his widow and his children are to have the whole of that estate. No effective disposition was so made, and, therefore, in my view, cl. 3 operates on the whole of the residuary estate. For these reasons, I agree with my Lord that the declaration of the learned judge on this portion of the summons ought to be varied.

Appeal allowed. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors: *James Turner & Son; Wordsworth & Co.; Mossop & Syms.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

DAVEY *v.* SHAWCROFT.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 12, 20, 1948.]

Coal—Control—Distribution—"Licensed merchant"—Unincorporate body—Committee registered as licensed merchant—Agent of committee—Interpretation Act, 1889 (c. 63), *s.* 19—*Coal Distribution Order*, 1943 (*S.R. & O.*, 1943, *No.* 1138), *arts.* 2, 78.

The appellant was the secretary of a committee of workmen and employees at a steelworks which was formed to supply its members with coal for domestic use. On the appellant's application, the committee was registered as coal merchants and a certificate of registration was issued in its name. The appellant, acting in the course of his employment, ordered coal to be supplied to premises which were not within the terms of the committee's authorisation. The appellant was charged that, being a licensed merchant, he unlawfully supplied coal to those premises contrary to the Coal Distribution Order, 1943, art. 2. It was not disputed that, if the appellant was a licensed merchant, he was guilty of the offence charged.

HELD: by virtue of the Interpretation Act, 1889, s. 19, the committee was a "person" within the meaning of art. 78 of the Order of 1943, and was, therefore, a licensed merchant within that article and art. 2 of the Order, and, under the terms of art. 78, the appellant, as the committee's agent, was also a licensed merchant for the purposes of the Order.

Per cur.: It is inconvenient to register under the Order an unincorporate body as such. It would be preferable that in the case of a committee, a club, or other association, one or, perhaps, two members "and others trading as aforesaid," or the manager, or other officer, should be registered as the licensed merchant.

[FOR THE INTERPRETATION ACT, 1889, s. 19, see HALSBURY'S STATUTES, Vol. 18, p. 1001.]

CASE STATED by Lincolnshire (Parts of Lindsey) justices.

At a court of summary jurisdiction sitting at Scunthorpe an information was preferred by the respondent, the local fuel overseer, for and on behalf of the Ministry of Fuel and Power, charging the appellant that he, then being a licensed merchant, with having, between Oct. 6 and Dec. 21, 1946, unlawfully furnished 16½ cwts. of coke for actual consumption in controlled premises at 42, Davy Avenue, Scunthorpe, and not for re-sale, his name not then being entered in the Controlled Premises Register as that of a licensed merchant authorised to furnish supplies of coal in relation to those premises, contrary to the Coal Distribution Order, 1943, art. 2, made under the Defence (General) Regulations, 1939, regs. 55 and 55AA. At the hearing on Oct. 22, 1947, the appellant contended *inter alia*, that he was not a licensed merchant within the meaning of the Coal Distribution Order, 1943, arts. 2 and 78, the committee of which he was the servant or agent being an unincorporate body and so not a "person" within the meaning of art. 78. The justices held that the appellant was a licensed merchant, convicted him, fined him £2 and ordered him to pay £5 5*s.* advocate's fee. The Divisional Court now dismissed his appeal. The facts appear in the judgment of LORD GODDARD, C.J.

Swanwick for the appellant.
H. L. Parker for the respondent.

Cur. adv. vult.

Apr. 20. The following judgments were read.

LORD GODDARD, C.J.: The short effect of the charge against the appellant was that he supplied coal to domestic premises which he was not authorised to supply. The facts found by the justices were that the appellant was the secretary of a committee of workmen and employees employed at the steelworks of John Lysaght, Ltd., the committee being formed, apparently, to supply its members with coal for domestic use. The appellant had signed an application for the registration of the committee as licensed coal merchants and in consequence of that application a licence was issued in these terms:

> Certificate of registration as a licensed merchant in the borough of Scunthorpe. I hereby certify that the Lysaghts Joint Works Coal Committee, Normanby Park Steel

Works, Scunthorpe, have been entered on the register of persons authorised to supply coal in the above-mentioned district.

This registration and certificate were renewed from time to time and were in force at the material times. Deliveries of coal were made on the orders of the appellant to various persons, and it was not contended that, if the appellant was a licensed merchant, he did not, by making the particular deliveries referred to in the charge, commit a breach of the Order. It is unnecessary to consider the reason why these deliveries were a breach of the Order, but it was conceded that they were. The appellant contended that the committee were not, and could not be, a licensed merchant within art. 2 of the Order, and that, accordingly, he, as their servant or agent, was not the servant or agent of a licensed merchant.

The definition of "licensed merchant" is contained in art. 78 of the Coal Distribution Order, 1943, which provides:

> "Licensed merchant" means any person carrying on an undertaking and whose name is entered in the Licensed Merchants Register as such and shall include the servant or agent, acting in the course of his employment, of any such person.

It was not contended that the appellant was a person carrying on an undertaking or that his name was entered in the register, but it was said by the prosecution that he became a licensed merchant in that he was the servant or agent of one who was. The submission of counsel for the appellant was that a committee could not be a licensed merchant, and, if that be right, it would follow that the appellant was not, and could not be, the servant or agent of a licensed merchant, so that, whether or not he had committed some other offence under the Order, he had not committed the offence with which he was charged. The whole question is whether a committee of persons can be a licensed merchant and registered as such.

At the root of the argument of counsel for the appellant was the contention that by the Interpretation Act, 1889, s. 2, it is provided that in the construction of every enactment relating to an offence punishable on indictment or on summary conviction the expression "person" shall, unless the contrary intention appears, include a body corporate. He contended that as the committee were not a body corporate, s. 2 had no application, and he also said that, in view of the terms of s. 2, s. 19 of the Act of 1889 had no application to any criminal matter, but applied only to civil matters or rights. That section provides:

> In this Act and in every Act passed after the commencement of this Act the expression "person" shall, unless the contrary intention appears, include any body of persons corporate or unincorporate.

The first answer to this contention is that the committee are not being prosecuted. They are not a party to any criminal proceedings. If members of an unincorporate body commit an offence they can be prosecuted, but they must be charged or indicted individually. If, however, a body of persons carry on an undertaking within the meaning of this Order, whether as partners or not, it seems to me that, unless a contrary intention can be found, they are a "person" and can, as a body, apply to be registered. The effect of the registration is, no doubt, that each member becomes a licensed dealer, but, as their relationship is joint, it follows that there is only one business and the sale of coal by one is a sale by all. The effect of registering the body does not mean that each member of the committee can supply coal to the same customer, thereby enabling the latter to get as many rations of coal as there are members of the committee. The customer cannot get more than one ration. That ration, by whichever member supplied, is supplied by all. So, the servant or agent of the committee is the servant or agent of each member, but he serves or acts for them jointly. In my opinion, s. 19 does enable the committee, who, by virtue of that section, are to be regarded as a person, if they carry on an undertaking, to be registered as a licensed merchant, and it is enough for the purposes of art. 20 if the name of the committee and the address at which they normally carry on business are registered. I can find nothing in the Order which indicates a contrary intention. I can find nothing, for instance, to indicate that a firm cannot be registered. If an offence were committed in the ordinary course of the firm's business, it may well be that each individual partner would be liable to prosecution, though they would have to be prosecuted as individuals and not in the firm's name.

There may well be other Orders or enactments which provide for the licensing of a person, and the very purpose for which the licence was granted might exclude the construction that " a person " could be a body of persons, for example, matters relating to the sale of intoxicating liquors, but this case deals with a licence to be granted to traders carrying on the business of coal merchants, one frequently carried on by partners, and a licence to the firm is, in effect, a licence to the partners. I have already pointed out that this does not enable them to multiply sales so as to defeat the object of the Order. It would, no doubt, be preferable that in the case of a committee, a club, or other association, one, or perhaps, two, of the members, or the manager, or other officer, should be registered as the licensed merchant. Were that done, the question raised in this case could not arise. For the reasons which I have endeavoured to state, I am of opinion that the justices came to a correct determination in point of law, and this appeal must be dismissed.

HUMPHREYS, J.: I agree in the result proposed. As, however, I may have approached the consideration of the matter from a slightly different angle from that indicated by my Lord, I proceed to state the way in which I have arrived at my conclusion.

In my opinion, the form of application to be registered as a licensed merchant sent in by the appellant on behalf of the committee was irregular and has resulted in the particulars of registration which followed on the application being also irregular, but I am not prepared to hold that the registration was illegal on that account. If the offence charged had involved a breach of the terms of the licence or registration, it might have been necessary to look at the matter more closely, but the substance of the offence here charged consisted in the furnishing of coal by the committee to certain premises without being authorised to do so. The appellant, as the agent of the committee, was the moving spirit in the doing of the various acts which constituted the alleged offence. It was he who caused a poster offering coal to be displayed and he who gave orders for the coal to be delivered. The only materiality of the licence held by the committee was that it afforded a complete defence to any charge under art. 1 of the Order, which provides that " no person other than a licensed merchant shall furnish coal," and it would, no doubt, have been pleaded, and successfully, if any prosecution under that clause had been instituted. On the facts of this case the registration could afford no defence to the appellant for the reason that it did not authorise the furnishing of coal to the particular premises mentioned, namely, 42, Davy Avenue, by the committee whose agent he was. I agree, however, that the information against the appellant for an offence against art. 2 was bound to allege that he, or the committee whose agent he was, had been registered. *Prima facie* proof of registration was afforded by the certificate which had been issued under art. 21. That certificate followed on an application made under art. 19. That article was, in my view, strictly complied with. That appears to be all that is necessary to justify registration. Article 20, however, shows the inconvenience of registering an unincorporate body as such. The same result could have been achieved by registering " A, B, C and D carrying on business in the name of Lysaght's Joint Works Coal Committee." In that event the full name of each member of the committee could have appeared on the register as required by art. 20. I see no reason, if the members of the committee were very numerous, why the persons registered should not be described as " A, B, C and D and others trading " as aforesaid. However that may be, I regard the language of art. 20 as being directory only as to what particulars should be entered on the register, and the omission, assuming such to be proved, of some names should not, in my opinion, be held to invalidate the registration, particularly at the instance of the person who himself is responsible for the form of registration, unless, indeed, it can be said that a committee, being an unincorporate body, cannot be a " person." As to that, s. 19 of the Interpretation Act, 1889, seems to me to be conclusive, since I find no indication to the contrary in the Coal Distribution Order itself. Section 2 of that Act was relied on by counsel for the appellant, and I think shows a further reason for not adopting this form of registration in future, since the committee as such cannot be prosecuted, but it affords no ground for whittling away the wide language of s. 19. The definition of " licensed merchant" in art. 78 of the Coal Distribution Order, in my opinion, carried the matter no further. There are no merits whatever in this appeal, and I think it should be dismissed.

PRITCHARD, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *W. Bains*, Scunthorpe (for the appellant) ; *Solicitor, Ministry of Fuel and Power* (for the respondent).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

CARDIFF RATING AUTHORITY AND ANOTHER *v.* GUEST KEEN BALDWINS IRON & STEEL CO., LTD.

[King's Bench Division (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 9, 20, 1948.]

Rates and Rating—Valuation—Plant and machinery—" Unit basis "—" Contractor's theory "—Blast and melting furnaces and coke ovens—Obligation to repair—Movability—Tilting furnaces—Gas and blast mains—Rating and Valuation Act, 1925 (*c.* 90), *s.* 22 (1) (*b*)*—Plant and Machinery* (*Valuation for Rating*) *Order,* 1927 (*S.R. & O.*, 1927, *No.* 480), *sched., class* (4).

A rating authority made a proposal to raise the assessment of the respondent's iron and steel works to £80,327 net annual value and £20,082 rateable value, and the proposal was confirmed by the assessment committee. On appeal to quarter sessions the assessment was reduced to £58,000 net annual value and £14,500 rateable value. The rating authority and the assessment committee appealed against the substituted assessment on the grounds that the recorder was wrong (i) in reducing the assessment by £6,090 net annual value in respect of 4 blast furnaces, 2 fixed steel melting furnaces and 69 coke ovens ; (ii) in holding that 5 tilting melting furnaces, certain gas mains and hot and cold blast mains were not rateable. The tilting furnaces each resembled a large bath 30ft. long and 18ft. wide weighing over 300 tons. They were made of steel plates and joists, bolted, riveted and welded together on site, and were lined with brickwork to a considerable thickness. They rested by their own weight on steel rollers, resting on curved roller paths which were themselves supported on concrete piers. The gas and blast mains consisted of 13,000ft. of steel piping made up of 20ft. lengths, bolted together on site, and resting on, but not attached to, steel vertical supports or metal bridge structures at a height of from 10ft. to 35ft. from the ground. The external diameter of the mains varied from 20ins. to 96ins., and the hot blast mains were lined with brickwork. It appeared from the Case that the recorder accepted in their entirety the capital values contained in the valuation made on behalf of the rating authority, and he also accepted the percentages by which, adopting the " contractor's theory " of valuation, the net annual value proposed for the hereditament had been reached. The recorder, however, did not adhere to that theory of valuation when determining the value of the blast furnaces, melting furnaces and coke ovens because they were " short lived," but he adopted instead the " unit basis " of valuation, whereby he assumed a net annual value in respect of each unit. The rating authority argued that the works ought to have been valued as one entire hereditament, and to treat any particular plant as a separate hereditament was to err in law and, further, that as, in conformity with the Rating and Valuation Act, 1925, s. 22 (1) (*b*), the valuation on the " contractor's theory " must be assumed to take into account the obligation to repair and maintain the hereditament, including the short-lived plant, that obligation would be taken twice into account by the further reduction resulting from the method adopted by the recorder.

Held : (i) it was clear from the Case that the recorder never had in mind more than one hereditament, but that, in arriving at the value of that hereditament, he preferred to consider the blast furnaces, melting furnaces and coke ovens on the " unit basis " rather than on the " contractor's theory," and, in so doing, he was not wrong in law.

(ii) the question whether the obligation to repair and maintain had been taken twice into account was one of fact, and the appeal could only succeed if it were shown that the recorder erred in law.

(iii) the recorder was wrong in applying the test of movability to decide the rateability of the tilting furnaces and gas and blast mains, and both the furnaces and the mains were "in the nature of a building or structure" within the meaning of class 4 of the schedule to the Plant and Machinery A (Valuation for Rating) Order, 1927, and, therefore, rateable.

Observations of LORD ESHER, M.R., and LINDLEY, L.J., in *Tyne Boiler Works Co.* v. *Longbenton Overseers* (1886) (18 Q.B.D. 81, 91, 94; 55 L.T. 825, 829, 830), *applied.*

[AS TO BASIS OF ASSESSMENT OF PLANT AND MACHINERY, see HALSBURY, Hailsham Edn., Vol. 27, pp. 392-394, paras. 826, 827; and FOR CASES, see DIGEST, Vol. 38, B pp. 531-534, Nos. *772-795.*]

Cases referred to:

(1) *Consett Overseers* v. *Durham County Council,* (1923), 128 L.T. 310; 87 J.P. 1; 20 L.G.R. 809; 38 Digest 575, *1121.*

(2) *Tyne Boiler Works Co.* v. *Longbenton Overseers,* (1886), 18 Q.B.D. 81; 56 L.J.M.C. 8; *sub nom., Tyne Boiler Works Co., Ltd.* v. *Tynemouth Union,* 55 L.T. 825; 51 J.P. 420; 38 Digest 533, *781.*

C (3) *Thomas (Richard) & Co., Ltd.* v. *Monmouth County Valuation Committee and Assessment Committee,* [1944] 1 All E.R. 417; 170 L.T. 333; 2nd Digest Supp.

CASE STATED by the Recorder of Cardiff. The appellants, Cardiff Rating Authority, made a proposal to increase the assessment of the iron and steel works, situated at East Moors, Cardiff, and known as the Dowlais Works, of the respondent occupiers to £80,327 net annual value and £20,082 rateable D value. On Aug. 4, 1943, the second appellants, Cardiff Assessment Committee, having heard the proposal and the occupiers' objections thereto, confirmed the proposal. The respondents appealed to quarter sessions, who heard the appeal on Sept. 26, 27 and 28, 1944, and on May 23, 1945, in a reserved judgment, allowed the appeal and reduced the assessment to £58,000 net annual value and £14,500 rateable value. The rating authority and the assessment committee appealed on the ground that (i) the "contractor's theory" of valuation should E be applied to the valuation of certain blast furnaces, melting furnaces and coke ovens, comprised in the hereditament, and (ii) certain overhead gas mains, cold blast mains and hot blast mains, and certain melting furnaces known as tilting furnaces, comprised in the hereditament were rateable plant and machinery. The occupiers formally raised the question of the rateability of certain electrical equipment which the court was precluded from deciding in their favour by the F decision of the Court of Appeal in *Richard Thomas & Co., Ltd.* v. *Monmouth County Valuation Committee and Assessment Committee* ([1944] 1 All E.R. 417). The Divisional Court held that the recorder was not wrong in law in adopting a "unit basis" of valuation in certain instances, but that he erred in deciding on the basis of movability that the tilting furnaces and gas and blast mains were not rateable. Leave to appeal was given to both appellants and respondents. The facts appear in the judgment of the court.

G *Craig Henderson, K.C.,* and *Roskin* for the appellants.

Sir Cyril Radcliffe, K.C., and *R. Gwyn Rees* for the company.

Cur. adv. vult.

Apr. 20. **PRITCHARD, J.,** read the following judgment of the court. The dispute which gives rise to this appeal is now nearly five years old, and it concerns the ascertainment of the net annual value and the rateable value of H iron and steel works at East Moors, Cardiff, of which the respondents are the occupiers. The works are known as the Dowlais Works. The appellants based their appeal on three grounds, namely: (i) they contended that the learned recorder was wrong in reducing the assessment by £6,090 (net annual value) in respect of 4 blast furnaces, 2 fixed steel melting furnaces and 69 coke ovens; (ii) they contended that the learned recorder was wrong in holding that 5 tilting furnaces were not rateable; (iii) they contended that the learned recorder was wrong in holding that certain gas mains and hot and cold blast mains were not rateable.

With regard to (i), the 4 blast furnaces, 2 fixed steel melting furnaces and 69 coke ovens, it appears from the Case that the appellants' witness, Mr. Gerald Eve, arrived at his figure of £80,327 (net annual value) by valuing the works as one entire hereditament, taking the effective capital values of the land, buildings, plant and machinery, and applying certain percentages thereto. The learned recorder says in the Case that he accepted in their entirety the capital values contained in Mr. Eve's valuation as being the true effective capital values of the land, buildings, plant and machinery, and also that he accepted the percentages applied by Mr. Eve to the said capital values to arrive at the net annual value of the hereditament. This method of arriving at the net annual value is known as "the contractor's theory" of valuation, and the learned recorder expressly says that he accepted the principle of this method. Later in the Case, however, he says that he did not adhere to "the contractor's theory" when determining the value of the blast furnaces, melting furnaces and coke ovens because some of these were "short-lived," and he says that, in respect of short-lived plant, it would be "very forced and anomalous" from a tenant's point of view to base the rent on the capital value. He decided, therefore, that all rateable plant and machinery which had a normal life of at least 20 years should be valued on "the contractor's theory," but that such parts of the blast furnaces, melting furnaces, and coke ovens as had a shorter normal life than 20 years should be valued, not on that basis, but on a "unit valuation." He then "fixed" the "units of valuation" by taking each of the 4 blast furnaces, each of the 2 melting furnaces and each of the 69 coke ovens as a separate "unit" and assessing a net annual value in respect of each unit, and he says that, if he was wrong in rejecting "the contractor's theory" of valuation in the case of these items, the net annual value of £58,000 fixed by him would be increased by £6,090. It is the appellants' contention that in this respect the Case demonstrates on the face of it that the learned recorder was wrong in law in his treatment of these blast furnaces, melting furnaces, and coke-ovens. They contend that the rateable value of these works had to be ascertained in accordance with the provisions of the Rating and Valuation Act, 1925, s. 22 (1) (*b*), and they rely on *Consett Overseers* v. *Durham County Council* (1) for the proposition that these works ought to have been valued as one entire hereditament and that to treat any particular part of the plant as a separate rateable hereditament was to err in law. In our judgment, it is clear from this decision that, if the learned recorder did treat these blast furnaces, melting furnaces, and coke-ovens as separate hereditaments, he was wrong in law and his decision based on such error could not be allowed to stand. We have come to the conclusion, however, that that is not what the learned recorder did. In his judgment we find the following passages:

> It is clear beyond doubt that the "contractor's theory" has now been used for so many years that I must apply it in the present case. But there comes a point at which the theory ceases to be of any real assistance in guiding me to the net annual value of the hereditament. If we realise that it is merely a device to facilitate the calculation of a figure for rating purposes, it becomes easy not to adhere to it when it would lead to anomalous results.

He then sets out the "anomalous results," to which, as already mentioned, he refers in the Case. When this part of the judgment is read with the Case, in which the learned recorder says:

> If I was wrong in rejecting the "contractor's theory" of valuation in the case of the blast furnaces, coke-ovens and the two fixed melting furnaces, the net annual value of £58,000 fixed by me would be increased by a figure of £6,090,

we think it becomes clear that he never had in mind more than one hereditament, but that, in arriving at the value of that hereditament, he preferred to consider these particular parts of the plant within the hereditament on what he calls the "unit basis" rather than to consider them (as Mr. Eve had done) on the "contractor's theory." In these circumstances, we do not think it would be right to hold that the learned recorder proceeded on a basis which was wrong in law.

This brings us to the appellants' second contention in respect of the blast furnaces, melting furnaces and coke-ovens. Counsel for the appellants, who described it as an "even stronger objection" to the valuation arrived at by the learned recorder, said that it must be assumed that anyone valuing a hereditament according to the "contractor's theory" would bear in mind the obligations imposed on the hypothetical tenant mentioned in the Rating and Valuation Act, 1925, s. 22 (1) (*b*), including the obligation "to repair" and "to maintain" the hereditament, and that, therefore, Mr. Eve's valuation must be deemed to have taken into account the fact that some of the furnaces were short-lived, a fact which would be taken twice into account by the further reduction resulting from the method adopted by the learned recorder. The short answer to this contention is that the question which it raises is one of fact, and this appeal can only succeed if it be shown that the learned recorder was wrong in law in the decision at which he arrived. For these reasons, in our judgment, the appeal fails in so far as it relates to the 4 blast furnaces, 2 fixed steel melting furnaces and 69 coke-ovens.

We now turn to the other two grounds, (ii) and (iii), on which the appellants base their appeal. These relate to 5 tilting furnaces and to certain gas mains and hot and cold blast mains. In both cases the learned recorder has held that the plant and machinery is not rateable. In both cases counsel for the respondents admits that the sole question is whether it can be said of this plant or machinery that it "is, or is in the nature of, a building or structure," within the meaning of the opening words of "class 4" of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O., 1927, No. 480), made under the Rating and Valuation Act, 1925, s. 24 (5). The 5 tilting furnaces are described in the Case as follows:

> Each of these tilting furnaces is a furnace resembling a very large bath, in which metal is melted, and which is capable of being tilted and is in fact tilted in operation by means of an electric motor for the purpose of pouring molten metal and slag from it into other receptacles. Each tilting furnace is made of steel plates and joists, bolted, riveted and welded together on site, and is lined internally with special brick lining of considerable thickness. The approximate size, weight and capacity of a tilting furnace are: Length, 30ft., width, 18ft.; superficial area (of molten metal, when full), 685 to 715 square ft.; weight, over 300 tons; capacity, 200 to 250 tons of steel. Each tilting furnace rests by its own weight on steel rollers, resting on curved roller paths, which are themselves supported on concrete piers. For the purpose of renewing the rollers and roller paths when necessary it is possible by the use of suitable appliances to lift each tilting furnace off its supporting piers.

From this description given by the learned recorder it would appear to be not unlikely that the ground on which he held that these tilting furnaces were not rateable was that they were movable, and that this was, in truth, the reason for his decision is made clear by his judgment in which he says: "The furnaces are, therefore, movable, and are, in fact, being moved continually while in use. In my view, they are not rateable." The gas mains and hot and cold blast mains are described as follows in the Case:

> Upon the said hereditament are 13,000 feet run of overhead gas mains, cold blast mains and hot blast mains made up of 20ft. lengths, bolted together on site and carried from one point to another throughout the steelworks, and resting on, but not attached to, steel vertical supports or metal bridge structures at a height of from 10ft. to 35ft above ground. The external diameter of these mains varies from 20 inches to 96 inches . . . The hot blast mains are lined with brickwork, so as to conserve the heat, and outside the brickwork is the outer casing of steel.

The Case recites an admission by all parties that the supporting structures were rateable, but the learned recorder upheld the respondents' contention that the mains themselves were not rateable. His reason (which we think might well be inferred from the Case) is made completely clear in his judgment, in which he said: "As to the mains themselves, I think, being removable, they are not part of the hereditament, and are, therefore, not rateable." There is nothing in the Case to indicate that the learned recorder had considered the question whether the mains or the tilting furnaces were, or were in the nature of, a building or structure within the meaning of the schedule to the Order of 1927, but his judgment does indicate that he did consider the question, and that, in doing so, he interpreted the opening words of class 4 in the schedule as adopting "the criterion of movability." In the Case the learned recorder says that, if he is wrong in holding that these items were not rateable, the net annual value of £58,000 fixed by him would be increased by £1,234 in respect of the mains and by £2,437 or £5,937 in respect of the tilting furnaces according to whether a " unit value " or the " contractor's theory " was the proper method of valuation to be adopted. In our judgment, in deciding that the mains and tilting furnaces were not rateable because they were movable, the learned recorder was wrong in law, and, having regard to the observations of Lord Esher, M.R., and Lindley, L.J., in *Tyne Boiler Works Co.* v. *Longbenton Overseers* (2) (18 Q.B.D. 91, 94) his decision cannot be supported. In our judgment, having regard to the descriptions of the mains and of the tilting furnaces contained in the Case, the learned recorder (had he not misdirected himself) must have come to the conclusion that both these items were in the nature of a building or structure and, therefore, rateable. It follows that the appellants are entitled to succeed on both these grounds.

In the result, the net annual valuation of £58,000 will be increased by £7,171, which is the aggregate of £1,234 in respect of the mains and £5,937 in respect of the tilting furnaces, the order made by the learned recorder in respect of costs will be revoked, and the appellants will have the costs of this appeal.

Order accordingly. Appellants to have costs of appeal and one half costs in the court below.

Solicitors: *Theodore Goddard & Co.*, agents for *S. Tapper Jones*, town clerk, Cardiff (for the appellants); *Simmonds, Church Rackham & Co.*, agents for *Llewellyn & Hann*, Cardiff (for the respondents).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

ILLSTON & ROBSON, LTD. *v.* SMITH.

[House of Lords (Lord Thankerton, Lord Porter, Lord Uthwatt, Lord du Parcq and Lord Oaksey), February 19, 20, 23, 24, 26, April 30, 1948.]

Workmen's Compensation—Compensation—Amount—Partial incapacity—Difference between current and pre-accident earnings—Economic changes arising since accident—Workmen's Compensation Act, 1925 (c. 84), *s.* 9 (3) (i).

In calculating the weekly payment payable to a workman in the case of partial incapacity under s. 9 (3) (i) of the Workmen's Compensation Act, 1925, it is not open to the employer to diminish the difference between the workman's pre-accident earnings and his post-accident earnings by showing that the whole or part of the difference is due to changes in the " economic position of the labour market " between the two dates. Conversely, when the workman, though on a less well paid type of work as a result of his incapacity, gets more as a result of such changes, the employer gets the benefit of the excess.

A capstan tool setter lost the ring finger of his right hand by an accident which arose out of and in the course of his employment. The arbitrator found that as a result of the injury the workman was partially incapacitated for work in the open market and for his pre-accident work. The employers contended that, in calculating the weekly payments payable to the workman, the difference between the pre-accident earnings and the post-accident earnings must be shown to result from the injury and that part of the diminution in the workman's earnings was due to economic changes.

Held: the arbitrator was bound to accept the workman's actual post-accident earnings as forming the second factor in arriving at the difference referred to in s. 9 (3) (i) and was not entitled to take into account any economic changes which had arisen since the accident.

Blakemore v. *Delta Mill* (1919), *Ltd.*, (1935) (28 B.W.C.C. 193), *followed.*

Jones v. *Amalgamated Anthracite Collieries, Ltd.*, ([1944] 1 All E.R. 1), *distinguished.*

Sharplin v. *W. B. Bawn & Co., Ltd.*, ([1947] 1 All E.R. 436), *approved.*

Lyon v. *Taylor Bros.*, (1928) (21 B.W.C.C. 215) *no longer law.*

[As to Amount of Compensation in Case of Partial Incapacity, see HALSBURY, Hailsham Edn., Vol. 34, pp. 914-917, paras. 1258-1260; and for Cases, see DIGEST, Vol. 34, pp. 414-418, Nos. *3364-3392.*]

Cases referred to :

(1) *Jones* v. *Amalgamated Anthracite Collieries, Ltd.*, [1944] 1 All E.R. 1 ; [1944] A.C. 14 ; 113 L.J.K.B. 49 ; 170 L.T. 78 ; 36 B.W.C.C. 195 ; 2nd Digest Supp. *affg.*, [1942] 2 All E.R. 600.

(2) *Delta Mill* (1919), *Ltd.* v. *Blakemore*, (1935), 104 L.J.K.B. 459 ; *sub nom., Blakemore* v. *Delta Mill* (1919), Ltd., 28 B.W.C.C. 193 ; Digest Supp.

(3) *Heathcote* v. *Haunchwood Collieries*, [1918] A.C. 52 ; 87 L.J.K.B. 226 ; 117 L.T. 677 ; 10 B.W.C.C. 647 ; 34 Digest 395, *3230*.

(4) *Lyon* v. *Taylor Bros.*, (1928), 21 B.W.C.C. 215 ; Digest Supp.

(5) *Raphael* (*Owners*) v. *Brandy*, [1911] A.C. 413 ; 80 L.J.K.B. 1067 ; 105 L.T. 116 ; 4 B.W.C.C. 307, H.L. ; *affg.*, S.C., *sub nom.*, *Brandy* v. *Raphael* (*Owners*), [1911] 1 K.B. 376, C.A. ; 34 Digest 427, *3470*.

(6) *Sharplin* v. *W. B. Bawn & Co., Ltd.*, [1947] 1 All E.R. 436 ; 177 L.T. 214.

APPEAL by the employers from a decision of the Court of Appeal, affirming the rejection by an arbitrator under the Workmen's Compensation Act, 1925, of the employer's contention that, in calculating under s. 9 (3) (i) the weekly payment payable to a workman in the case of partial incapacity, the difference between the pre-accident earnings and the post-accident earnings of the workman must be shown "to result from the injury" and not from economic changes arising since the accident. The appeal was dismissed.

Beney, K.C., and *Colin Coley* for the employers.

Paull, K.C., and *Marven Everett* for the workman.

The House took time for consideration.

Apr. 30. **LORD THANKERTON :** My Lords, the workman has obtained an award under the Workmen's Compensation Acts for the weekly sum of 12*s.* 4*d.* with appropriate supplementary allowances in respect of partial incapacity. The award was made by His Honour JUDGE TUCKER in the Birmingham County Court on July 23, 1946, and was to apply from Feb. 3, 1946. On an appeal by the employers, this award was affirmed by the Court of Appeal by an order dated Feb. 26, 1947. Hence the present appeal.

The workman, who had been employed by the employers for a number of years as a capstan tool setter, was injured in his right ring finger by an accident which admittedly arose out of and in the course of his employment. As a result of the accident, the workman's right ring finger was amputated through the proximal joint on July 9, 1945. The workman started work again on Sept. 10, 1945, at his old work as a capstan setter for the employers, and has continued at that work ever since. The learned arbitrator accepted the workman's evidence that, as the result of the injury, he was not able to supervise so many operators as formerly, and was, therefore, unable to earn so much money as before, he being only able to supervise at most five operators instead of eight, which made a difference of £1. The arbitrator found that "by reason of, and as a result of the injury sustained by the applicant, he was partially incapacitated for work in the open market and for his pre-accident work of a capstan setter." The workman's pre-accident earnings, as revised under s. 6 of the Workmen's Compensation Act, 1943, were £9 16*s.* 11*d.* per week, and his post-accident earnings were £8 12*s.* 3*d.* down to the date of the hearing of the arbitration, the difference amounting to £1 4*s.* 8*d.* In view of the contentions of the employers and to facilitate their being again raised on an appeal, the arbitrator made findings that one-third of this difference was due to the workman's incapacity for work, resulting from the injury, and that two-thirds was due to industrial conditions and the change-over from war to peace. However, on consideration of certain authorities, to which I will refer later, he rejected the employers' contentions, and awarded the workman 12*s.* 4*d.* per week, being one-half of the said difference.

It is hardly necessary to remind your Lordships that the right to compensation is conferred by s. 1 (1) of the Act of 1925, and that the amount of compensation, in the case of partial incapacity, is to be measured by the provisions of s. 9 (1) and (3), the relevant provisions of which are as follows :

> 9.—(1) The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained : . . . (3) The rules for calculating the weekly payment in the case of partial incapacity shall be—(i) If the maximum weekly payment would, had the incapacity been total incapacity, have

> amounted to 25*s.* a week or upwards, the weekly payment in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident . . .

My Lords, we had a long citation of decisions in this House and in the Court of Appeal and the Court of Session, but I do not think that I am incorrect in stating that the employers' contentions were solely based on the decision of this House in the recent case of *Jones* v. *Amalgamated Anthracite Collieries, Ltd.* (1) which they sought to distinguish from the decision of this House in *Blakemore* v. *Delta Mill* (2). The employers' contention is that the difference between the pre-accident earnings and the workman's present actual earnings must be shown to " result from the injury," and that in the present case the arbitrator has found that, to the extent of two-thirds, they do not so result. In my opinion, this contention is based on a misunderstanding, or misconstruction, of sub-s. (3) of s. 9 of the Act of 1925.

I will refer, first, to *Blakemore's* case (2), in which the workman, who had been a cotton-spinner in the employ of the employers, was admittedly partially incapacitated and entitled to compensation under the Workmen's Compensation Acts, provided he could prove a weekly amount due as calculated under s. 9, and, in particular, sub-s. (3). The only alternative employment he had been able to get was as a bookmaker's clerk, the employment being seasonal and part-time. It was clearly held—not necessarily for the first time—that the words " is earning or is able to earn " provide two distinct alternatives and that the words " in some suitable employment or business " do not qualify the first alternative, and also that there was no justification for confining the first alternative to full-time employment. I venture to quote from my speech, which was concurred in by both my noble and learned colleagues. After noting that, in contrast with the Act of 1906, a fixed amount of one-half of the difference between the two factors is substituted by the Acts of 1923 and 1925 for the discretion permitted to the arbitrator, I proceed to say (28 B.W.C.C. 193, 207, 208) :

> The appellants maintain that the words " is earning or is able to earn " do not express true alternatives, but are conjunctive, and that, accordingly, (*a*) the arbitrator was not bound in law to hold that what the respondent was " able to earn " was necessarily the amount he was in fact actually earning, and (*b*) that the arbitrator was justified in finding that the part-time wages earned by the respondent were no criterion of what the respondent was able to earn. It appears clear to me that the first of these contentions is not conditioned by the fact of part-time employment, but that, if sound, it must equally apply where, though the workman is employed on a whole-time basis, the amount of work available in that employment is affected by conditions not personal to the workman, *e.g.*, of the labour market . . . The words clearly express alternative methods of assessing the value of the post-accident capacity for work, and these alternative methods will apply according as the workman is in fact then employed or is unemployed. If the appellants' first contention were sound, there was no need for the insertion of the first alternative, and the actual earnings of the workman would not be the criterion of his earning power, but only an item of evidence—more or less useful—to enable the arbitrator to arrive at what he was " able to earn." . . . In my opinion, the Act provides a simple method, though it may not be a logical one, as the actual earnings of the workman are presumably conditioned by the existing economic position of the labour market—an element which falls to be excluded in assessing the amount which he " is able to earn."

I then refer to the qualification that the workman's actual earnings must be the result of a *bona fide* effort to get work suitable to his then condition, and to Lord Dunedin's well known *dictum* in *Heathcote* v. *Haunchwood Collieries* (3) ([1918] A.C. 52, 56; 10 B.W.C.C. 647, 651). But this qualification is not available in the present case, since it rests on a comparison of what the workman is earning under existing economic conditions with what he could earn under the same existing conditions, whereas the employers' contention rests on a comparison of what the workman is earning under existing economic conditions with the economic conditions which affected his pre-accident earnings. That comparison seems to me to be clearly irrelevant to what he is actually earning at present, although a comparison of economic conditions at the material times may be relevant to a review of the other factor, the pre-accident earnings, under s. 6 of the Act of 1943. Similarly, any comparison of existing conditions with any post-accident economic conditions at any earlier date would be equally irrelevant. I may add that, in my opinion, the decision in *Lyon* v. *Taylor Brothers* (4), already moribund, was finally overruled by the decision in *Blakemore's* case (2).

In my opinion, the employers' contention is excluded by the decision in *Blakemore's* case (2). The learned arbitrator, having found that the workman was partially incapacitated, by reason of and as a result of the injury sustained A by him, for work in the open labour market and for his pre-accident work of a capstan setter, was bound by the statute to accept his actual earnings as forming the second factor in arriving at the difference referred to in sub-s. (3) of s. 9, and he was not entitled to inquire into any economic changes arising since the accident.

It remains to consider whether the decision in *Jones's* case (1) is of any assistance to the employers. Jones, who had been employed by the employers B as a collier before the accident, admittedly suffered an injury arising out of and in the course of his employment. As the result of the accident he was paid as for total incapacity for about three years when he began work above ground and then received compensation as for partial incapacity based on the difference between his pre-accident earnings of £2 10*s.* 8*d.* a week and his earnings above ground, until November, 1937, when the latter earnings became as much C as, or more than, his pre-accident earnings, and compensation, therefore, ceased. While he was actually earning £3 15*s.* 4*d.*, he was called up—on Sept. 30, 1940—for service in the army under the National Service (Armed Forces) Act, 1939, his pay and allowances amounting to £2 0*s.* 9*d.* per week. In May, 1942, he applied under s. 9 (3) (i) of the Act of 1925, for compensation, on the footing that his actual earnings were £2 0*s.* 9*d.* per week, and that he was entitled to one-half the difference between that figure and his pre-accident earnings, D which came to 4*s.* 11½*d.* per week. The arbitrator found that he was still partially incapacitated for work as the result of the accident, that he was not fit for his pre-accident work as a collier, but was fit for light work, at which he could earn a wage of £3 15*s.* 4*d.* The learned arbitrator added this important finding, " The cause of his inability to earn £3 15*s.* 4*d.* is due, not to any physical incapacity, but solely to his conscription under the 1939 Act." He awarded the compensation claimed, but his decision was reversed by the Court of Appeal, E whose decision was affirmed by this House. Following the decision in *S.S. Raphael* (*Owners*) v. *Brandy* (5) it was held by this House that Jones's military pay and allowances were " earnings " within the meaning of the Workmen's Compensation Acts, but it was held that the reduced earnings of the workman in an employment which is in no way connected with his partial incapacity or the injury resulting from the accident are not a proper factor to be taken F into account as being what " he is earning " for the purpose of calculation of weekly compensation due in respect of partial incapacity resulting from the injury. It is clear that Jones's employment in the army and his earnings in respect thereof arose regardless of his partial incapacity. As my noble and learned friend LORD DU PARCQ, then in the Court of Appeal, stated ([1942] 2 All E.R. 600, 604) :

> The principle then appears to me to be that the words " which he is earning " refer G only to earnings which are, at least in some degree, affected by the workman's incapacity. If I am right as to this, it follows that, as a general rule, a man whose earnings are reduced because he has been called up for service in His Majesty's army cannot properly claim that his soldier's pay and allowances shall be treated as his earnings for the purposes of this sub-section. They represent a figure which is wholly irrelevant to the calculation thereby prescribed. The reduction in his income is due, not to his incapacity, but to the fact that the legislature has made him (in common with all H other young men) liable for military duty.

This statement was approved in this House. In other words, it was the lack of any connection between the workman's injury and the employment from which the reduced earnings were derived that formed the basis of the decision. In a previous passage on the same page, after a reference to *Blakemore's* case (2) and LORD DUNEDIN'S *dictum* in *Heathcote's* case (3), my noble and learned friend says :

> The fact that economic depression or some other such cause has reduced the general level of wages is no ground for saying that actual earnings are shown to be an irrelevant

> consideration. The words of the sub-section, as has been authoritatively held, do not permit such a construction. It must have been contemplated by the legislature that many causes might contribute, together with the incapacity, to bring about a reduction in earnings, and it is, perhaps, fortunate that the draftsman has used words which free the arbitrator from the delicate task of allocating the loss to the various causes which, in combination, may be responsible for it.

These words accurately express my view of the result of the decision in *Blakemore's* case (2). The decision in *Jones's* case (1) was based on the finding by the arbitrator that the cause of his inability to earn £3 15*s.* 4*d.* was due, not to any physical incapacity, but solely to his conscription under the Act of 1939, an antithesis to the findings in the present case. Accordingly, in my opinion, the employers can derive no assistance from the case of *Jones* (1), and I may add that I am quite unable to find any justification for the suggestion that the decision, or the speeches of the majority of this House, in *Jones's* case (1) are inconsistent with the previous decision of this House in *Blakemore's* case (2).

This case was heard by the Court of Appeal along with a number of cases in which a similar contention was involved, and they held that case was ruled by the decision already given in one of the cases, *Sharplin* v. *W. B. Bawn & Co., Ltd.* (6). I agree with the judgment of the court in this latter case, which was delivered by SOMERVELL, L.J., and, in particular, with the passage in which he states ([1947] 1 All E.R. 436, 440) :

> The conclusion we come to on the construction of the section in principle and on authority is as follows. If the workman is *bona fide* earning what he reasonably can earn, it is not open to the employer to diminish the " difference " between this figure and his pre-accident earnings—actual or as adjusted under the Acts—by showing that the whole or part of the reduction is due to changes in the " economic position of the labour market" between the two dates. Conversely, when the workman, though on a less well-paid type of work as a result of his incapacity, gets more as a result of such changes, the employer gets the benefit of this excess.

Accordingly, I am of opinion that this appeal fails, and should be dismissed with costs, the order of the Court of Appeal being affirmed.

LORD PORTER : My Lords, this case raises a question as to the *quantum* of compensation to be awarded to a workman who is admitted to be partially incapacitated, and turns on the true construction of s. 9 of the Workmen's Compensation Act, 1925. The wording of which immediate consideration is required is that of sub-s. (3) (i) and the vital expression is :

> . . . the weekly payment in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident.

Before his accident the average weekly earnings of the workman in question as revised were £9 16*s.* 11*d.* and at the hearing of the reference the average weekly amount which he was earning was £8 12*s.* 3*d.*, a difference of £1 4*s.* 8*d.* *Prima facie* therefore his compensation should be half of the difference between the two sums, *viz.* : 12*s.* 4*d.* In fact, however, the diminution in his earnings is due, not to the accident only, but also to economic causes, *i.e.*, to a general reduction in the earning power of workmen engaged in a similar type of work caused by the fall of wages. Admittedly, when he first came back to work his loss of earning power resulted from the accident, but when at a later date the wage of both workmen of full capacity and those partially incapacitated fell to a lower level, the workman's loss of wages was caused partly by the accident but partially also by a fall in wages. It is said, therefore, that to give the workman half the difference between what he earned in the past and the lessened sum which he can earn at the present is to give him an undue advantage over his fellows and might, indeed, result, in certain circumstances, in his receiving more than a man able to work at full capacity. Suppose, for instance, that the full wage was originally £6 and the wage of the injured man £4, but, owing to economic causes, the full wage dropped to £4 and that of the disabled man to £3. If then his original earnings of £6 be compared with those ultimately earned by him and he is given half the difference as compensation, he will receive £3 as wages and £1 10*s.* as compensation, a total of £4 10*s.*, whereas an uninjured man will receive £4 only. Such a result, it is said, cannot have been intended and the section, when properly construed, bears no such meaning.

My Lords, the contention that account must be taken of the change in economic conditions and that compensation must be reduced accordingly is supported by pointing out that in sub-s. (1) the incapacity must result from the accident and by the suggestion that, therefore, when one comes to construe sub-s. (3), it must be read as awarding the difference between the pre-accident earnings and the post-accident earnings so far only as their reduction results from the accident. A reduction which has nothing to do with the accident is said to be ruled out. Certain qualifications, however, must, it is admitted, limit the width of the contention. It is conceded that where a workman is driven out of a particular occupation and compelled to undertake another type of work, and that type of work suffers a reduction in wages the injured man is entitled to increased compensation. The tribunal, it is agreed, cannot, and is not empowered to, consider what his earnings in his original employment would have been. The pre-accident figure is fixed by the Act at the average weekly earnings before the accident, and, if the man can show that his actual post-accident average weekly earnings are less than this sum, the *quantum* of compensation is fixed at half the difference between the two, whatever the cause of the diminution may be, provided it is not due to some action for which the workman himself is responsible. The fact that he might have been earning less than before at his original work is irrelevant. It is, however, argued that where, as here, the workman remains in the same occupation and the only result of the accident is to make his working capacity slower and his earnings consequently less, the true result is that part only of the reduction in his wages is due to the accident, the rest being due to economic conditions. For example, if he is working an eight-hour day and the payment is 2*s.* 6*d.* an hour, he would earn £1 a day or in a 44-hour week £5 10*s.* If, however, the pace of his working is reduced by one-eighth, and his rate of wages is correspondingly reduced, he would earn only 17*s.* 6*d.* or in a 44-hour week £4 16*s.* 3*d.* and his compensation would be one-half of the difference of 13*s.* 9*d.* Suppose then the wage was reduced to 2*s.* an hour, the workman of full capacity would earn only 16*s.* a day or £4 8*s.* a week and the injured man 14*s.* or £3 17*s.* a week. His actual weekly loss from the accident in these circumstances, it is maintained, is not 13*s.* 9*d.* but 11*s.* To give him more would be to compensate him, not for loss of earning power, but for the accidental and irrelevant economic conditions. What he is entitled to is compensation, and compensation in the ordinary sense of the word is a replacement of what he has in fact lost by the accident. It is, however, further conceded that by the decision in *Blakemore* v. *Delta Mill* (2) the wording at the end of sub-s. (1) (i), " which he is earning or is able to earn in some suitable employment or business," has been held to deal with two contrasted cases. If the workman is, in fact, earning a wage, one must look only at what he is, in fact, earning. What he is able to earn is irrelevant. The expression " is able to earn " etc., only becomes effective where the man is either refraining from earning or is unable to earn anything at all owing to economic conditions or some similar cause. That proposition is not contested. The controversy is whether one should imply in construing " is earning " or " is able to earn " the addition of the words " solely as a result of the accident."

My Lords, I find it very difficult to make such an implication in the case of the words " is earning." As to the phrase " is able to earn " I desire to reserve my judgment, but the earlier expression seems to me to give an easy and simple rule. The pre-accident wage only is to be considered and compared with the actual earnings and then half the difference is to be given as compensation. If the post-accident wage goes up the employer gets the benefit and the compensation payable goes down. If, on the other hand, the post-accident wage goes down the workman benefits and his compensation goes up. The pre-accident earnings are a fixed sum calculated as prescribed by the Act. Formerly they did not vary with any subsequent changes which took place in the wages paid to those engaged in the same work and only do so now because of the provisions of s. 6 of the Act of 1943, but this provision has no application to the present case. No doubt, the legislature, if it had so desired, might have provided that the workman should get half his actual loss in the conditions from time to time obtaining and no more, but it has not done so.

The employers urged, however, that what was given was compensation and that compensation is limited to the actual loss which the man suffers.

No doubt, this is true where there is no indication to the contrary, but under this Act the man gets what the Act prescribes—no more and no less. He does not get the difference between the wages he would have been earning at any individual moment, had he been uninjured, and those which he was, in fact, earning at that moment. The statute gives him half the difference between his pre-accident and post-accident earnings. Nor do I see that anything is gained by a reference to sub-s. (1). Undoubtedly, incapacity must result from the accident, but the *quantum* of compensation for that incapacity is not necessarily confined to the difference between what the injured man can earn at a particular date and what his uninjured fellows are then earning. Apart from authority I should have reached this conclusion, but it is said that, though the later authorities, and, in particular, *Blakemore's* case (2), might have led to this conclusion, the decision in *Jones's* case (1) shows such a view to have been wrong and decides that the difference in earning power is irrecoverable except in so far as the loss is due to the accident and to no outside circumstances.

My Lords, I cannot accept this view. *Jones* v. *Amalgamated Anthracite Collieries, Ltd.* (1) was a peculiar case. Admittedly, his army pay was "earnings" within the meaning of the Act. Your Lordships were bound by the decision in *S.S. Raphael (Owners)* v. *Brandy* (5) so to hold, but the reduction in his earnings had nothing to do with the accident. It was due to the extraneous fact that he had been called up for military service, an employment which was in no way connected with the injury. The arbitrator expressly found that the cause of his inability to earn more than his pay was due, not to any physical incapacity, but solely to his conscription under the Act of 1939. In other words, his inability to earn had no connection with his accident. Whatever his physical condition he would have earned no more. In the present case and cases of the same class, the inability to earn more is at least connected with the accident in as much as the man cannot earn more in his injured state and could earn more were he uninjured. In *Jones's* case (1) the injury caused no reduction of earnings—injured or uninjured the man earned the same sum. The distinction may seem a fine one. Nevertheless it exists. In my view, there is no ground for dividing the *quantum* of loss into two parts, one due to this accident, the other to economic causes. The workman can earn no more because of his accident. It may be that at other times and in other circumstances he would have done so. As it is, he cannot, and the Act, as I think, plainly gives him the difference between the pre-accident figure and his actual earnings where he is earning something and it is not his doing that prevents him from earning more. I would dismiss the appeal.

LORD DU PARCQ: My Lords, I concur in the opinions of your Lordships who have preceded me, and I only wish to add that, in particular, I agree with what was said by my noble and learned friend on the Woolsack as to the effect of *Jones* v. *Amalgamated Anthracite Collieries, Ltd.* (1). My noble and learned friend, **LORD UTHWATT**, who is unable to be present, has authorised me to say that he also concurs in the opinions which have been expressed.

LORD OAKSEY: My Lords, I have had the advantage of reading in print the speech of my noble friend, Lord Thankerton, and I agree with it.

Appeal dismissed with costs.

Solicitors: *Waterhouse & Co.*, agents for *Buller, Jeffries & Kenshole*, Birmingham (for the employers); *W. H. Thompson* (for the workman).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

BOWDEN *v.* RALLISON.

[King's Bench Division (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 22, 1948.]

Small Tenement—Recovery of possession—Notice of intention to apply to justices—Tenancy agreement—Notice to quit—Statutory tenancy—Small Tenements Recovery Act, 1838 (*c.* 74), *s.* 1; *sched.*

In 1935 the landlord let to the tenant a cottage, within the Rent Restrictions Acts, under the terms of a document which provided: "I, F.R., agree to let cottage at B. to Mr. B., as tenant, and subject to six months notice to quit same on either side. I, Mr. B., agree to hire said cottage from Mr. R., as tenant at a rent of four shillings per week, and agree to quit same subject to six months notice on either side." On Apr. 4, 1939, the landlord gave the tenant six months' notice to quit and asked for possession on Oct. 11. The tenant remained in possession after the expiration of the notice under the provisions of the Rent Restrictions Acts, and continued to pay the rent each week. On Oct. 31, 1947, a second notice to quit on Nov. 10, 1947, was given. The tenant refused to deliver up the premises, and the landlord's agents served on him the following notice under the Small Tenements Recovery Act, 1838, s. 1: "We . . . give you notice that unless peaceable possession of the tenement . . . held of . . . F.R., under a tenancy from week to week which was determined by notice to quit . . . on Nov. 10, 1947 . . . be given . . . the said F.R. will" apply to the justices for possession. The application having been granted by the justices, on appeal:

Held: on the true construction of the tenancy agreement, six months' notice to quit could be given at any time, the notice given on Apr. 4, 1939, was good, and, on its expiry, the tenant became a statutory tenant, and, therefore, the second notice to quit was a mere nullity, and the notice given under s. 1 was invalid, since it failed correctly to state the nature of the tenancy and the date on which it was determined.

[As to Recovery of Possession under the Small Tenements Recovery Act, 1838, see HALSBURY, Hailsham Edn., Vol. 20, pp. 283-285, para. 319; and for Cases, see DIGEST, Vol. 31, pp. 548-550, Nos. *6951-6968*.]

Cases referred to:

(1) *Morrison* v. *Jacobs*, [1945] 2 All E.R. 430; [1945] K.B. 577; 115 L.J.K.B. 81; 173 L.T. 170; 2nd Digest Supp.

(2) *Shuter* v. *Hersh*, [1922] 1 K.B. 438; 91 L.J.K.B. 263; 126 L.T. 346; 31 Digest 570, *7173*.

Case Stated by Norfolk justices.

At a court of summary jurisdiction sitting at East Dereham on Dec. 19, 1947, an application under the Small Tenements Recovery Act, 1838, s. 1, was made by the respondent, the landlord of a cottage at Bushey Common, Gressenhall, East Dereham, for recovery of possession of the cottage from the appellant, who was the tenant of it. The landlord contended that the agreement under which the tenant had held the premises had been for a tenancy which was subject to six months' notice to quit expiring at any time, that such a notice had been given expiring on Oct. 11, 1939, and that thereafter the tenant had remained in possession either as a weekly tenant (in which case the tenancy had been determined by a further notice to quit dated Oct. 31, 1947) or as a statutory tenant under the Rent and Mortgage Interest Restrictions Acts (in which case the landlord claimed possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (*g*) (ii), on the ground that the cottage was required for the occupation of a cowman, who, as certified by the Norfolk War Agricultural Executive Committee, was to be employed on work necessary for the proper working of the landlord's farm). The justices held that the tenancy had been duly determined by notice to quit expiring on Nov. 10, 1947, and, therefore, the provisions of the Small Tenements Recovery Act, 1838, had been complied with, and, further, that the landlord had satisfied the requirements of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (*g*) (ii), and it was reasonable to make an order for possession, which order, accordingly, they made. The Divisional Court allowed the tenant's appeal on the ground that the landlord's notice of intention to apply to the justices did not comply with the requirements of the Act of 1838. The facts appear in the judgment of LORD GODDARD, C.J.

Rougier for the tenant.
I. C. Baillieu for the landlord.

LORD GODDARD, C.J : As generally happens when a case comes before this court under the Small Tenements Recovery Act, 1838, questions of the utmost difficulty arise. When that Act was passed no county courts, as we now understand them, existed, and, no doubt, it was, therefore, desirable to provide some method by which disputes with regard to small tenements, such as cottages, could be determined. This Act is full of pitfalls and very technical considerations apply. Parties would be much better advised if they now took advantage of the county court where proceedings for the recovery of houses are much simpler and also they have the advantage that a trained lawyer—a county court judge—hears the case.

The present matter comes before us on a Case Stated by justices before whom proceedings were taken to recover possession of a cottage belonging to the respondent landlord and occupied by the appellant. In accordance with the provisions of the Act, before the proceedings can be taken, a notice has to be served on the tenant. It is provided by s. 1 of the Act :

> When and so soon as the term or interest of the tenant . . . shall have ended or shall have been duly determined by a legal notice to quit or otherwise, and such tenant . . . shall neglect or refuse to quit and deliver up possession of the premises . . . it shall be lawful for the landlord of the said premises or his agent to cause the person so neglecting or refusing to quit and deliver up possession to be served (in the manner hereinafter mentioned) with a written notice, in the form set forth in the schedule to this Act, signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this Act.

If the tenant still does not give possession, proceedings may be taken before justices. Form No. 1 in the schedule is in these terms :

> I——[the owner . . .] do hereby give you notice, that unless peaceable possession of the tenement [shortly describing it] situate——, which was held of me, . . . under a tenancy from year to year, or [as the case may be], which expired [or was determined] by notice to quit from the said——, or otherwise . . . on the——day of ——, and which tenement is now held over and detained from the said ——, be given to —— [the owner . . .] on or before the expiration of seven clear days from the service of this notice, I——shall . . . apply to Her Majesty's justices . . . to issue their warrant directing the constables . . . to . . . take possession of the said tenement . . .

The notice, therefore, requires that the landlord must set out the nature of the tenancy, and show that it has either expired or been determined by notice to quit and the date of that expiration or determination. In this case a notice on behalf of the owner was given in these terms :

> We . . . do hereby give you notice that unless peaceable possession of the tenement consisting of a cottage situate at Gressenhall, Norfolk, which was held of the said Frederick Rallison under a tenancy from week to week which was determined by notice to quit from us . . . on Nov. 10, 1947, and which tenement is now held over and detained from the said Frederick Rallison, be given to the said Frederick Rallison on or before the expiration of seven clear days from the service of this notice, the said Frederick Rallison will

apply to the justices.

The facts are that at some time in 1935 the appellant went into possession of the cottage under the following written terms :

> I, Frederick Rallison, agree to let cottage at Bushy Common, Gressenhall, to Mr. Bowden as tenant, and subject to six months notice to quit same on either side.

Then underneath that there is :

> I, Mr. Bowden, agree to hire said cottage from Mr. Rallison, as tenant at a rent of four shillings per week, and agree to quit same subject to six months notice on either side.

That document is signed by the tenant, Bowden, over a sixpenny stamp, but it is not signed by the landlord, Rallison. No date was stated therein for the tenancy to begin. The first point advanced by counsel for the tenant was that this document created a periodic tenancy and the notice could only be given to expire at the end of six months from the date when the tenancy began, that is to say, if the tenancy began on Mar. 1, a notice could then be given to expire on Sept. 1, or a notice could be given on Sept. 1 to expire on Mar. 1. I construe this document as meaning that the cottage was held subject to six months' notice at any time. The words " at any time " do not appear in the document, but I think it is reasonably clear that that must have been intended. As the rent was paid weekly, I think the notice should expire at the end of a particular week, but that is immaterial to the present purpose. On Apr. 4, 1939, the landlord, by his agent, gave the tenant six months' notice to quit and asked for possession of the premises on Oct. 11. The tenant, however, remained in possession of the cottage, which was subject to the Rent Restrictions Act. Thereafter he paid his rent punctually. On Oct. 31, 1947, a second notice to quit was given demanding possession on Nov. 10 " or at the expiration of the current week of your tenancy which shall expire next after the end of seven days from the date of this notice." I am glad I have not got to construe that, for what it means I do not know. It was that notice to quit which was referred to in the notice served on the tenant under the Small Tenements Recovery Act.

Assuming, as I have construed it, that the original agreement meant that the tenant was liable to receive a six months' notice at any time, it follows that the notice which was given on Apr. 4, 1939, was a notice in accordance with the tenancy agreement. If that be right, the tenancy expired on Oct. 11, 1939. The justices do not find anything from which it can be inferred that a new tenancy was created by agreement between the parties because since the Rent Restrictions Acts the mere acceptance of rent by the landlord and the payment of rent by the tenant is no evidence of a new tenancy between them. That was decided by the Court of Appeal in *Morrison* v. *Jacobs* (1). The position is that when a notice to quit expires, the house being protected by the Rent Restrictions Acts, the landlord may not be able to get possession unless he can show certain things. He may not, therefore, attempt to get possession, and the mere fact that he accepts the rent does not show that there is a new contractual tenancy. It is equally consistent with what is known as a statutory tenancy. As the justices have not found here anything except that the tenant remained in possession after the notice to quit had expired in 1939, and had paid his rent, the inference must be that he remained there as a statutory tenant. Therefore, when the landlord desired to get possession of the house, he ought to have stated in the statutory notice that the tenancy expired in October, 1939, but the tenant had remained in possession as the statutory tenant, and then placed before the justices the circumstances on which he relied as justifying him in applying for a warrant for possession and in contending that the justices were entitled to make an order in accordance with the Rent Restrictions Acts.

It seems to me that the landlord has given a wrong notice under the Small Tenements Recovery Act. This second notice to quit was a mere nullity. It has been decided by the Court of Appeal in *Shuter* v. *Hersh* (2) that when a tenant is holding over as a statutory tenant, the original tenancy having been determined, no notice to quit is required to enable the landlord to apply for an order for possession. Whenever the tenancy in this case expired, it certainly did not expire by virtue of the second notice to quit. In my opinion, therefore, the landlord has failed to show that he has discharged the duty to give a proper notice which is placed on him by the Small Tenements Recovery Act. He has wrongly described the tenancy and he has wrongly described the time when the tenancy was put an end to. Accordingly, the justices had no jurisdiction to make this order and the appeal succeeds.

HUMPHREYS, J.: I agree in the result proposed by my Lord and concur in the reasons which he has given.

PRITCHARD, J.: I agree. It seems to me that counsel for the landlord is in a dilemma. The notice to quit in 1939 was either good or bad. If it was bad, the original tenancy exists and the tenant is entitled to succeed. On the other hand, if it was good—and I agree that it was good, because, as my Lord has said, the original written tenancy must be construed as giving the parties the right to determine it at any time by giving six months' notice—then one of two things happened. Either it was waived by lapse of time (not by payment of rent) and, having been waived, is no longer effective, and again the tenant succeeds because the original tenancy subsists; or it was not waived, and the tenant became a statutory tenant. If that was the position, these proceedings under the Act of 1838, ought to have been founded on the notice to quit of April, 1939, and not on another notice to quit which was a mere nullity.

Appeal allowed with costs.

Solicitors: *Vizard, Oldham, Crowder & Cash,* agents for *Mills & Reeve,* Norwich (for the appellant); *Haslewood, Hare & Co.,* agents for *Hood, Vores & Allwood,* East Dereham (for the respondent).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

JUDSON *v.* ELLESMERE PORT EX-SERVICEMEN'S CLUB, LTD.

[Court of Appeal (Lord Greene, M.R., Somervell, L.J., and Roxburgh, J.), April 8, 9, 22, 1948.]

Industrial and Provident Society — Disputes — Arbitration — Expulsion of member—Non-compliance with rules—Jurisdiction—Industrial and Provident Societies Act, 1893 (*c.* 39), *s.* 49 (1).

The Industrial and Provident Societies Act, 1893, s. 49 (1) provides: "Every dispute between a member of a registered society . . . and the society . . . shall be decided in manner directed by the rules of the society, . . . and the decision so made shall be binding and conclusive on all parties . . . and shall not be removable into any court of law . . ."

The rules of a club registered under the Act provided that all disputes should be referred to an arbitrator appointed by the club; that no member, unless convicted of an offence in a court of law, should be suspended or expelled without first being summoned before the committee to explain his conduct and opportunity given to advance a defence; and that a member suspended or expelled should have the right to appeal only to the arbitrators appointed under the rules. Without being summoned before the committee, the plaintiff was informed by the chairman of the club that he had been suspended for breach of a rule prohibiting gambling on the premises and thereafter he was refused admission to the club premises. The plaintiff claimed an injunction to restrain the committee, their servants, or agents, from enforcing his suspension, a declaration that he was still a member, and damages. The defendants applied for an order that all proceedings be stayed pursuant to s. 4 of the Arbitration Act, 1889, but the county court judge refused to make an order. On appeal:

Held: the dispute being whether the plaintiff was a member or not, it was not a dispute between the club and a member of it as such, within the meaning of s. 49 (1) of the Act of 1893, and so determinable by arbitration in accordance with the rules, and, therefore, the jurisdiction of the court was not ousted and the decision of the county court judge was correct.

Willis v. *Wells* ([1892] 2 Q.B. 225), and *Palliser* v. *Dale* ([1897] 1 Q.B. 257), *doubted.*

Andrews v. *Mitchell* ([1905] A.C. 78), *distinguished. Prentice* v. *London* (1875), (L.R. 10 C.P. 679), *applied.*

[As to Determination under Rules of Disputes Between Member and Industrial or Provident Society, see HALSBURY, Hailsham Edn., Vol. 17, pp. 489, 490, paras. 1056-1061; and for Cases, see DIGEST, Vol. 28, pp. 125, 126, Nos. *56-63.*]

Cases referred to:

(1) *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; 2nd Digest Supp.

(2) *Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; 37 B.W.C.C. 51, C.A.; *affd.*, [1946] 1 All E.R. 98; [1946] A.C. 163; 2nd Digest Supp.

(3) *Prentice* v. *London,* (1875), L.R. 10 C.P. 679; 44 L.J.C.P. 353; 33 L.T. 251; 39 J.P. 711; 7 Digest 497, *265.*

(4) *Morrison* v. *Glover,* (1849), 4 Exch. 430; 19 L.J.Ex. 20; 14 L.T.O.S. 204; 14 J.P. 84; 7 Digest 497, *266.*

(5) *Willis* v. *Wells,* [1892] 2 Q.B. 225; 61 L.J.Q.B. 606; 67 L.T. 316; 56 J.P. 775; 25 Digest 323, *250.*

(6) *Palliser* v. *Dale,* [1897] 1 Q.B. 257; 66 L.J.Q.B. 236; 76 L.T. 14; 25 Digest 323, *251.*

(7) *Andrews* v. *Mitchell,* [1905] A.C. 78; 74 L.J.K.B. 333; 91 L.T. 537; 25 Digest 325, *266.*

APPEAL by the defendants, a society registered under the Industrial and Provident Societies Acts, 1893 to 1928, from an order of His Honour DEPUTY JUDGE SMYLIE, made at Birkenhead County Court, and dated July 18, 1947, refusing an application to stay proceedings brought by the plaintiff for an injunction to restrain the defendants from enforcing his suspension from their club, for a declaration that he was still a member, and for damages. The appeal was dismissed.

E. Steel and *Elwyn Jones* for the defendants.
Kennan and *J. H. Barrington* for the plaintiff.

Cur. adv. vult.

Apr. 22. **LORD GREENE, M.R.:** I have read the judgment which is about to be delivered by SOMERVELL, L.J., and I agree with it.

SOMERVELL, L.J., read the following judgment. I am authorised to say, on behalf of **ROXBURGH, J.,** who has also read this judgment, that he agrees with it.

This is an appeal from a decision of His Honour DEPUTY JUDGE SMYLIE, sitting at Birkenhead County Court, refusing an application by the defendants to stay proceedings. In his particulars of claim the plaintiff alleged that in 1934 he was duly elected a member of the defendant club, which is a club registered under the Industrial and Provident Societies Acts, 1893 to 1928, and from that date up to and including the current year was duly paying his subscriptions. It is admitted that the plaintiff has been and was a member up to the time when the present dispute arose. The plaintiff then summarises r. 14 of the club, which deals with the power of the committee of the club to suspend or expel members and provides that no member, unless convicted of an offence by a court of summary jurisdiction or other court, shall be suspended or expelled without being first summoned before the committee to explain his conduct and opportunity given to advance a defence. He then alleges that, on or about Mar. 22, 1947, he was informed by the chairman of the club that he had been suspended and that from that time he has been refused admission to the club premises. He further alleges that the provisions of the said rules were not complied with in that he was not summoned before the committee. He claims an injunction to restrain the committee, their servants or agents, from enforcing his suspension, a declaration that he is still a member, and damages. There is, therefore, as appears, a dispute whether the plaintiff has been properly suspended or expelled.

The defendants applied for an order that all proceedings be stayed pursuant to s. 4 of the Arbitration Act, 1889. When the matter came on before the learned judge, it is clear from his note that the defendants based their submission, at any rate, in the first instance, not on s. 4 of the Arbitration Act, 1889, but on s. 49 (1) of the Industrial and Provident Societies Act, 1893. No objection appears to have been taken, nor was any objection taken before us, that this section was not expressly referred to in the defendants' original application. Section 49 (1) of the Industrial and Provident Societies Act, 1893, provides as follows:

> Every dispute between a member of a registered society, or any person aggrieved who has for not more than six months ceased to be a member of a registered society, or any person claiming through such member, or person aggrieved, or claiming under the rules of a registered society, and the society or an officer thereof, shall be decided in manner directed by the rules of the society, if they contain any such direction, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court.

I have already summarised the material part of r. 14 dealing with suspension and expulsion. Rule 15 provides that a member suspended or expelled shall have the right to appeal only to the arbitrators appointed under the conditions laid down in r. 28 (2). Rule 18 provides for the constitution of the committee referred to in r. 14. Rule 28 (2) is as follows :

> All disputes between a member or person aggrieved who has for not more than six months ceased to be a member, or any person claiming through such member or person aggrieved, or under the rules, and the club or the committee shall be referred to the executive of the Working Men's Club and Institute Union, Ltd., or such person or persons as it may appoint, who shall be the arbitrator or arbitrators of the club, whose decision shall be final.

I will also set out the material part of r. 29, which is headed "Misconduct of members" :

> No gambling . . . shall be permitted on the club premises. Any member offending under this rule shall be dealt with by the committee under r. 14 . . . The secretary or president shall have power to order the withdrawal of any member offending under any of the heads specified in this rule from the club premises, and such member shall have no right of re-entry to the club premises until summoned to meet the committee, as provided in r. 14.

I have referred to this last rule because we have before us some correspondence between the parties and the solicitors subsequent to Mar. 22, the day on which the plaintiff alleges that he was informed of his suspension. He wrote, and subsequently his solicitors wrote, asking for the reasons and, in effect, challenging the action that had been taken. On Apr. 23 the defendants' solicitors wrote the following letter to the plaintiff, which may have or purport to have reference to this rule :

> Dear Sir, We have been consulted by the Ellesmere Port Ex-Servicemen's Club, Ltd., and they have handed to us your letter of the 14th instant. We are instructed to inform you that your membership terminated in accordance with the agreement which you signed on your application for membership of the club, by reason of your failure to observe the rules of the club, namely, by your persistent gambling on the club premises, and after repeated warning. We are asked to point out that as the termination of your membership did not arise by express expulsion it is open to you, if you so desire, to make application again for membership, in which event, on the completion of the usual forms and a personal attendance before the committee, your application will be considered on its merits. Yours truly, Walker, Smith & Way.

The question is whether the dispute as it appears in the particulars of claim is within the words of s. 49 (1) so that it must be determined by arbitration in accordance with the rules quoted.

Similar provisions to those contained in s. 49 (1) of the Act referred to are to be found in the Friendly Societies Acts, 1896 to 1929, and it is on the cases decided under those provisions that the defendants relied. If these cases are still good in law, the county court judge's decision must, I think, stand. Counsel for the defendants submitted, however, that, although not expressly overruled, they were inconsistent with the decision of the House of Lords in *Heyman* v. *Darwins, Ltd.* (1). One of the cases in question was a decision of this court, and it is laid down in *Young* v. *Bristol Aeroplane Co., Ltd.* (2) ([1944] 2 All E.R. 293, 300), that this court "is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords."

I will now consider the three decisions under the Friendly Societies Acts. The first is *Prentice* v. *London* (3). In that case the society was maintaining that the plaintiff had never become a member. In the later cases, as in the present case, the plaintiff was admitted to be a member and the dispute arose whether he had been properly deprived of his membership. In considering whether an arbitration clause applies, there is obviously a difference in principle between these two different circumstances. The court, however, did not rely on this. BRETT, J., referred to an earlier case of *Morrison* v. *Glover* (4), the facts of which were different but in which the Court of Exchequer had decided, in construing similar words, that for the arbitration clause to apply it must be shown that the subject-matter in dispute is one arising between, in that case, the trustees and a member of the society *as a member*. BRETT, J., in *Prentice* v. *London* (3) said (L.R. 10 C.P. 679, 687) :

> A dispute as to whether a party is a member or not clearly is not a dispute between the society and the plaintiff as a member. That being so, rule 30 does not oust the jurisdiction . . .

Some of the other judges did not put it quite so widely, but in *Willis* v. *Wells* (5) the principle as enunciated by BRETT, J., was applied to exclude from s. 22 of the Friendly Societies Act, 1875, a dispute whether the plaintiff had been properly expelled. Section 22 reads as follows:

> Every dispute between a member or person claiming through a member or under the rules of a registered society, and the society or an officer thereof, shall be decided in manner directed by the rules of the society.

GRANTHAM, J., said this ([1892] 2 Q.B. 225, 228):

> The affidavit of the defendant York distinctly states that the defendant refused to consider the plaintiff any longer a member of the society. That being so, the present case cannot be treated as a dispute between the plaintiff as a member of the society and the society.

He then quoted the sentence I have quoted from BRETT, J., in the earlier case and also a sentence from the judgment of LINDLEY, J., in the same case.

The issue came before this court in *Palliser* v. *Dale* (6). By that time s. 22 of the Friendly Societies Act, 1875, had been amended by an Act of 1895 which extended s. 22 to apply to every dispute between any person aggrieved who had for not more than six months ceased to be a member of a society. The first argument, which was rejected, was that this provision overruled the principles as laid down in *Willis* v. *Wells* (5). The court then went on to consider the construction of the words of s. 22. The earlier cases to which I have referred were expressly approved. LORD ESHER, M.R., said ([1897] 1 Q.B. 257, 261):

> . . . it was correct to say that a dispute as to whether a person is a member of the society or not is not a dispute between the society and a member of it as such . . .

He also put it in this way (*ibid.*):

> . . . if the society choose to expel a member, they are estopped from afterwards saying that he is a member, and therefore bound by the provisions of the rules with regard to disputes between the society and a member of it.

LOPES, L.J., delivered judgment on the same lines. The words of s. 22 have been judicially construed in this sense. In 1908, by the Friendly Societies Act of that year, the friendly societies' code was amended by adding a sub-section—(8)—to the section containing the provisions considered in these cases, which by that time was s. 68 of the Consolidation Act, the Friendly Societies Act, 1896. That sub-section provided that the expression " dispute " includes any dispute arising on the question whether a member or person aggrieved is entitled to be or to continue to be a member or to be reinstated as a member. Although there have been a number of Acts amending and adding to the statutory provisions relating to industrial and provident societies, no such amendment has been made to that code. It may be that the question had not arisen with regard to such societies, but it seems to me impossible to proceed on the assumption that the absence of any amendment to the similar provisions in that code was due to inadvertence.

I have referred to this matter because it seems to me that it should make this court reluctant to regard these cases as overruled unless it is plain that they cannot stand in the light of the decision in *Heyman* v. *Darwins, Ltd.* (1), to which I will now refer. The issue there arose under an arbitration clause in a contract which was as follows:

> If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout, the same shall be referred for arbitration in accordance with the provisions of the Arbitration Act, 1889, or any then existing modification thereof.

The facts are somewhat complicated, but the issue was whether an arbitration clause applied when one party to the contract was refusing to carry it out and the other party accepted this as a repudiation, claiming damages on the ground that the refusal to carry out the contract was wrongful. There were certain *dicta* in earlier cases, which were carefully considered in the various speeches, that in these circumstances an arbitration clause was inapplicable. The effect of the decision is, I think, sufficiently summarised for present purposes in the following paragraph from the speech of VISCOUNT SIMON, L.C. ([1942] 1 All E.R. 337, 343):

> If the dispute is as to whether the contract which contains the clause has ever been

entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void. If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen " in respect of," or " with regard to," or " under " the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly.

In any event, this decision will, I think, leave unaffected the actual decision in *Prentice* v. *London* (3), because in that case the society was maintaining that the plaintiff had never become a member. It is submitted by the defendants, however, that *Willis* v. *Wells* (5) and *Palliser* v. *Dale* (6) can no longer be regarded as good law. Speaking for myself and with great diffidence, if we were free to re-consider those decisions, I am doubtful whether I should come to the same conclusion. That, however, is not the question before us. The question is whether they can stand in the light of the House of Lords' decision. If they can, *Palliser* v. *Dale* (6) is binding on us. I think they are consistent with it. All their Lordships stressed the importance of the precise words of the arbitration clause which might be in question. The words in the statute are not " any dispute arising in respect of membership," or " with regard to the relations between a member and the society." One might imagine a parallel in an ordinary contractual case if, *e.g.*, X employed a number of agents and had a form of contract which contained a clause " any dispute between an agent and X shall be referred to arbitration." This might well be construed more narrowly than a clause which said " any dispute in respect of or with regard to the contract of agency." It would, I think, be possible that the principle expressly laid down in *Palliser* v. *Dale* (6) might be applied to such a clause consistently with the House of Lords' decision. I must not be taken as expressing any opinion whether it ought or ought not to be so applied. That it might be is sufficient to prevent me from saying that *Palliser* v. *Dale* (6) cannot stand with *Heyman* v. *Darwins, Ltd.* (1). For these reasons I think the defendants' argument on this point fails.

The plaintiff sought to rely on the decision of the House of Lords in *Andrews* v. *Mitchell* (7), but, in my view, that decision does not assist in the present argument. It was a case in which a member of a friendly society was summoned before an arbitration committee. That committee purported to expel him, not for the offence for which he had been brought before them, but for another offence which the arbitration committee held he had committed. In respect of that offence he had not had the proper notice in accordance with the rules and had not been properly heard. In the lower courts the summons for a writ of prohibition which had been made on behalf of the friendly society to stay the proceedings had been dismissed on the authority of *Palliser* v. *Dale* (6) which the House of Lords were invited to overrule. They refrained from overruling or dealing with it, holding that the arbitration committee had proceeded without jurisdiction and its decision was, therefore, null and void *ab initio*. A study of the printed case and record makes it clear that the defendant was maintaining that the decision of the arbitration committee was an effective decision and the only right of the plaintiff was to appeal against it in accordance with the rules. The issue, therefore, was, as it seems to me, a different one. In the present case there has been no decision by an arbitrator or arbitration committee. In *Andrews* v. *Mitchell* (7) if, as the House of Lords held, the original decision was null and void, clearly the plaintiff could not be restricted to a right of appeal against it.

Counsel for the defendants at one time suggested that he could rely on the words : " any person . . . claiming under the rules," in s. 29 (1). The difficulty about this suggestion is that identical words occur in s. 22 of the Act of 1875 as construed in the cases to which I have referred. These words must have been construed as not covering a dispute whether a person who had been a member had been properly expelled. They were, no doubt, put in to cover persons who, though not members, would or might have rights or obligations *vis-a-vis* the society which were dealt with by the rules. The provisions of the present rules as to loans might, I think, give rise to disputes covered by these words. Counsel for the defendants also submitted that the arbitration clause in the rules was wider than the provisions of the Act of 1893, and, if he failed under that Act, he could apply for the discretionary stay under s. 4 of the Arbitration Act, 1889. I cannot see that the clause is wider than the Act of 1893. It follows its wording very closely and does not, in my opinion, cover any dispute which is not within s. 49 (1). I, therefore, think that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Lovell, Son & Pitfield*, agents for *Walker, Smith & Way*, Chester (for the defendants); *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re FOX. *Ex parte* OUNDLE AND THRAPSTON RURAL DISTRICT COUNCIL AND OTHERS *v.* THE TRUSTEE.

[CHANCERY DIVISION (Jenkins and Harman, JJ.), March 8, 15, 22, April 23, 1948.]

Bankruptcy—Property available for distribution—Reputed ownership—Materials stored in builder's yard—Materials on building site—Bankruptcy Act, 1914 (*c.* 59), *s.* 38 (2) (*c*).

In August, 1946, a builder was granted licences to build certain dwelling-houses for a local authority and he started work in the same month. On Mar. 22, 1947, he was adjudicated bankrupt. The building contract under which the work was done provided for "interim certificates" to be given monthly by the architect of the authority, whereby the builder would be entitled on presentation to payment of 90 per cent. of the sum certified to be due to him. This sum was to be arrived at by valuing "the work properly executed" and "the materials and goods delivered upon the site for use in the works," and it was further provided that where an interim certificate on which the builder had received payment included the value of "any unfixed materials and goods intended for and placed on or adjacent to the works," those materials and goods became the property of the local authority. Between October and December, 1946, three such certificates were given covering (*a*) materials, provided by the builder, which had never been on the building site, but were, for convenience, stored by arrangement with the architect in the builder's yard; (*b*) other materials provided by the builder which were lying loose on the site; and (*c*) roofing tiles supplied by a sub-contractor and also lying loose on the site. The materials in categories (*a*) and (*b*) had been bought by the bankrupt under licences from the appropriate authorities and were, admittedly, the property of the builder until he received payment under the interim certificates, when the property in them passed to the local authority. The tiling work was to be carried out under a sub-contract which provided that all materials sent for slating and tiling jobs were to remain the property of the sub-contractors "until fixed in work." The tiles were consigned by the sub-contractors to themselves at the site, care of the builder, in whose charge as bailee the tiles were left, and they were not at any time the property of the builder. The trustee in bankruptcy disclaimed the building contract with the local authority and moved in the county court for a declaration that the materials comprised in categories (*a*), (*b*) and (*c*) vested in him under the Bankruptcy Act, 1914, s. 38 (2) (*c*), as having been at the material date "in the possession . . . of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof." The declaration having been granted, on appeal:

HELD: to bring s. 38 (2) (*c*) into operation it must be shown, not merely that the goods in question were in the bankrupt's possession, but also that he was the reputed owner thereof. Mere proof of possession in some circumstances might raise a *prima facie* case of reputed ownership only to be rebutted by proof, or judicial notice, of a custom negativing that view, but the primary question always must be whether the possession of the goods by the bankrupt was such that the inference that he was the reputed owner must arise. Applying those principles to the present case, the circumstances of the builder's possession of the materials in category (*a*) were precisely the same as if the goods had been his own, with nothing to show that they were not, or might not be, his, and, therefore, the builder was in possession of them in such circumstances that he was the reputed owner thereof within the meaning of the statute, but the materials in categories (*b*) and (*c*) were not in his possession in such circumstances.

Re Couston, Ex parte Watkins, (1873) (8 Ch. App. 520; 28 L.T. 793), *Re Watson & Co., Ex parte Atkin Bros.*, ([1904] 2 K.B. 753; 91 L.T. 709), *Re Kaufman Segal & Domb, Ex parte Trustee*, ([1923] 2 Ch. 89; 128 L.T. 650), *applied.*

Re Weibking, Ex parte Ward, ([1902] 1 K.B. 713; 86 L.T. 455), *explained and distinguished.*

[As to Reputed Ownership, see HALSBURY, Hailsham Edn., Vol. 2, pp. 230-241, paras. 301-315; and for Cases, see DIGEST, Vol. 5, pp. 750-802, Nos. *6475-6854.*]

Cases referred to:

(1) *Re Florence, Ex p. Wingfield*, (1879), 10 Ch.D. 591; 40 L.T. 15; 5 Digest 806, *6885.*
(2) *Re Couston, Ex p. Watkins*, (1873), 8 Ch. App. 520; 42 L.J.Bcy. 50; 28 L.T. 793; 5 Digest 808, *6898.*
(3) *Re Watson & Co., Ex p. Atkin Brothers*, [1904] 2 K.B. 753; 73 L.J.K.B. 854; 91 L.T. 709; 5 Digest 798, *6819.*
(4) *Smith* v. *Hudson*, (1865), 6 B. & S. 431; 6 New Rep. 103; 34 L.J.Q.B. 145; 12 L.T. 377; 5 Digest 795, *6798.*
(5) *Load* v. *Green*, (1846), 15 M. & W. 216; 15 L.J.Ex. 113; 7 L.T.O.S. 114; 5 Digest *795, 6794.*
(6) *Joy* v. *Campbell*, (1804), 1 Sch. & Lef. 328; 3 Bli. N.S. 110, *n*; 5 Digest 795, *i.*
(7) *Belcher* v. *Bellamy*, (1848), 2 Exch. 303; 17 L.J.Ex. 219; 5 Digest 781, *6706.*
(8) *Hamilton* v. *Bell*, (1854), 10 Exch. 545; 24 L.T.O.S. 118; *sub nom., Bell* v. *Hamilton*, 24 L.J.Ex. 45; 5 Digest 798, *6824.*
(9) *Gibson* v. *Bray*, (1817), 8 Taunt. 76; 1 Moore C.P. 519; 5 Digest 798, *6821.*
(10) *Re Smith, Ex. p. Bright*, (1879), 10 Ch.D. 566; 48 L.J.Bcy. 81; 39 L.T. 649; 5 Digest 798, *6818.*
(11) *Re Kaufman Segal & Domb, Ex p. Trustee*, [1923] 2 Ch. 89; 92 L.J.Ch. 218; 128 L.T. 650; Digest Supp.
(12) *Colonial Bank* v. *Whinney*, (1886), 11 App. Cas. 426; 56 L.J.Ch. 43; 55 L.T. 362; *revsg.*, (1885), 30 Ch.D. 261; 5 Digest 787, *6745.*
(13) *Lingard* v. *Messiter*, (1823), 1 B. & C. 308; 2 Dow. & Ry. K.B. 495; 1 L.J.O.S. K.B. 121; 5 Digest 800, *6839.*
(14) *Re Keen & Keen, Ex p. Collins*, [1902] 1 K.B. 555; 71 L.J.K.B. 487; 9 Mans. 145; *sub nom., Re Keen, Ex p. Bristol School Board*, 86 L.T. 235; 5 Digest 672, *5955.*
(15) *Re Weibking, Ex p. Ward*, [1902] 1 K.B. 713; 71 L.J.K.B. 389; 86 L.T. 455; 5 Digest 790, *6765.*

Appeal from a decision of His Honour Judge Lawson Campbell at Peterborough County Court on Jan. 13, 1948.

The county court judge held that materials stored in the yard of the bankrupt, a builder, and materials lying on a building site were all in the possession of the bankrupt in such circumstances that the bankrupt was the reputed owner thereof within the Bankruptcy Act, 1914, s. 38 (2) (*c*), and, therefore, that they must be included in his property divisible among his creditors. He expressed the view that the presumption could be negatived only by proving a custom of the trade that such materials in the bankrupt's physical possession should not be deemed to be in his reputed ownership, and he found the evidence thereof insufficient. The Divisional Court now allowed the appeal as regards the materials on the site, but dismissed it as regards the materials in the bankrupt's yard. The facts appear in the judgment of the court.

Denys Buckley for the first appellants (the local authority).

Upjohn, K.C., and *J. G. S. Hobson* for the second appellants (sub-contractors and owners of some of the materials).

Van Oss for the trustee in bankruptcy. *Cur. adv. vult.*

Apr. 23. **JENKINS, J.,** read the following judgment of the court. These are appeals by the Oundle and Thrapston Rural District Council (whom we will call " the first appellants ") and Ellis Partridge & Co. (Leicester), Ltd. (whom we will call " the second appellants ") from a decision of the Peterborough County Court dated Jan. 13, 1948, to the effect that certain building materials belonging in part to the first appellants and in part to the second appellants have become the property of the trustee in bankruptcy of one Albert Fox under the Bankruptcy Act, 1914, s. 38 (2) (*c*), commonly known as the " reputed ownership clause."

The bankrupt, Albert Fox, carried on a builder's business at King's Cliffe, in the county of Northampton, where he had a builder's yard. At the date of his adjudication in bankruptcy on Mar. 22, 1947, he was engaged in building two pairs of houses at King's Cliffe for the first appellants. Leave to build these houses was given by the Minister of Health in August, 1946, and work started in the same month. As a result of various difficulties and delays the building contract was not signed by the bankrupt until Dec. 31, 1946, and was not signed by the first appellants until Mar. 22, 1947, that is, on the actual date of adjudication. That point was not pursued in this court where the case was argued on the footing that the work on these houses had been done under the contract. This document is one of the printed model forms of the Royal Institute of British Architects with certain modifications introduced by the parties. It bears date Mar. 22, 1947, and is expressed to be made between the first appellants and the bankrupt. Under it the bankrupt agrees to execute and complete the houses as shown on certain drawings and described in certain bills of quantities " upon and subject to the conditions annexed hereto " for a sum of £5,199 17*s*. 0*d*. payable by the first appellants " at the times and in the manner specified in the said conditions." Of these conditions No. 24 (read in conjunction with the appendix to the contract) provides for what are known as " interim certificates " to be given monthly by the architect. These certificates entitle the builder on presentation to payment of 90 per cent. of the sum certified to be due to him, which is to be arrived at by valuing " the work properly executed " and " the material and goods delivered upon the site for use in the works " up to and including a date not more than seven days before the date of the certificate, with a proviso not here material. By condition 11 it is provided in effect that where an interim certificate on which the builder has received payment includes the value of " any unfixed materials and goods intended for and placed on or adjacent to the works " those materials and goods become the employer's property and may not be removed except for use on the works without the written authority of the architect. Under this contract three interim certificates were given by the architect between October and December, 1946, and payments were made on them aggregating £1,125. These certificates covered materials which it will be convenient to divide into three categories for the purposes of these appeals :—(*a*) Materials provided by the builder particularised in sched. II to an affidavit of the trustee sworn on Oct. 10, 1947. These were never on the site, but had, by arrangement between the builder and the architect, been stored in the builder's yard some distance away. This was a mere matter of convenience, the circumstances being explained in the affidavit of Henry Ralph Surridge (a member of the firm of architects appointed for the purposes of the contract) sworn in these proceedings on Nov. 20, 1947. (*b*) Further materials provided by the builder, being also itemised in the beforementioned schedule. These were at all material dates lying loose on the site. (*c*) Certain roofing tiles. These were supplied by the second appellants and were also at all material dates lying loose on the site. The items in categories (*a*) and (*b*) had been purchased by the bankrupt under licences from the appropriate authorities. Consequently, under the licences devoted to this particular contract and no other, they were the property of the bankrupt until he received payment under the certificates before-mentioned, when the property in them admittedly passed to the first appellants. The tiles in category (*c*) are in a different position, for it appears that the bankrupt entered into a sub-contract for the tiling of the houses with the second appellants. This sub-contract is contained in or evidenced by a highly informal document described as " Traveller's Sale Note." It is dated Oct. 9, 1946, and provides for " tiling, lathing and feeting " the houses at £134 6*s*. per pair by the second appellants on terms stated on the back of the note. From these terms it appears that the contract was, in effect, that the second appellants should supply and themselves fix the necessary tiles for the price mentioned, and one of the conditions is in these words: "all materials sent for slating and tiling jobs to remain our [*sc.* the tiler's] absolute property until fixed in work." It appears further that in October and November, 1946, the tiles in question were consigned by the second appellants to themselves, care of the bankrupt at the site, and were left on the site by their employee in charge of the bankrupt as bailee. The property in these tiles, therefore, has never been in the bankrupt, and they remain the property of the second appellants as sub-contractors. Nevertheless, they were, at the critical date, lying on the site with the before-mentioned materials in category (*b*). The only notice apparent to the passer-by was a builder's board displayed on the site showing the name of the bankrupt as the builder on the job.

In these circumstances the trustee, having disclaimed the bankrupt's contract with the first appellants, moved in the Peterborough County Court for a declaration that all the materials above-mentioned had vested in him under the Bankruptcy Act, 1914, s. 38 (2) (*c*), as having been at the material date:

> . . . in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof.

The learned county court judge held that there was no distinction for the purposes of reputed ownership between the materials in the yard (category (*a*)) and those on the site (categories (*b*) and (*c*)), all being clearly in the sole possession of the bankrupt, and that it followed as an inference from the facts and circumstances of the case that they were in his possession so that he was the reputed owner. He went on to express the view that "in order to negative the strong presumption it is necessary to prove a custom in this trade that materials in the bankrupt's actual physical possession should not be deemed to be in his reputed ownership," and said that the evidence was clearly not enough to negative the "presumption of reputed ownership." As regards the consent of the true owner required by the statute, he said that, in his view, the appellants were well aware of the true state of all the facts and "must be presumed" to have consented to the "reputed ownership." He, therefore, acceded to the trustee's motion as regards the whole of the materials here in question. Hence these appeals.

We do not accept the learned county court judge's view that the bankrupt's possession of the materials in itself raised a presumption of reputed ownership only to be rebutted by proof of some notorious custom of the building trade which would affect persons dealing with him with notice that materials, though in his possession, were not necessarily his property. To bring s. 38 (2) (*c*) into operation it must be shown, not merely that the goods in question were in the bankrupt's possession, but also that they were in his possession in such circumstances that he was the reputed owner thereof, and, furthermore, that they were so in his possession by the consent or permission of the true owner. Mere proof of possession in given circumstances (with the requisite consent or permission) *may*, indeed, raise a *prima facie* case of reputed ownership only to be rebutted by proof—or judicial notice—of a custom negativing that view, but the primary question must always be whether, in the circumstances, the possession of the goods by the bankrupt involved the inference that he was the reputed owner. If the answer to that question is "No," then *cadit quaestio*. It is only if the answer is "Yes" that the question of custom enters into the matter at all. Further, we differ from the learned county court judge in that he drew no distinction between the materials in the yard and those on the site. All the circumstances in which the bankrupt was in possession of the materials must be taken into account, and it seems to us that their physical situation in his own yard, on the one hand, and on the first appellants' building site, on the other, is a circumstance of vital importance.

A section in terms not unlike those of s. 38 (2) (*c*) of the Act of 1914 has been part of our bankruptcy law since the days of James I, and there is not unnaturally a great number of cases on the subject, though it will only be necessary for us to refer to a few of them. In considering whether a particular transaction falls within the mischief of the enactment, it is important to remember the object of the section and its predecessors, and its penal effect in depriving a man of his property for the benefit of others to whom *prima facie* he owes no duty. This is well stated by JAMES, L.J., in *Re Florence, Ex parte Wingfield* (1) (10 Ch.D. 594):

> The section must, however, be read, as the similar provision in the bankruptcy statutes from the time of James I has always been read, with some attention to common sense. It has always been construed as meaning this: that if goods are in a man's possession, order, or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit. But, if no such credit has been given, then the maxim applies, *cessante ratione cessat ipsa lex.*

It appears from this passage that the conditions essential to the operation of the section are that the true owner of the goods should, by leaving them in the possession, order or disposition of the bankrupt, put him in a position by means of them to obtain false credit. It is not, of course, necessary to show that the bankrupt has, in fact, obtained false credit by means of the goods. He will, in effect, be presumed to have done so at the expense of the general body of creditors if the circumstances in which he is in possession are such as must necessarily lead persons dealing with him to believe the goods are his. Unless the true owner, judged on the footing that knowledge must be imputed to him of the necessary consequences of his acts, can be shown to have been guilty of some remissness in this respect, the section cannot be brought into operation against him. He is not to be deprived of his goods merely because an inference that the bankrupt is the true owner *may* arise. In such a case anyone giving credit to the bankrupt on the footing that the goods were the bankrupt's property would be the victim of his own carelessness in making an unwarranted assumption and not of any remissness on the part of the true owner.

The leading case on the application of the section is *Re Couston, Ex parte Watkins* (2), where LORD SELBORNE, L.C., said (8 Ch. App. 528):

> The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who take any means to inform themselves on the subject. So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to shew that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods, one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession.

To this statement of the law may be added the following passage from the judgment of the Court of Appeal delivered by VAUGHAN WILLIAMS, L.J., in *Re Watson & Co.* (3) ([1904] 2 K.B. 753, 757):

> BLACKBURN, J., in his judgment in *Smith* v. *Hudson* (4) said: "*Load* v. *Green* (5) decides that the true owner as such must consent that the other side should be reputed owner, not being true owner." The doctrine of reputed ownership was first embodied in the Bankruptcy Act, 21 Jac. 1. It has been couched in various words in the successive bankruptcy statutes, but this principle has run through them all, and the statement of LORD REDESDALE in *Joy* v. *Campbell* (6) (a case which has been approved and acted on again and again: see *Belcher* v. *Bellamy* (7), *Hamilton* v. *Bell* (8), and many other cases), that the true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt, justifies this statement. This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise: see *Hamilton* v. *Bell* (8);

Gibson v. *Bray* (9); *Ex parte Bright* (10). The question for us then is: Did Messrs. Atkin consent to the possession by the bankrupts, Messrs. Watson, under such circumstances that customers were entitled to assume that Messrs. Watson were the owners of the goods in their trade or business?

In *Re Kaufman Segal & Domb* (11) P. O. LAWRENCE, J., said ([1923] 2 Ch. 93):

> Mr. Hansell has contended that the trustee in bankruptcy, in order to bring chattels within the order and disposition clause of s. 38 of the Bankruptcy Act, 1914, must prove, not only that the bankrupts are in possession of the goods, but also that they are in possession of the goods under such circumstances that the inference of ownership in the bankrupts "must" arise.

With this guidance, the first question to be considered is whether these goods, which were admittedly in the possession of the bankrupt, were so in such circumstances that the inference that he was the owner was one which *must* arise. As appears from our criticism of the reasoning of the learned county court judge, it seems to us that in this respect category (*a*) (the materials in the bankrupt's yard) stands quite apart from categories (*b*) and (*c*) (the materials and roofing tiles on the site). As to category (*a*), the circumstances were precisely the same as if the goods had been his own, with nothing whatever to show that they were not, or might not be, his. We cannot but think that any man seeing building materials stored in a builder's yard would naturally suppose that they were the builder's property and could not be expected to come to any other conclusion. The evidence directed to showing that in these days builders, in fact, carry no stock and can have no materials except such as are obtained under licences earmarking them for the contracts which they have in hand, does not, in our judgment, alter this result. Even if the hypothetical inquirer into the bankrupt's position knew that the materials in the yard must have been obtained under licence for use only on particular approved works, that would give him no ground for supposing that the bankrupt was not the owner of them. So far as the materials in this category are concerned it seems to us that the tests prescribed in *Re Couston* (2), *Re Watson & Co.* (3), and *Re Kaufman* (11) are plainly satisfied. We, therefore, hold, that the bankrupt was in possession of these materials in such circumstances that he was the reputed owner thereof. Next, were the goods in this category then in the builder's possession "in his trade or business"? We think they were. These words must be satisfied by the character of the goods as building materials, coupled with their presence in a builder's yard where his business is carried on. They have been construed as meaning "for the purposes of or purposes connected with his trade or business": see *Colonial Bank* v. *Whinney* (12) (30 Ch.D. 274), and that definition is clearly satisfied here. Finally, as to the goods in category (*a*), were they so in possession "by the consent and permission of the true owner"? In our judgment, they were. The true owners' (*i.e.*, the first appellants') consent was given through their architect, Mr. Surridge, who had ample authority in that behalf, and, in our judgment, the true owners must be taken to have known the risk they ran. We are, accordingly, of opinion that the learned county court judge's decision was right and should be affirmed so far as the materials in category (*a*) are concerned.

Turning now to categories (*b*), the first appellants' materials on the site, and (*c*), the second appellants' roofing tiles also on the site, the first question to be considered is whether any distinction should, for the present purpose, be drawn between these two categories on the ground that, whereas the former were, in fact, the property of the bankrupt until they passed to the first appellants under condition 11 of the contract, the latter were never his property, but belonged throughout to the second appellants. On this point we were referred to two cases, namely, *Lingard* v. *Messiter* (13) and *Re Watson & Co.* (3), *per* VAUGHAN WILLIAMS, L.J., in the course of the argument ([1904] 2 K.B. 756) to show that the onus of proof shifts according to whether the bankrupt was or was not at one time the owner of the goods, or, in other words, that it is easier to infer reputation of ownership where the bankrupt, having been in possession of the goods as owner, has remained in possession after transferring the property in them to somebody else, than it is to do so where the bankrupt is in possession of goods of which he never was the owner. We do not think these general propositions are of any assistance in the present case. After all, the section is concerned with the apparent, not the actual, situation. From this point of view no distinction can, in our view, be drawn between the tiles and the other materials on the site, unless the evidence led to show that in the midlands and north tiling is almost universally done by sub-contractors on terms that the roofing materials are to remain their property until fixed should be regarded as amounting to proof of a custom to that effect of which notice must be imputed to the hypothetical inquirer. Accordingly, we propose to consider all these materials, including the tiles, as one, and, in doing so, to assume for the moment that the custom alleged on behalf of the second appellants is not made out. On this assumption we ask ourselves what inference the hypothetical inquirer would draw as to the ownership of materials (including roofing materials) on the site. He would see the site, with two pairs of houses in course of erection on it, and (from the notice board thereon) that the bankrupt was in possession of the site as the builder engaged on the work. He would see that the bankrupt had in his possession on the site materials visibly appropriated to the building of the houses. That is as much as his eyes would tell him. In addition, he must (we think) be taken as knowing that whereas the bankrupt might be building as a speculation on his own account, it was equally, if not more, likely that the bankrupt was concerned merely as a contractor building on somebody else's land for that other person, in which latter case no inference as to ownership of the materials based on the former hypothesis could justifiably be drawn. If the hypothetical inquirer took steps to inform himself as to the terms on which building operations are normally undertaken by a building contractor for a building owner with a view to arriving at some conclusion as to the ownership of the materials on the site (as he must be assumed to have done on the principle stated in *Re Couston* (2)), he would (according to the evidence before us) discover that the ownership of the materials on the site depended on the terms of the contract with the building owner ; that, as likely as not, or more likely than not, the contract was either in the R.I.B.A. form or in a form containing provisions to the same effect as condition 11 of the R.I.B.A. form ; and that, if this was the case, all or any of the materials on the site, though provided in the first instance by the builder, might have become the property of the building owner by inclusion in certificates under which payment had been made. It, therefore, seems to us that it is impossible to impute to the hypothetical inquirer the inference that the bankrupt was the owner of the materials on the site as an inference which must arise from the bankrupt's possession of those materials. The most that can be said is that such an inference might have been drawn. It was not a necessary inference. It follows that, in our opinion, the materials (including roofing materials) on the site were not in the possession of the bankrupt in such circumstances that he was the reputed owner thereof within the meaning of the section as interpreted by the authorities to which we have referred. The bankrupt's possession of these materials was, in our view, of the character, aptly described by Wright, J., in *Re Keen & Keen* (14) ([1902] 1 K.B. 560), as "ambiguous," and neither such as to make the bankrupt the reputed owner of the goods nor such that the appellants' consent to it amounted to a consent on their part to the bankrupt's reputation of ownership.

Counsel for the trustee placed considerable reliance on *Re Weibking* (15), in which Wright, J., held on the facts that a bankrupt builder was the reputed owner of loose materials on a building site which under the terms of the contract had become the property of the owners of the site. That decision is, no doubt, in point as regards subject-matter, but the facts are not fully stated in the report, and, so far as stated, show that the transaction there in question was of a type in which a builder builds in anticipation of leases to be granted to him of the completed houses, or, in other words, as a speculator on his own account and not merely as a contractor as in the present case. In view of the principles stated in the other authorities we have mentioned, we think *Re Weibking* (15) should be regarded simply as a decision on the facts of that particular case and not as purporting to lay down any general rule as regards the reputation of ownership of loose materials in the possession of a builder on a building site. We are fortified in this conclusion by the observations of the same learned judge in *Re Keen & Keen* (14), which also concerned materials of this description.

The conclusion to which we have come with respect to the materials on the site as a whole makes it unnecessary for us to express any opinion as to the alleged custom of sub-contracting for the roofing of houses on terms that the tiles are to remain the property of the sub-contractor until fixed, and we think our proper course is to leave it open for decision in any future case in which it may arise, perhaps on more authoritative and explicit evidence than is now before us. In the result, the first appellants' appeal succeeds as regards their materials on the site, but fails as regards the materials in the yard, while the second appellants' appeal succeeds without qualification. The second appellants should have their costs here and below. The first appellants should also have their costs of appeal, but we think, so far as they are concerned, the order as to costs made in the county court should remain undisturbed. I should add that, so far as the order involves payment of costs by the trustee, that will be without prejudice to any right he may have to recover those costs out of the estate of the bankrupt.

Order accordingly.

Solicitors: *Hiscott, Troughton & Page*, agents for *Hunnybun & Sykes*, Thrapston (for the first appellants); *Bennett, Ferris & Bennett*, agents for *Bray & Bray*, Leicester (for the second appellants); *Chamberlain & Co.*, agents for *Mellows & Sons*, Peterborough (for the trustee in bankruptcy).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

R. *v.* SURREY (MID-EASTERN AREA) ASSESSMENT COMMITTEE. *Ex parte* MERTON AND MORDEN URBAN DISTRICT COUNCIL & ANOTHER.

[King's Bench Division (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 21, 22, 1948.]

Rates and Rating—Valuation list—Amendment Proposal—Specification of grounds for proposed amendment—"Person aggrieved"—Rating and Valuation Act, 1925 (*c.* 90), *s.* 37 (1), (2).

A rating authority made a proposal for the amendment of the valuation list by increasing the assessment of a hereditament which was treated as wholly industrial, stating in the proposal form: "The proposed amendment is supported upon the following grounds: That the present assessment is insufficient, incorrect and unfair." The existing assessment was stated, and notice was given that: "The precise assessment desired will be notified at a later date." The assessment committee declined to entertain the proposal on the ground that (*a*) the proposal was bad because it did not give the information required by the Rating and Valuation Act, 1925, s. 37 (2), and (*b*) the rating authority had not considered the particular premises, but had merely come to the general conclusion that industrial buildings of the type in question in the locality were assessed at too low figures, and, therefore, the authority could not be a "person aggrieved" within s. 37 (1).

Held: (i) it was not necessary to state on the proposal form the amount of the increase desired, nor was it necessary to indicate that the proposed amendment was not due to part of the premises being apportioned as non-industrial.

R. v. *West Norfolk Assessment Committee, Ex parte Ward* (*F. B.*), (1930) (94 J.P. 201), *followed.*

R. v. *Reading Assessment Committee and another, Ex parte McCarthy E. Fitt, Ltd.*, ([1948] 1 All E.R. 194), *distinguished.*

(ii) the conclusion that all properties of a particular type in its locality were, or might be, undervalued was sufficient to make the rating authority a "person aggrieved."

[As to Proposals for the Amendment of the Valuation List, see HALSBURY, Hailsham Edn., Vol. 27, pp. 484-488, para. 913; and for Cases, see DIGEST, Vol. 38, p. 585, and Supp.

For the Rating and Valuation Act, 1925, s. 37, see HALSBURY'S STATUTES, Vol. 14, p. 665.]

Cases referred to :

(1) *R.* v. *Reading Assessment Committee and another, Ex parte McCarthy E. Fitt, Ltd.*, [1948] 1 All E.R. 194.

(2) *R.* v. *West Norfolk Assessment Committee, Ex parte Ward* (*F. B.*), (1930), 94 J.P. 201 ; (1926-31), 1 B.R.A. 418 ; Digest Supp.

MOTIONS for orders of *mandamus* addressed to the Surrey (Mid-Eastern Area) Assessment Committee directing them to hear and determine a proposal by the Merton and Morden Rating Authority in respect of premises at Lombard A Road, Merton.

The assessment committee held that the proposal was bad because it did not give the information required by the Rating and Valuation Act, 1925, s. 37 (2). The Divisional Court now reversed that finding and held that the orders of *mandamus* should go. The facts appear in the judgment of LORD GODDARD, C.J.

B *Simes, K.C.*, and *Charles Scholefield* for the applicants (the Merton and Morden Urban District Council and the Surrey County Valuation Committee).

Rowe, K.C., *Squibb* and *W. L. Roots* for the respondents (the Surrey (Mid-Eastern Area) Assessment Committee).

LORD GODDARD, C.J. : Two points are raised. The first is whether the proposal complied with the Rating and Valuation Act, 1925, s. 37. The C point was taken by the assessment committee that the proposal was bad because it did not give the information required by the statute, and it was said that the case was covered by the recent decision of this court in *R.* v. *Reading Assessment Committee, Ex parte McCarthy E. Fitt, Ltd.* (1). The proposal states :

> We, the council of the urban district of Merton and Morden, the rating authority for the said urban district, in pursuance of the Rating and Valuation Acts, 1925-1946, D do hereby make a proposal for the amendment of the valuation list for the time being in force for the said urban district by increasing the assessment of the hereditament described in the schedule hereto. The proposed amendment is supported upon the following grounds : That the present assessment is insufficient, incorrect and unfair.

It is then set out that the net annual value of the present assessment is £1,360 and the rateable value is £340, and it is also said : " The precise assessment desired will be notified at a later date." I should have thought that there could E be no conceivable doubt that that is a proposal by the rating authority to increase the net annual value and the rateable value of that property. It has been decided by the Court of Appeal in *R.* v. *West Norfolk Assessment Committee* (2) that it is not necessary in making these proposals that the actual figures which it is sought to insert in the valuation list should be stated in the proposal. It is enough if the ratepayer is informed that the rating authority propose to increase the assessment on the ground stated. He need F not be told by how much it is intended to increase it. If, before the case came before the assessment committee, the ratepayer or anybody else who was interested had not been told by how much it was suggested that the assessment should be increased or decreased, as the case might be, that, no doubt, would have been a good ground for an application to the assessment committee to grant an adjournment so that the ratepayer and his advisers would be able to G consider the figures.

It is, however, said by counsel for the assessment committee that the present case is covered by *R.* v. *Reading Assessment Committee* (1). He says that the property which is affected by this proposal is an industrial hereditament, and that in respect of industrial hereditaments the valuation list has to show the net annual value, how much of that net annual value is attributed to the industrial part of the premises, and the rateable value, and also the net annual value H and the rateable value in regard to the non-industrial part of the premises. These premises have never been treated as otherwise than industrial premises. There has been no apportionment, and, therefore, in the valuation list the columns which deal with the non-industrial part of the hereditament are left blank. Counsel for the assessment committee argues that, as the rating authority do not show in this proposal that they propose to keep the premises wholly industrial or say they are going to increase the total rateable value by apportioning some part of the premises as being non-industrial, this proposal is bad. If the rating authority had desired to alter the valuation list by apportioning some part of the value to non-industrial premises, that would have been a distinct ground which must have been stated separately. If it had not been stated in the proposal, I think it would have been incompetent for the assessment committee to have considered the proposal, but all they are saying here is: "We take your hereditament which is in the valuation list and we say that the valuation ought to be increased." In my view, this proposal is perfectly good within the authority of the *West Norfolk* case (2), and that there is no objection to be taken to it on that ground. A

In the *Reading* case (1), the premises were partly industrial and partly non-industrial. The notice which was served showed the net annual values and rateable values of the industrial and non-industrial portions set out with the words against them: "To be amended." In that case the court thought that the proposal was bad because it did not indicate to the ratepayer whether it was proposed to alter the proportions of industrial and non-industrial user or B whether they were to be kept the same, the valuation of both portions merely being raised. There is nothing of that sort in this case and I do not think any objection could be taken on that ground to the proposal which is now before us.

Counsel for the assessment committee further says that the evidence in this case shows that when the rating authority made their proposal they had not applied their minds to the particular hereditament with which we are concerned. It is clear that the rating authority had come to the conclusion that, owing to C the changes which had taken place in the district, it was likely that what they call special properties—industrial properties of a certain class—were assessed too low, and the affidavit which has been made by their rating surveyor says:

> I formed the opinion in 1946 that, in consequence of a continued general rise in rental values and an increase in demand for premises of this character, there was a *prima facie* case for an increase in the assessments of the special properties of this class throughout D the county, particularly those properties which had not been completely revalued during the last five years.

It was then decided that the authority would serve proposals for an increase in respect of all the special properties, and counsel's argument is that, as the authority had not applied their minds at the time the proposals were put forward to each individual property, they cannot be said to be a "person E aggrieved" within s. 37 (1) of the Rating and Valuation Act, 1925, so as to entitle the authority to make a proposal for the amendment of the list. A "person aggrieved" for the purpose of this Act, that is to say, a person who is entitled to make a proposal either for increasing or decreasing the amount of the valuation, must mean a person who considers that he is aggrieved and may be able to show that he is aggrieved because until the decision is given either by the assessment committee or quarter sessions, if there is an appeal, F no one can say whether the person is aggrieved. It may turn out that he has no case for grievance at all. The contention of counsel for the assessment committee is that, at any rate, it must be shown that the particular assessment has been before the minds of the rating authority, who made the proposal in this case, but it does not seem to me they need apply their minds to every particular hereditament and have advice on that particular hereditament before they G make a proposal. It is quite enough to make them a "person aggrieved" if they say, as they did in this case: "We think that all the special properties in this district are or may be undervalued, and we will, therefore, take steps to get them valued and make the proposal." They give what are called protective notices, because, if they could not do so, some ratepayers in respect of whose property valuations were made at an early period would be affected while others would not. It seems to me that, if we gave effect to counsel's H argument, it would be only one more step to say that, unless the ratepayer had been advised that his property was over-assessed, he could not be deemed to be a person aggrieved, or, unless he was able to put forward some special knowledge, he could never bring his appeal as a person aggrieved. In one sense any application to the assessment committee is speculative because the applicant does not know whether the evidence he is going to produce will be accepted or whether it will not, but I cannot see that if the rating authority consider that, owing to changes which have taken place, the probabilities are that the whole of the properties of a particular class in their district are under-assessed, they are not "persons aggrieved" and, as such, able to make a proposal. Accordingly, I think both these points fail and the *mandamus* must go as asked.

HUMPHREYS, J.: I agree.

PRITCHARD, J.: I agree.

Orders of mandamus granted with costs.

A Solicitors: *Wyatt & Co.*, agents for *Dudley Aukland*, clerk to Surrey County Council (for the applicants); *Gard, Lyell & Co.*, agents for *Theodore Bell, Cotton & Curtis*, Sutton (for the respondents).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

B

TURNER *v.* UNDERWOOD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 20, 1948.]

C *Criminal Law—Evidence—Admission—Statement by accused after caution that he had "done time" for previous similar offence.*

On being asked by a railway police officer what he had to say about a complaint of indecent exposure of his person in a railway carriage and after being cautioned, the appellant said: "Can I speak to you alone. I don't want to get into trouble. I won't do it again. I have done time for this before." Evidence of the statement was given by the police officer on the hearing by justices of a charge of indecent behaviour against the D appellant.

HELD: although tantamount to evidence of a previous conviction, the statement was admissible as an admission by the appellant that he had committed a deliberate and indecent act.

[AS TO ADMISSIONS ARISING FROM QUESTIONS BY POLICE, see HALSBURY, Hailsham Edn., Vol. 9, p. 203, para. 291; and FOR CASES, see DIGEST, Vol. 14, pp. 414-E 417, Nos. *4318-4357*.]

CASE STATED by Stockport justices.

At a court of summary jurisdiction sitting at Stockport an information was preferred by the respondent under the bye-laws and regulations made by the London, Midland and Scottish Railway Co. for regulating the travelling upon and using and working of and for maintaining order in and upon the company's railways pursuant to the Railway Clauses (Consolidation) Act, 1845, as extended F by the Regulation of Railways Act, 1889, charging the appellant with behaving in an indecent manner while in a certain carriage upon the London, Midland and Scottish Railway, to the annoyance of another person, contrary to bye-law 14. The information was heard on Nov. 21, 1947, when the court fined the appellant 20*s.* and 10*s.* costs. The facts appear in the judgment. The appeal was dismissed.

G *H. J. Baxter* for the appellant.

The respondent did not appear and was not represented.

LORD GODDARD, C.J.: The appellant was convicted by the justices for the county borough of Stockport on a charge that while in a certain carriage on the London, Midland and Scottish Railway he behaved in an indecent manner to the annoyance of another person then being therein, contrary to H bye-law 14. The offence was the exposure of his person to another man in the carriage, and he now appeals on the ground that inadmissible evidence was given against him.

The evidence which it is alleged was inadmissible was this. On the day following the offence the other passenger saw the appellant at a railway station and complained to an officer of the railway police who asked the appellant what he had to say. The appellant replied: "I have never seen him before," and "I didn't pull it out." Thereupon he was cautioned. He then said: "Can I speak to you alone? I don't want to get into trouble. I won't do it again. I have done time for this before." It is said that the conviction ought to be quashed because the words he used, "I have done time for this before," were tantamount to evidence of a previous conviction, as, indeed, they were. This is a statement made by the appellant at the time, and in strictness what a man says in relation to the charge is admissible against him. In cases which are tried before juries where the court knows that the defendant has said something in a statement which amounts to an admission of a previous conviction or discloses other matters reflecting on his character, it is the practice for the court to see that that is not read to the jury, but there is no rule of law that what a man says in relation to the charge is not evidence against him. In a case like the present the court must know what has been said before it can rule one way or another whether the evidence is admissible or not. It is different from a case where a judge or chairman or recorder is trying a case on depositions and can say: "I direct you not to lead this part of the evidence." This statement, in my opinion, was relevant because it goes to show that the appellant was admitting that what he had done was a deliberate and indecent act. In my view, there is no ground for quashing the conviction.

HUMPHREYS, J.: I agree.

PRITCHARD, J.: I agree.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *John Moorley & Co.*, Manchester (for the appellant).

Appeal dismissed.

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

HIBBERT *v.* McKIERNAN.

[King's Bench Division (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 14, 15, 22, 1948.]

Criminal Law—Larceny—Stealing by finding—Golf balls picked up on golf links after being lost by original owners—Possession of landowners—Larceny Act, 1916 (*c.* 50), *s.* 1 (2) (i) (*d*).

The appellant, while trespassing on some golf links belonging to the members of a golf club, picked up and carried away eight golf balls which had been lost and abandoned by their original owners. The club had taken steps to exclude trespassers from the links and to prevent the taking of balls, but the officials of the club did not know at any given moment the position or number of balls that might be lying on their property.

Held: every householder intends to exclude thieves from his property and this confers on him a special property in goods found on his land which is sufficient to support an indictment if the goods are taken therefrom with a felonious intent; on the evidence the appellant had such an intent; and, therefore, he was rightly convicted of larceny under the Larceny Act, 1916, s. 1 (2) (i) (*d*).

R. v. *Rowe*, (1859) (Bell, C.C. 93; 32 L.T. 339), *applied.*

R. v. *White*, (1912) (107 L.T. 528), *explained.*

[As to Taking by Finding, see HALSBURY, Hailsham Edn., Vol. 9, p. 500, para. 859; and for Cases, see DIGEST, Vol. 15, pp. 877-880, Nos. *9631-9648.*]

Cases referred to:

(1) *Bridges* v. *Hawkesworth*, (1851), 21 L.J.K.B. 75; 18 L.T.O.S. 154; 3 Digest 64, *77.*

(2) *Elwes* v. *Brigg Gas Co.*, (1886), 33 Ch.D. 562; 55 L.J.Ch. 734; 55 L.T. 831; 3 Digest 65, *79.*

(3) *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q.B. 44; 65 L.J.Q.B. 460; 74 L.T. 761; 3 Digest 65, *80.*

(4) *Hannah* v. *Peel*, [1945] 2 All E.R. 288; [1945] K.B. 509; 114 L.J.K.B. 533; 2nd Digest Supp.

(5) *R.* v. *Rowe*, (1859), Bell, C.C. 93; 28 L.J.M.C. 128; 32 L.T. 339; 23 J.P. 117; 15 Digest 913, *10,042.*

(6) *R.* v. *White*, (1912), 107 L.T. 528; 76 J.P. 384; 15 Digest 880, *9648.*

Case Stated by Stockport justices.

The appellant was charged under the Larceny Act, 1916, s. 2, with stealing golf balls, the property of the secretary and members of a golf club. On consenting to be dealt with summarily, he was tried by the justices and convicted of the offence. He appealed against the conviction on the ground that the members of the club had no property in the balls (which were found by the justices to have been abandoned by their original owners), and that, therefore, he had not stolen them within the meaning of s. 1 of the Act of 1916. His appeal was now dismissed by the Divisional Court. The facts appear in the judgment of LORD GODDARD, C.J.

E. Garth Moore and *Geoffrey Lane* for the appellant.
Heathcote-Williams for the respondent.

Cur. adv. vult.

Apr. 22. The following judgments were read.

LORD GODDARD, C.J.: This is a Case stated by two justices for the county borough of Stockport, before whom the appellant was charged with, and convicted of, stealing eight golf balls, the property of the secretary and members of the Reddish Vale Golf Club. The material facts found by the justices are that the appellant was on the golf links on the day in question watching play and that he picked up eight balls which had been previously lost by members and which were found on him when arrested. The appellant, who had on a previous occasion or occasions been warned off the links which are the property of the members of the club, on arrest gave a false name and address and at first denied that he had taken any balls, but, when they were found on him, he said that he knew he had no right to take them. The justices also found that the balls had been abandoned by their original owners, and only one was capable of being identified by the original owner. Whether the justices meant that the balls had been abandoned so that the owners never intended to recover them if they could, as would be the case if they had thrown them away as useless, or whether they meant no more than that the search for them had been abandoned, may be open to question, but we must assume that the finding means that the owners had renounced both their possession of and property in the balls.

The justices were of opinion that the appellant took the balls for the purpose of selling them, and they also found that the police were, to the knowledge of the appellant, watching for the purpose of preventing the taking of balls and warning off trespassers. In these circumstances, the justices were of opinion that, in taking the balls, the appellant meant to steal them and did steal them, but the Case goes on to state at considerable length the questions of law which they considered arose, in the main whether the appellant acquired a title to the balls by finding them, which, as they had been abandoned by their original owners, would prevail against the owners of the land on which they were found. This led them to consider a line of cases with regard to the title to chattels found on the land of a person who is neither the finder nor the original owner, the most conspicuous of which are *Bridges* v. *Hawkesworth* (1), *Elwes* v. *Brigg Gas Co.* (2), *South Staffordshire Water Co.* v. *Sharman* (3), and *Hannah* v. *Peel* (4). The first three of these cases have long been the delight of professors and text writers, whose task it often is to attempt to reconcile the irreconcilable. It is, however, right to say that in recent years both the Corpus Professor of Jurisprudence at Oxford and the Professor Emeritus of English Law at Cambridge have expressed the opinion that *Bridges* v. *Hawkesworth* (1) was wrongly decided. If it was, the difficulty largely disappears, but that much-battered case has lately been re-invigorated by the decision of BIRKETT, J., in *Hannah* v. *Peel* (4), and I am glad to think that, for the reasons I am about to give, it is still for wiser heads than mine to end a controversy which will, no doubt, continue to form an appropriate subject for moots till the House of Lords lays it to rest for all time. I gladly pay tribute to the gallant and laborious effort of these justices to resolve the conflict. Probably no court of summary jurisdiction has ever before grappled so manfully with a really difficult question of law or stated their conclusions more clearly, and it will be disappointing to them to know that this court, notwithstanding a careful and learned argument by counsel for the appellant, is of opinion that these interesting questions do not in this case arise.

We are here dealing with a charge of larceny, with a thief who took the balls *animo furandi*, not with an honest man who, finding an article on the land of another, proclaims that fact with a view to discovering the owner if he can, and, when no owner comes forward, asserts a possessory title against the owner of the land on which it was found. We need not be troubled with nice questions relating to *animus domini, corpus possessionis, de facto* control, or the like. Every householder or landowner means or intends to exclude thieves and wrongdoers from his property, and this confers on him a special property in goods found on his land sufficient to support an indictment if the goods are taken therefrom, not under a claim of right, but with a felonious intent. This was the decision in *R.* v. *Rowe* (5)—a decision of the Court for Crown Cases Reserved, a court of high authority, especially considering the judges by whom it was comprised and whose decision is, in any case, binding on us. The prisoner in that case was convicted of stealing iron from the bed of a canal belonging to a company in whom the property was laid. The iron had fallen or been thrown overboard from barges and had been taken by the prisoner when the canal was drained. The court had no difficulty in affirming the conviction. There is not the least indication that the iron had sunk into the bed of the canal or that the court decided the case on that ground, which, it may be said, was the *ratio decidendi* in *Elwes* v. *Brigg Gas Co.* (2). In *Elwes* v. *Brigg Gas Co.* (2) a prehistoric boat was found buried in the land of the plaintiff which had been demised to the gas company, and CHITTY, J., held that it was as much the property of the freeholder as minerals would be, though, no doubt, he also held that the plaintiff was the first in possession after the original and presumably prehistoric owner. I do not agree that the authority of *Rowe's* case (5) is in any way qualified by *R.* v. *White* (6) in the Court of Criminal Appeal. The conviction in the latter case was quashed simply on the ground that the summing-up did not sufficiently explain the law of stealing by finding, now expressly defined in the Larceny Act, 1916, s. 1 (1) and (2) (i) (*d*).

The fact is that in the present case the theft alleged was of golf balls from a golf course. On every course balls must be lost from time to time, to be retrieved when the grass is cut or when someone has the time to look for them. Clearly there is no licence from the club to all and sundry to go on the course and take what they can find, and the facts show that the club did mean to exclude these pilferers, though the officials of the club did not know at any given moment the position or number of balls that might be lying on their property. A simple illustration will show the fallacy of the appellant's contention. A., meaning to give his neighbour B. a present of game, takes a brace of pheasants to the latter's house. Finding the door open he leaves them in the hall, and thereby abandons both his property in and possession of them. B. has at the moment gone out to post a letter, so does not know of A.'s gift. C., who has seen A.'s action, enters the house before B. returns and takes the game. Can it be doubted that C. is guilty of larceny and that the property can rightly be laid in B.? In the present case any difficulty might have been avoided by describing the balls, or, at any rate, seven of them, as the property of persons unknown, and at the present day allegations concerning the ownership of stolen property are, except in a few exceptional cases, treated as immaterial. In my opinion, the justices were right in convicting, and this appeal is dismissed.

HUMPHREYS, J.: In my opinion, the justices who stated this Case have created a number of suggested difficulties which do not arise on the simple facts of the case. I express no opinion on the statement:

> We are agreed that the golf balls in question were lost by the original owners in such circumstances that they must be held to have been abandoned . . .

beyond saying that I find nothing in the facts of the case as stated to support such an inference, but I assume for the purpose of my judgment that the balls were abandoned by their original owners.

The simple question in the Case, as I see it, is this. Was there evidence to justify the conviction of the appellant of the theft of those balls? That appears to me to be a totally different question from that elaborately argued by the justices in the course of stating the Case, namely:

> Would the members of the golf club have had a claim to the balls, when found, superior to that of an honest finder of them while they lay upon the golf course?

The appellant was not an honest finder. Indeed, he was not a "finder" at all except in the sense in which a burglar may be said to "find" the jewellery on the dressing-table of the householder, to steal which is the object of his entry on the premises. It is found that the appellant was a trespasser who had been warned off the golf course, and that he was aware that police were employed to prevent unauthorised persons from picking up and taking away golf balls. It was further found that the appellant, after giving a false name and address and denying that he was in possession of any golf balls, was found in possession of eight of them, and then admitted that he knew he had no right to take them. He, therefore, as the justices found, acted fraudulently, without any claim of right and with the intention of permanently depriving the owners of their property. In truth, he went there to steal the golf balls which he knew would be lying there and he stole as many as he could see. To describe such a person as having acquired any sort of property in the balls would be fantastic.

It is said, however, that the golf balls were not the subject of larceny because the members of the club had no property in them. Why not? The balls were on their land. They were believed to be there in some numbers, though the time had not arrived for searching for and retrieving them. The intention of the members to exercise control over the balls was proved by the steps taken by them to prevent other persons from interfering with them. In my opinion, this case is covered by the decision in *R.* v. *Rowe* (5) referred to by my Lord. In such a case as the present it is not necessary to allege or prove who is in law the owner of the goods. Indeed, it is not essential to name any person as the owner of the goods in an indictment for larceny though it is the practice to do so: see r. 6 (1) of the rules contained in sched. I to the Indictments Act, 1915. I agree that the appeal should be dismissed.

PRITCHARD, J.: I agree. In view of the finding of fact that the balls had been abandoned, the main question argued in this case was whether, before the appellant picked up the balls, the members of the club had acquired of them a possession of such a nature that interference with it was capable of becoming the basis of a charge of larceny. Before it can be said that the members did acquire such a possession of the balls, I think it must appear from the facts found that they intended to exclude others from interfering with the balls, and that they had over them a degree of power which was sufficient for the purpose of giving effect to such intent. In my judgment, on the facts found, it is clear that the members did so intend and had such power. It is true that there was no finding that they knew of the existence of these eight balls on their links, but I do not think that this absence of knowledge prevented the members having the necessary *animus domini*, which may be contained, and, I think, was contained, in a larger intent to exclude others from the place where, in fact, the balls were. For these reasons I agree that the appellant was rightly convicted of larceny and that this appeal fails.

Appeal dismissed with costs.

Solicitors: *Sayer, Ledgard & Smith*, agents for *Smith, Fort & Symonds*, Stockport (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Arthur Bond*, clerk to the Stockport justices (for the respondent).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

MINISTER OF PENSIONS *v.* HIGHAM.

[KING'S BENCH DIVISION (Denning, J.), April 15, 1948.]

War Pension—Mercantile marine—"War risk injuries"—Abnormal conditions on board ship—Construction—Ejusdem generis rule—Pensions (Mercantile Marine) Act, 1942 (*c.* 26), *s.* 1 (2) (*d*)—*War Pensions (Naval Auxiliary Personnel) Scheme,* 1944 (*S.R. & O.,* 1944, *No.* 499), *sched. I* (2) (*d*).

War Pension—Appeals—Conflicting decisions of courts of co-ordinate jurisdiction —Later decision preferred.

In considering whether "injuries sustained . . . at sea or in any other tidal water or in the waters of any harbour" are attributable to "the existence on board ship of any other conditions arising out of any such war as aforesaid which would be abnormal in time of peace" within the meaning of para. (*d*) of s. 1 (2) of the Pensions (Mercantile Marine) Act, 1942, that paragraph is not to be read *ejusdem generis* with the preceding paragraphs in the sub-section.

Minister of Pensions v. *Ballantyne*, 1948 Sessions Notes, 26, *followed. Obiter dictum of* DENNING, J., *in Staynings* v. *Minister of Pensions* ([1947] 1 All E.R. 347, 348), *explained.*

Per cur. : The doctrine of *stare decisis* does not apply in its full vigour to war pensions cases. The decisions of the various courts of co-ordinate jurisdiction are binding on the pensions appeal tribunals but not on themselves or each other, and, there being no provision for appeals from those courts to a superior court which could decide in favour of one or the other of two conflicting decisions, the English court would follow the general rule that where there are conflicting decisions of courts of co-ordinate jurisdiction the later decision is to be preferred if it is reached after full consideration of the earlier decision.

Observations on the limitations on the scope of the term "war risk injuries."

[AS TO WAR PENSIONS TO MARINERS OF BRITISH SHIPS, see HALSBURY, Hailsham Edn., Vol. 34, p. 781, para. 1102, and Supp.; and FOR CASES, see 2nd Digest Supp.]

Cases referred to :

(1) *Staynings* v. *Minister of Pensions*, [1947] 1 All E.R. 347.
(2) *Minister of Pensions* v. *Ballantyne*, 1948 Sessions Notes 26.
(3) *Minister of Pensions* v. *Nugent*, [1946] 1 All E.R. 273; 115 L.J.K.B. 208; 174 L.T. 146; 2nd Digest Supp.
(4) *Cook* v. *Minister of Pensions*, (1948), Reports of Selected War Pensions Appeals, Vol. 1, p. 1219.

APPEAL by the Minister of Pensions from a decision of a pensions appeal tribunal that the claimant was entitled to a pension under the War Pensions (Naval Auxiliary Forces) Scheme, 1944. The appeal was dismissed.

H. L. Parker for the Minister.

Crispin for the claimant.

DENNING, J. : The claimant was a canteen assistant employed by the N.A.A.F.I. He sustained injuries in his civilian work before the war which left him with bone trouble, and that pre-existing disease was aggravated by reason of the abnormally long hours and conditions of service to which he was subject while he was employed by the N.A.A.F.I. The tribunal found that he was entitled to a pension under the War Pensions (Naval Auxiliary Personnel) Scheme, 1944. The Minister appeals, not because he seeks to reverse the decision of the tribunal, but because he seeks guidance on the law. There appears to be a difference between the Court of Session and this court as to the interpretation of the relevant statutory provisions and the Minister has brought this appeal so as to have the position clarified.

The provision which has given rise to difficulty is the definition of "war risk injury" in sched. I (2) to the Scheme which is in the same words as s. 1 (2) of the Pensions (Mercantile Marine) Act, 1942. It provides that a war risk injury is a physical injury sustained "at sea or in any other tidal water or in the waters of any harbour" and attributable to certain specified conditions, the fourth of which is "(*d*) the existence on board ship of any other conditions arising out of [the war] which would be abnormal in time of peace." In *Staynings*' case (1) I said in an *obiter dictum* ([1947] 1 All E.R. 347, 348) :

> What is covered by para. (*d*) is something *ejusdem generis* with the preceding paragraphs such as alterations in the physical conditions existing on board ship.

In *Ballantyne's* case (2) the Court of Session said they were unable to agree with this *dictum*, and they saw no reason for giving para. (*d*) the restricted meaning.

This case raises an important point as to the use of precedents in pensions cases. I desire to state, as I have said before, that the doctrine of *stare decisis* does not apply in its full rigour to this branch of the law. The decisions of the superior courts (the High Court in England, the Court of Session in Scotland, and the Supreme Court in Northern Ireland) are binding on the pensions appeal tribunals. They are not absolutely binding on the superior court itself or on the courts of co-ordinate jurisdiction, but will be followed in the absence of strong reason to the contrary. What is to be done, however, when there is a decision of the Court of Session which is in conflict with a decision of this court, or *vice versa* ? The conflict cannot be resolved by an appeal to a higher tribunal because there is no provision for any such appeal, yet resolved it must be. I am told that when this court has given rulings on the law which were more in favour of the claimants than those of the Court of Session, some claimants moved from Scotland to England in order to come before the tribunals in this country, and the reverse has happened. When the Court of Session in *Ballantyne's* case (2) gave a ruling which was more in favour of the claimant than that in *Staynings*' case (1), one claimant took an accommodation address in Scotland in order to come before a tribunal there. Such a state of affairs A must be remedied. I lay down for myself, therefore, the rule that, where the Court of Session have felt compelled to depart from a previous decision of this court, that is a strong reason for my reconsidering the matter, and if, on reconsideration, I am left in doubt of the correctness of my own decision, then I shall be prepared to follow the decision of the Court of Session, at any rate in those cases when it is in favour of the claimant because he should be given the benefit of the doubt. In this respect I follow the general rule that where there are B conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if it is reached after full consideration of the earlier decision. I trust that, by the application of this principle, the few differences that have arisen between the Court of Session and this court will be solved.

Applying this principle I follow the ruling of the Court of Session in *Ballantyne's* case (2) and hold that para. (*d*) is not to be restricted by the application of the *ejusdem generis* rule. I would like to say, however, that I did not mean, by C my observations in *Staynings*' case (1) to limit the application of para. (*d*) to physical conditions on board ship. It is plain that the conditions which existed in *Ballantyne's* case (2), *viz.*, the necessity of keeping in convoy, the exposure to enemy attack, and the need to stand-by during attacks or threatened attacks, created conditions on board ship which would be abnormal in time of peace, and I have so held in other cases. If those conditions involved the necessity of D continuously working longer hours, and, in consequence, a man suffered from a disease or the aggravation of a disease, then the injury would be a "war risk injury." If, however, the longer hours were not due to war-time conditions on board ship, but to other conditions which might happen equally in time of peace, as, for instance, to climatic or weather conditions, the injury would not be a "war risk injury." That is all I meant to convey by my observations in *Staynings*' case (1). It is important, however, to notice that the scope of E "war risk injuries" is not so wide as to include any injury which is attributable to war service. There are several limitations contained in s. 1 (2) of the Act of 1942 which make the position of naval auxiliary personnel and merchant seamen less favourable than that of naval men. One limitation is that the injury must be sustained "at sea or in any other tidal water or in the waters of any harbour." It is that limitation which deprived a coastguard of a pension in *Nugent's* case (3), and that limitation could have deprived the present claimant F of a pension if the aggravation of his disease had been due, not to his service afloat, but to his standing on concrete floors ashore.

Another limitation, in para. (*d*), is that the abnormal conditions must exist "on board ship." The fact that the conditions are abnormal for the man personally is not sufficient. For instance, if a clerk is taken from his office and sent to be a canteen assistant in a ship, the conditions for him personally G would be abnormal compared with his work in time of peace and might aggravate an old-standing complaint, but if the conditions existing on board the ship were not abnormal for the ordinary canteen assistant the injury could not be a "war risk injury." Another limitation is that, although the conditions on board ship may arise out of the war, they must also be "abnormal in time of peace." Thus, the presence of a ship in dock for repairs may be due to war damage, but, if the conditions under which she is being repaired are in no way H abnormal, accidents happening to men while she is in dock are not "war risk injuries" unless the war damage plays some intermediate part in them: see *Cook's* case (4), at p. 1219. These limitations could have deprived the present claimant of his pension if the tribunal had accepted the commanding officer's evidence that during the whole of his service abroad the ship was refitting, with the majority of the ship's company on leave, and he was not subjected to any abnormal or severe condition arising out of the war. I have mentioned these limitations because I do not wish it to be supposed that I am holding that the tribunal came to a correct decision on the facts of this case or that its findings of fact were even sufficient to justify the decision. Counsel for the Minister does not invite me to go into that matter, and I, therefore, say no more about it. All I say on the point raised before me is that the *dictum* in *Staynings'* case (1) does not go to the length suggested, and this appeal is, therefore, dismissed.

Appeal dismissed.

Solicitors: *Treasury Solicitor* (for the Minister); *Culross & Trelawny* (for the claimant).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

Re KNOWLES' WILL TRUSTS. NELSON *v.* KNOWLES.

[Court of Appeal (Lord Greene, M.R., Somervell and Cohen, L.JJ.), April 20, 21, 1948.]

Will—Construction—Trust—Leasehold property—Renewal of lease by trustee—Obligation to hold on trusts of will.

By his will, dated May 3, 1900, a testator, who died on Mar. 29, 1906, after giving certain legacies, bequeathed the residue of his estate, to his son A. By a codicil, dated July 6, 1903, he referred to the gift to A. of his residuary estate, and directed that A. should stand possessed of his "leasehold farm watercress beds and mill . . . for the residue unexpired of the term of 21 years granted therein to me by a certain indenture of lease . . . and the horses and carts stock in trade live and dead stock implements and machinery in and about the said premises upon trust to carry on the business of a farmer watercress grower and miller thereon . . . and to divide the net profits of such businesses after payment of the rent necessary repairs insurance and other outgoings between my said son A. and my daughters B., C., D. and E. share and share alike during their joint lives and upon the death of any of my said daughters to divide such net profits between my said son and the survivor or survivors of my said daughters share and share alike and upon the death of the survivor of my said four daughters I give and bequeath the said leasehold farm watercress beds and mill for all the residue then unexpired of the said term farming stock implements and all other premises to my said son A. absolutely." In October, 1923, the lease of the farm, which contained no option to renew, expired, and at that time A. and the four daughters were all living. On Nov. 23, 1923, a new lease for 21 years from Oct. 10, 1923, was granted to A., and on Aug. 19, 1944, a second new lease for 21 years from Oct. 10, 1944, was granted to him. A. accounted for the profits of the business to the four daughters up to October, 1923, but after that date, without rendering any account, he merely handed to the four daughters, or the survivors or survivor of them, money which was approximately what they should have received on the basis of A.'s continuing trusteeship. The surviving daughter claimed to be entitled to a moiety of the profits of the businesses.

Held: (i) on the true construction of the will and codicil the words "the residue unexpired of the said term" were a description of the testator's leasehold interest and not an indication of the duration of the trust, the testator's intention being to provide for his four daughters during their lives so far as he could with remainder to A. absolutely after, but not before, the death of the last surviving daughter.

(ii) there being nothing in the will or codicil to exclude the general rule, A. was under a duty to the *cestuis que trustent* or *cestui que trust* on the expiration of the original and any subsequent lease to obtain if he could a renewal thereof on beneficial terms, and the court would not permit him to retain for himself the benefit of such renewal.

Principle stated by Buckley, J., and Romer, L.J., *in Re Biss, Biss* v. *Biss* ([1903] 2 Ch. 40, 43, 60; 88 L.T. 403, 406), *applied.*

Decision of Roxburgh, J., *reversed.*

Per Cohen, L.J.: The rule that a trustee who obtains the renewal of a lease is presumed to have acted in the interests of all persons interested in the old lease appears to apply wherever a testator bequeaths his leasehold interest in property on trust and, on its true construction, the will is silent as to what is to be done in the event of a renewal of the lease.

[AS TO ACCRETIONS TO TRUST PROPERTY, see HALSBURY, Hailsham Edn., Vol. 33, pp. 139-141, paras. 236-238; and FOR CASES, see DIGEST, Vol. 43, pp. 631-635, Nos. *707-733*.]

Cases referred to:

(1) *Re Biss, Biss* v. *Biss*, [1903] 2 Ch. 40; 72 L.J.Ch. 473; 88 L.T. 403; 43 Digest 632, *708*.

A (2) *Keech* v. *Sandford*, (1726), Sel. Cas. Ch. 61; 2 Eq. Cas. Abr. 741; Cas. *temp.* King, 61; 43 Digest 633, *720*.

APPEAL from a decision of ROXBURGH, J., made on Oct. 23, 1947, who held that, having regard to the terms of the testator's will, the beneficiaries under a trust arising thereunder had as such no interest in the profits of a farming business after the expiration of the original lease of the farm forming part of the
B trust fund, the trustee having obtained a renewal of the lease in his own name and having continued the business for his own benefit. The Court of Appeal reversed his decision. The facts appear in the judgment of LORD GREENE, M.R.

Jennings, K.C., and *H. E. Francis* for the plaintiff, Mrs. Nelson, (sole surviving daughter of the testator.)

R. L. Edwards for the defendant, the testator's son.

C **LORD GREENE, M.R.:** This appeal raises a short but interesting point on the will of the testator, James Goodall Knowles, a farmer who died in 1906. He had a son and four daughters, the survivor of the four daughters being a Mrs. Nelson. One of the farms which the testator occupied was situated in the parishes of Warmwell and West Knighton in the county of Dorset. It appears to have been a mixed farm, and it also had watercress beds and a mill in which the business of a miller was carried on by the testator. The lease under which he
D held that farm expired on Oct. 10, 1923. He made his will on May 3, 1900, and of the two codicils thereto, only the second, dated July 6, 1903, is of importance. He died on Mar. 29, 1906, leaving a widow who died in 1916. Of the four daughters the first to die was a Mrs. Rolph whose death took place in 1931.

By his will the testator gave his furniture to his widow, a legacy of £1,000 to each daughter, and the residue to his son, the defendant, Alfred Goodall
E Knowles, subject to a condition that he provide a suitable home for the testator's wife during her lifetime. By the second codicil he refers to the gift of his residuary estate to his son contained in the will and proceeds to modify it by declaring that his son should stand possessed:

> . . . of my leasehold farm watercress beds and mill situate in the parishes of Warmwell and West Knighton in the county of Dorset for the residue unexpired of the term of 21 years granted therein to me by a certain indenture of lease . . . and the horses
> F and carts stock in trade live and dead stock implements and machinery in and about the said premises upon trust to carry on the business of a farmer watercress grower and miller thereon and to cultivate improve and manage the said farm and watercress beds and from time to time to dispose of the live and dead stock for the time being thereon and the crops raised thereon with full power to purchase any live and dead stock seeds and manures and to carry on the said mill in such manner as he shall think best and to employ foremen and other workmen in and about the said farm watercress beds and mill at such wages as he shall think fit.

G That is a comprehensive trust to carry on the business on the premises mentioned and to use for that purpose the live and dead stock and so forth. The trust continues:

> . . . and to divide the net profits of such businesses after payment of the rent necessary repairs insurance and other outgoings between my said son Alfred Goodall Knowles and my daughters Beatrice Mary Rolph [and the other daughters] share and share alike
> H during their joint lives . . .

Clearly he conceived himself to be making provision for his four daughters as well as for his son by means of this trust to carry on the business. He goes on:

> . . . and upon the death of any of my said daughters to divide such net profits between my said son and the survivor or survivors of my said daughters share and share alike and upon the death of the survivor of my said four daughters I give and bequeath the said leasehold farm watercress beds and mill for all the residue then unexpired of the said term farming stock implements and all other premises to my said son Alfred Goodall Knowles absolutely.

In all other respects he confirms his will. The result is that, subject to the trusts declared by the codicil in relation to the property comprised in those trusts, the son is absolutely entitled, because the original gift to him as residuary legatee is only cut down to the extent necessary to give effect to the trusts declared by the codicil.

In October, 1923, when the lease came to an end there were living not only the son but also all four daughters. On Nov. 23, 1923, a new lease for 21 years from Oct. 10, 1923, was granted to the son, and on Aug. 19, 1944, a second new lease was granted to him of the same premises for 21 years from Oct. 10, 1944. It appears that the son accounted for the profits of the business to his sisters down to the time when the old lease expired, and from that date to 1944 he handed to his sisters, or the survivors, or, ultimately, the survivor, of them, money which appears to have been more or less what they would have received on the basis of the business being carried on by the son as trustee for them or the survivor of them. He does not appear to have rendered any account. The plaintiff in the present action claims that in respect of the renewed leases and the businesses carried on on the premises—with the live and dead stock changed, of course, from time to time, but still, as she says, subject to the trusts—the profits are still trust profits and ought to be divided accordingly. She asks for a declaration that in the events which have happened she (the plaintiff) since the death of her sister, Amy Jones, who died in 1944, is beneficially entitled to one-half of the net profits of the said business during her life, and she asks for an account of the profits for the 6 years immediately preceding the issue of the summons. ROXBURGH, J., held that the plaintiff had no interest in the profits of the business earned after the expiration of the original lease in 1923. He held that on the true construction of the will when the original lease expired the business, the live and dead stock, and so forth, and any renewal of the lease obtained by the son belonged to him as residuary legatee, with the consequence that from 1923 none of the sisters was entitled to anything, and the payments that the son had made since that date must be regarded as purely *ex gratia*.

For the plaintiff it is argued that the solution to the question raised here is to be found in the ordinary rule that a trustee cannot be allowed to derive a personal benefit from his position of trustee and the opportunities that that position gives him. By virtue of his ownership of the lease in his capacity as trustee, it is said, the defendant succeeded in getting it renewed, and equity cannot allow him to keep the benefit which he has so obtained for himself. He must, therefore, hold it as trustee for others. For the defendant it is said, and this is what the learned judge accepted, that the defendant is himself beneficially entitled to everything comprised in the estate subject only to the limited operation of the trusts declared by the second codicil. It is argued that the proper interpretation of the second codicil is that the trusts declared are only to last for a limited time, namely, the duration of the original lease. In my opinion, the learned judge's conclusion cannot be supported. The rule referred to—which is so well known that it does not require re-stating—applies to the case of leaseholds where the trustee, by reason of his advantageous position as trustee, obtains a renewal of the lease. Whether he does that because the lease itself contains a right to call for a renewal or merely because as sitting tenant he is in an advantageous position to obtain a renewal, the result is the same, and it does not depend on the language used by the testator, although, of course, a testator aware of the rule could either refer to it and say that he wishes it to apply, a thing which would be quite unnecessary and mere surplusage, or, if he pleases, he can say he wishes it not to apply, in which case it will not apply. The nature of the rule is such that in cases where it operates it has the effect of bringing into existence an item of property which accrues to what the testator himself had. In the case of a lease where there is no right of renewal, all that the testator has to give is the property for the remainder of the term of the lease, but when the rule operates and the trustee is precluded from keeping for himself a renewal which he obtains the result is to add something which the testator had not got and which in point of time is going to endure for a longer period than the original subject-matter of the testator's bounty. That something which is going to last until a later date than the testator had contemplated or had dealt with in his will the trustee cannot keep. Where the original lease expires during the lifetime of a beneficiary for life, but the trustee obtains, in the circumstances I have described, a renewal of the lease, that renewal, it seems to me, must enure for the benefit of the beneficiary. If the testator gives a leasehold interest to a trustee to hold on trust for A for life and after A's death, for B, and the lease comes to an end in the lifetime of A but the trustee gets a renewal which he cannot keep for himself, it seems to me to follow necessarily that he holds the renewed lease for the benefit of A for life and after A's death, for B. In other words, the same beneficial trusts as applied to the original entity of the original lease apply to the extension of that entity obtained in that way. It would be wrong to say on principle that the effect of getting a renewal in those circumstances was that the renewed lease enured, not to the benefit of the original beneficiaries under the settlement of the original lease, but for the benefit of the residuary legatee. The present case has a complication which makes it rather more difficult by reason of the fact that the trustee himself is the residuary legatee.

With those preliminary observations I can examine shortly the language of this will. That the defendant is a trustee is perfectly clear. By the second codicil, the beneficial interest in the residue given him by the will is cut down to the extent that it is converted into an interest as trustee for the purposes of the codicil. There are two items of property comprised in the second codicil, the leasehold interest in the farm, which necessarily comes to an end when the lease determines, and the live and dead stock and so forth which do not come to an end when the lease determines. The nature of the trust, it appears to me, for present purposes must be examined closely in connection with the beneficial interests which the testator is creating. It is, to my mind, manifest from the language that he uses that his intention was to provide for his four unmarried daughters. They were, at the date of the will and at the date of his death, I think I am right in saying, unmarried. They were comparatively young women, the youngest of them was in her twenties. The testator's main intention was that they should be able to live, as, no doubt, they had lived in his lifetime, out of the proceeds of the farm which was to be carried on by their brother. He gave them a share in the profits during their joint lives and the life of the survivor. That is the duration of the beneficial trusts which the testator wished to establish. If the lease was going to expire not many years after his death and not to be renewed during the lifetime of any of his daughters, the provision that he wished to make for them to that extent would have been frustrated, but that his intention was to provide for them during their lives so far as he could is, it seems to me, manifest. I can find nothing in the beneficial trusts which can be construed as amounting to an expression by the testator of a desire on his part that the rule of equity which I have been discussing is not to apply. On the contrary, it seems to me that the beneficial trusts which he declared are perfectly consistent with the application of the rule of equity, because in the event of the trustee obtaining a renewal the benefit to the daughters will continue for a longer period than the testator could expect it to be continued under the actual terms of the lease which he held. There is nothing to suggest that it would not be contrary to his wishes in any way that the sisters should be deprived of the benefit of any renewal and that the benefit of that renewal should go to the son. That appears to me to be further confirmed in that, so far as the codicil is concerned, the interest in the leasehold farm and the farming stock, implements and so forth, is only to fall to the son on the death of the survivor of the four daughters. The effect of ROXBURGH, J.'s judgment is that, leaving apart the leasehold farm which raised this question of renewal, the other property—the farming stock and so forth—becomes the property of the son while there is still a daughter alive although the codicil says in terms that it is on the death of the survivor of the four daughters that the son is to get those things. The real weight of the argument rests, I think, and in the view of ROXBURGH, J., rested, on the words with which the testator describes the leasehold interests and the direction that he gives with regard to them. He declares that his son is to stand possessed of his leasehold farm—and he describes it—for the residue unexpired of the term of 21 years granted by the original lease. It is said that those words indicate the duration of the trust—that the trust is to continue so long only as that lease which is the subject-matter and the necessary means of carrying on the business lasts. In my opinion, that argument gives a wrong force to the words by which the testator describes his interest. It is to be noted, as counsel for the plaintiff pointed out, that the proper way of describing a leasehold interest to which a testator or a settlor is referring is to describe the parcels and deal with them, but to deal with them only for the interest in them which the settlor or the testator has got, namely, an interest for the residue of the term. That is the appropriate description, and any experienced draftsman who wished to use accurate technical language would always describe the interest in the remainder of a lease to a settlor or testator in that way. The same expression, it is to be noted, appears in the ultimate gift by which on the death of the survivor the testator gives and bequeaths the said leasehold farm, etc., "for all the residue then unexpired of the said term." That, again, is a proper technical way of describing the interest which would then exist on the assumption that the only thing in question was the original term.

The result appears to me to be that the testator had one thing in the matter of the land to dispose of and one thing only, namely, the residue of the subsisting term. That he gives to the trustee on trust to carry on the business there. If the existing lease had contained an option to renew, a renewal obtained under the option would have been part of the subject-matter of the trusts. The effect of the operation of the rule of law to which I have referred is to put a renewal obtained by a trustee otherwise than by virtue of an option on precisely the same footing as a renewal obtained under an option. He must hold it as though it were part of the subject-matter of the original gift, and the fact that the testator has not expressly or by implication referred to an accretion which might take place by virtue of the operation of this rule of law appears to me to be neither here nor there. Nor do I think it matters if the testator, in describing the subject-matter, uses language which is strictly only appropriate to the interest which he has got, and that, it seems to me, is all he has done here. It is the rule of law which overtakes the intention of the testator and adds something which he himself had not got to the subject-matter of his benefaction. When once the matter is appreciated in this way, it seems to me that all the testator here has done is to deal in terms with what he had got by a proper and accurate description and nothing more, and it is only by the application of the rule of law that, to return to the phrase which I used earlier (a useful but not very accurate phrase), the life of the subject-matter of his bounty is extended. It is extended because the original subject-matter dies when the lease expires, but it gets a new term of life by the renewal, and the effect of the extension of its life enures to the benefit of those beneficiaries whom the testator intended to benefit and for the time during which he intended to benefit them under the original trust. In my opinion, the appeal succeeds.

SOMERVELL, L.J.: I agree that the appeal succeeds and with the reasons which have been given by the Master of the Rolls for reversing the judgment of the learned judge.

COHEN, L.J.: I agree, but, as we are differing from the learned judge in the court below, I will state quite shortly my reasons. The rule of law to which my Lord has referred is not a rule of construction and does not depend on any implied intention on the part of the testator. The principle, I think, is conveniently stated by Buckley, J., in *Re Biss* (1), where the learned judge says ([1903] 2 Ch. 43):

> The leading authority upon that is *Keech* v. *Sandford* (2). The principle is that the trustee owes it to his *cestui que trust* to obtain a renewal, if he can do so, on beneficial terms, and that the court will not allow him to obtain a renewal upon beneficial terms for himself when his duty is to get it for his *cestui que trust.*

The case went to the Court of Appeal, and in the Court of Appeal Romer, L.J., used language which showed the force and the imperative extent of the rule. He says (*ibid.*, 60):

> . . . the equitable doctrine I am considering is not limited in its application to cases where the old lease was renewable by agreement or custom, or where the new lease was obtained by surrender or before the expiration of the old lease. There may well be, and often is, an advantage, for the purpose of obtaining a new lease, in being in the position of an old lessee; and that advantage may be of appreciable value in the view of a court administering equity, even though the landlord is under no obligation to

grant a new lease to the old tenant. And, further, I may note here that the cases shew that, with regard to a person obtaining a renewal who occupies a fiduciary position, it is contrary to public policy to allow him to rebut the presumption that in obtaining a renewal he acted in the interests of all persons interested in the old lease.

That rule appears to me to apply wherever a testator bequeaths his leasehold interest in property on trust, and the will is, on its true construction, silent as to what is to be done in the event of a renewal of the lease. If on the true construction of the testator's will there is to be found a direction either in express terms or by implication that if the trustee renews the lease he may retain the renewed lease for his own benefit, there is no room for the application of the rule. I agree with the MASTER OF THE ROLLS that there is no such direction here and it is quite impossible to make any such implication. I do not desire to repeat the analysis of the second codicil which my Lord has made. For the reasons he gave, I think that the rule to which I have referred plainly applies here and that the appeal must succeed.

Appeal allowed. No costs of the action in the court below: plaintiff to have costs of appeal as between party and party.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Wallington, Fabian & White*, Watford (for the plaintiff); *Guscotte, Wadham & Co.*, agents for *Vaisey & Turner*, Tring (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

ARGONAUT NAVIGATION CO., LTD. *v.* MINISTRY OF FOOD.

[KING'S BENCH DIVISION (Sellers, J.), April 12, 23, 1948.]

Charterparty—Demurrage—Stowing—Cargo of wheat put on board in bulk and requiring to be bagged before stowing.

By a charterparty a ship was to proceed to a port in Canada, as ordered, to load wheat, and was "to be loaded according to berth terms, with customary berth dispatch," and, if detained more than 5 days, the charterer was to pay demurrage "provided such detention shall occur by default of charterer or his agents." On Oct. 10, 1946, the ship was ordered by the charterer to proceed to Sorel (a port on the St. Lawrence 40 miles from Montreal) to load grain. She arrived at Sorel at 12.45 p.m. on Oct. 11, and was ready to load a full cargo as from 1 p.m. Loading began at 3.30 p.m. and continued intermittently until Oct. 17. The lay days expired and the ship came on demurrage at 7 a.m. on Oct. 15. Under the port regulations (which had statutory force) the ship, a two deck steamship, was allowed to carry bulk grain to the full capacity of the lower holds, but all other grain in the 'tween decks must be in bags, and this rule was also necessary for the safety of the ship and the proper stowage of cargo. The loading was done by the charterer's agents who put the wheat on board the vessel by means of elevators. By 8.45 a.m. on Oct. 17, as much wheat as could be carried by the ship in bulk had been loaded on board and some loose wheat had been placed in the 'tween decks where it was being put into bags. As the bagging proceeded, more loose wheat was poured in from the elevators at a reduced rate. The last wheat was put on board at 1 p.m. and the bagging of the loose wheat was completed at 3 p.m. The charterer paid demurrage until 8.45 a.m. on Oct. 17, but contended that he was not liable for demurrage for the period from 8.45 a.m. to 3 p.m. of that day:

HELD: (i) the ship could not be said to be loaded until the cargo had been loaded and bagged in the 'tween decks, as required by the port regulations and for the safety of the ship; to avoid demurrage, the bulk wheat should have been delivered in sufficient time within the lay days to allow this to be done before their expiry; and, therefore, the charterer was in default and was liable to pay the demurrage until 3 p.m. on Oct. 17.

(ii) it made no difference that the vessel was already on demurrage at 8.45 a.m.

Observations of LORD ESHER, M.R., in *Harris* v. *Best, Ryley & Co.*, (1892) (68 L.T. 76, 77) and *of* WRIGHT, J., *in Svenssons* (*C. Wilh.*) *Travaruaktiebolag* v. *Cliffe S. S. Co.* ([1932] 1 K.B. 490, 494, 495), *applied.*

[AS TO DEMURRAGE, see HALSBURY, Hailsham Edn., Vol. 30, pp. 344-349, paras. 524-529 ; and FOR CASES, see DIGEST, Vol. 41, pp. 559-566, Nos. *3851-3909*.]

Cases referred to :

(1) *Harris* v. *Best, Ryley & Co.*, (1892), 68 L.T. 76 ; 41 Digest 564, *3886*.
(2) *Svenssons* (*C. Wilh.*) *Travaruaktiebolag* v. *Cliffe S. S. Co.*, [1932] 1 K.B. 490 ; 101 L.J.K.B. 521 ; 147 L.T. 12 ; Digest Supp.
(3) *Akt. Reidar* v. *Arcos, Ltd.*, [1927] 1 K.B. 352 ; 96 L.J.K.B. 33 ; 136 L.T. 1 ; 41 Digest 341, *1922*.

ACTION by shipowners for a declaration that the charterer was liable to pay demurrage for time spent in stowing the cargo in accordance with statutory port regulations after the full cargo had been loaded, on the ground that the shipowners had completed the stowing with all reasonable dispatch and without any default, and the delay was due to the charterer or his agents. SELLERS, J., gave judgment for the shipowners. The facts appear in the judgment.

Mocatta for the shipowners.
Eustace Roskill for the charterer.

Cur. adv. vult.

Apr. 23. **SELLERS, J.,** read the following judgment. The plaintiffs, as owners of the Canadian steamship Argobec, sue the Ministry of Food under a charterparty entered into with the Minister. It has been stated by counsel that this is the first case which has come before the courts where the Crown Proceedings Act, 1947, has been invoked. The claim is for a declaration that the charterer is liable to pay demurrage under the charterparty, or, alternatively, for a small sum of money as demurrage due. The Ministry, on their part, resist the claim and seek a decision on two points which, it is said, frequently arise under this type of charterparty : (i) whether, if the lay days expire at the moment when the wheat in bulk has been put on board to the maximum amount permitted, any time occupied thereafter either in the process of allowing grain to fall slowly into the 'tween decks of a vessel to be bagged as the port regulations demand, or the time actually occupied in stowing the cargo after the elevators have stopped delivering, should count as loading time ; and (ii) in the event of the answer to the first question being in the negative, whether it makes any difference if the vessel is already on demurrage at the time when the final quantity of wheat is put on board. The case was argued on an agreed statement of facts.

By a charterparty, on Approved Baltimore Berth Grain Form, dated Sept. 11, 1946, it was agreed between the plaintiffs, the owners of the Canadian steamship Argobec, and the Minister of Food that the said steamship should :

> . . . with all convenient speed, sail and proceed to [certain named ports, including Montreal and Sorel] one port only, and there load, always afloat, from the charterer or his agents, a full and complete cargo of [*inter alia*] wheat in bulk and/or flour in bags.

Orders as to loading port were to be given as per cl. 13 attached. The vessel was to load under inspection of underwriters' agents, at her expense, and to comply with their rules, not exceeding what she could reasonably stow and carry, and, being so loaded, was to proceed to one safe port in the United Kingdom or on the continent as ordered and there deliver her cargo. The charterparty further provided as follows :

> Steamer to be loaded according to berth terms, with customary berth dispatch, and if detained longer than 5 days, Sundays and holidays excepted, charterer to pay demurrage as per cl. 19 attached, provided such detention shall occur by default of charterer or his agents. Notification of the vessel's readiness must be delivered at the office of the charterer or his agents at or before 4 p.m. (or at or before 12 noon, if on Saturday), vessel also having been entered at the Custom House, accompanied by pass of the inspector of vessel's readiness in all compartments, the lay days will then commence at 7 a.m. on the next business day, whether in berth or not.

The provision that the vessel was to load under inspection of underwriters' agents and to comply with their rules was applicable to vessels loading in United States ports only, and it was agreed before me that loading of grain at Montreal, and also at Sorel, a port on the St. Lawrence some 40 miles downstream from Montreal, was subject to similar regulations laid down in the revised rules and by-laws of the office of port warden of the harbour of Montreal. The regulations are of statutory force and are enforceable by fines. They provide :

> A.1. The master of any vessel intending to load grain for any port not within the limits of inland navigation shall notify the port warden and make arrangements for a preliminary survey. 8. The port warden, if requested, shall issue within 24 hours of the completion of such preliminary survey a written report setting out the repairs and work necessary to render the vessel fit to carry her proposed grain cargo and any modifications considered necessary for the erection of shifting boards, feeders, etc.

The agreed statement of facts then goes on to say :

> The Argobec was a two deck steamship, and as regards such ships the regulations provide . . . that bulk grain may be carried to the full capacity of all lower holds, provided properly constructed feeders are fitted in the hatches and trunked in the 'tween decks. Such feeders are to contain not less than 2½ per cent. and not more than 8 per cent. of the capacity of the hold they are designed to feed. All other grain in the 'tween decks must be in bags, complying with regulations affecting shifting boards and dunnage. Apart from this regulation, it was necessary for such cargo to be bagged to secure the safety of the ship and the proper stowage of the cargo.

The agreed statement also says that, until the master of a vessel produces to the Canadian customs authorities a certificate from the port warden to the effect that all the requirements of the regulations have been fully complied with, he is unable to secure a clearance for his vessel to leave the port of Montreal for any port not within the limits of inland navigation.

In pursuance of orders given by the charterer or his agents, the Argobec proceeded to Montreal. She was prepared for the loading of a cargo of grain before and on her arrival at Montreal, and at 1.30 p.m. on Oct. 7, 1946, a preliminary survey having been held, the port warden's certificate was issued that the vessel was fit to carry a grain cargo. Written notice of readiness, coupled with the port warden's certificate, was given by the master to the charterer's agents at Montreal at 1.45 p.m. on the same day, and the lay days, accordingly, began at 7 a.m. on Oct. 8. No cargo was loaded by the charterer or his agents at Montreal, but in the afternoon of Oct. 10 the master received orders to proceed on the following day to Sorel to load grain. The vessel proceeded accordingly and arrived at Sorel at 12.45 p.m. on Oct. 11, and her master there obtained and delivered to the charterer's agents a certificate of the Sorel port warden that the vessel was ready to load a full cargo of grain as from 1 p.m. on that day. Loading began at 3.30 p.m. on Oct. 11, and took place intermittently until Oct. 17, by the charterer or his agents putting the wheat on board the vessel in bulk by means of elevators. The lay days expired, and the vessel came on demurrage, at 7 a.m. on Oct. 15. By 8.45 a.m. on Oct. 17, as much wheat as could in compliance with the regulations be carried by the vessel in bulk had been put on board, the holds and feeders were full and some loose wheat had been put in the 'tween decks, where the stevedores had begun bagging wheat in bags provided by the shipowners. As the loose wheat in the 'tween decks was bagged, more loose wheat was poured in from the elevators at a rate reduced to enable the stevedores to proceed with the bagging, and the last wheat was put on board at 1 p.m., by which time the vessel was down to her marks. Bagging of the loose wheat to be carried in the 'tween decks was not completed until 3 p.m. and the Sorel port warden then issued his certificate that all the requirements of the regulations had been complied with. In all, about 14,000 bags, containing about 28,306 bushels of wheat, were stowed in the 'tween decks. The agreed statement goes on to say :

> The total time actually used between 3.30 p.m. on Oct. 11 and 3 p.m. on Oct. 17 in putting on board the said cargo and bagging that portion of it to be carried in the 'tween decks other than in the feeders was 1 day, 12 hours and 20 minutes. Had the charterer or his agents had cargo available and desired to load it, there would have been time between 7 a.m. on Oct. 8 or 3.30 p.m. on Oct. 11 and 7 a.m. on Oct. 15 within which to have put it on board and to have completed the bagging of the portion to be carried in the 'tween decks required by the regulations to be bagged. The bagging of the wheat carried in bags in the 'tween decks was carried out by stevedores employed by the shipowners with all reasonable dispatch and without any default by the shipowners or their stevedores, and the operation of bagging could not reasonably have

> been completed before 3 p.m. on Oct. 17. It is agreed that the vessel was on demurrage from 7 a.m. on Oct. 15 to 8.45 a.m. on Oct. 17, a period of 2 days, 1 hour, 45 minutes . . .

The dispute, therefore, between the parties is with regard to the two periods on Oct. 17 : (i) the period from 8.45 a.m. to 1 p.m., during which time wheat was being loaded for the purpose of bagging and which was sufficient by 1 p.m. to bring the vessel down to her marks, and, therefore, to constitute a full and complete cargo, and (ii) the period from 1 p.m. to 3 p.m., during which time no further cargo was taken in, but the bagging was being completed and the cargo was being stowed as the regulations required and so as to give safety and stability to the vessel.

Under the charterparty the shipowners have to place the ship at the specified port and there load from the charterer or his agents wheat in bulk according to berth terms. Five days (Sundays and holidays excepted) are allowed for the steamer to be loaded, and if she is detained longer than five days the charterer is to pay demurrage if the detention occurs by the default of the charterer or his agents. What is the obligation created by the agreement "to be loaded"? There is, I think, high authority which gives guidance on this point. In *Harris* v. *Best, Ryley & Co.* (1), Lord Esher, M.R., answered the question in this way (68 L.T. 76, 77) :

> Loading is a joint act of the shipper or charterer and of the shipowner ; neither of them is to do it alone, but it is to be the joint act of both. What is the obligation on each of them in that matter ? Each is to do his own part of the work, and to do whatever is reasonable to enable the other to do his part. This puts upon the shipper the obligation of bringing the cargo alongside the ship, and of doing a certain part of the loading. What is that part of the loading ? By universal practice the shipper has to bring the cargo alongside so as to enable the shipowner to load the ship within the time stipulated by the charterparty, and to lift that cargo to the rail of the ship. It is then the duty of the shipowner to be ready to take such cargo on board and to stow it in the vessel. The stowage of the cargo is the sole act of the shipowner. What is a reasonable course of action for both parties ? The shipper has all the lay days within which to bring his cargo to the ship, and, if he did not act reasonably, he might bring it all upon the last of those days ; to do so would be unreasonable ; he must act reasonably and bring the cargo alongside in sufficient time to enable the shipowner to do his part within the lay days. The shipowner must receive and stow the cargo reasonably as it is brought alongside.

In *C. Wilh. Svenssons Travaruaktiebolag* v. *Cliffe Steamship Co.* (2), Wright, J. [dealing with the question whether the stage had been reached when the loading was completed] said ([1932] 1 K.B. 490, 494, 495) :

> It has been contended very strenuously by [counsel for the charterers] that that stage had been reached because, in his submission, loading for this purpose means simply the reception of the goods on board, and the moment the last parcel of cargo which it is intended to load is placed on the vessel the loading is completed notwithstanding the fact that some stowage may be necessary and may commonly be done. I do not think that that is the law. I think that in a case like this, and, indeed, in most cases, the mere reception or dumping down of the cargo on the ship does not involve the completion of the loading, because I think the operation of loading involves all that is required to put the cargo in a condition in which it can be carried. In this case the operation of stowing the cargo was comparatively simple. The pit props came up from the water in the ship's slings and were slung on to the deck. Then the sling was released, but, before it was released, the sling was put in such a position that the props would fall in the proper direction—that is, lying fore and aft—and would more or less sink into their places. Some operation of stowing, however, was necessary in respect of each such sling—some props would not fall in the right position and would have to be straightened out, and the props generally would have to be arranged so that they would lie as closely as possible together with their round sides as neatly in contact as could be achieved. That was a small operation, no doubt, but it was done sling by sling before the next sling could come on board, and it had to be done in respect of the last load . . . If it were necessary to decide the matter, but it is not, I should also hold that in the facts of this case the lashing was a necessary part of the operation of loading.

It was pointed out by counsel for the charterer that Wright, J., was there dealing with stages of a voyage in relation to seaworthiness and not with the question of when loading was completed in relation to a demurrage claim.

That is true, but, having regard to their general tenor, I feel that the observations of WRIGHT, J., can be regarded as of general application, especially in view of his statement (*ibid.*) :

> I think that in a case like this, and, indeed, in most cases, the mere reception or dumping down of the cargo on the ship does not involve the completion of the loading, because I think the operation of loading involves all that is required to put the cargo in a condition in which it can be carried.

A In the case of the loading of a general cargo, time is, of necessity, taken in placing and stowing the cargo as it arrives in the hold. Often the delivery of cargo on board a vessel is slowed down because of the difficulty of stowing certain kinds of cargo, or of stowing it in a place particularly difficult of access, or by reason of its structure or some obstruction. I have never heard it suggested in such a case that, in assessing the time taken in loading for purposes of demurrage, an apportionment should take place (on some estimated basis, B for accuracy would be impossible) between time taken in stowing and time taken in bringing the goods to the hold. I can see no reason why it should be different with bulk cargo, which has to be trimmed, or, to some extent, put into bags, for the purpose of safety or for complying with enforceable regulations the object of which is safety. It cannot, I think, make any difference that the time so occupied arises from time to time in the course of loading, or C at the end when all the cargo is on board, or at any particular stage of the operation. It seems to me to be immaterial who has to pay the costs of the loading or whose task in the joint effort may finish first. The shipper would normally finish his work of delivering cargo to the ship before the ship receives it, and, in my view, the loading cannot be said to be completed when the shipper—here the charterer—has done all that is required of him. I will assume, without deciding, that the Canadian Water Carriage of Goods Act, D 1936, is incorporated in this charterparty. If that is so, it provides [by art. III, para. 2 of the schedule] that, subject to certain limitations :

> . . . the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

The three words "load," "handle" and "stow" are used, but that does not, in my view, lead to the conclusion that stowing is not part of loading, just as E the handling of goods is part of the loading.

In this case I find that loading was not completed until 3 p.m. on Oct. 17. The facts reveal that the actual loading took only one day, twelve hours and twenty minutes, and that the charterer was in default in not completing the loading within the lay days. To detain the vessel beyond the lay days was a breach of the contract by the charterer : see *Aktieselskabet Reidar* v. *Arcos, Ltd.* (3). He remained in default and without any protection under the F charterparty until the loading was completed. The shipowners have, therefore, established all that is necessary for them to recover demurrage under the relevant clause of the charterparty. The lay days expired at 8 a.m. on Oct. 15. Demurrage has been admitted and paid to 8.45 a.m. on Oct. 17. The shipowners are entitled to demurrage from then until 3 p.m., namely, £77 10*s*.

The effect of this judgment is that the steamer cannot be said to be loaded G until the cargo has been loaded and bagged, if required for safety or by regulation, in the 'tween decks, and that in order to avoid demurrage the bulk wheat must be delivered in sufficient time within the lay days to allow this to be done before their expiry. That, I think, answers the first question. In answer to the second question, I am of opinion that it makes no difference whether the vessel is already on demurrage or not. The charterparty requires that the detention shall occur "by default of the charterer or his agents," H and this, I think, applies in all circumstances. If default is not proved, demurrage does not accrue. The two questions arise sufficiently on the issues between the parties to make it permissible for the court to answer them. There will be judgment for the plaintiffs for £77 10*s*.

Judgment for the plaintiffs with costs.

Solicitors : *Stoke & Mitcalfe* (for the shipowners) ; *Treasury Solicitor* (for the charterer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

CHESSINGTON DEVELOPMENT CO., LTD. AND OTHERS *v.* SURBITON BOROUGH COUNCIL.

[CHANCERY DIVISION (Romer, J.), February 26, 27, March 1, 11, April 21, 1948.]

Town and Country Planning—Interim development agreement between landowners and local authority—Permission to develop lands in accordance with specified method—Permission relating to period after planning scheme in force—Authority's planning scheme not yet in force—Revocation of permission for interim development—Town and Country Planning Act, 1932 (*c.* 48), *ss.* 10, 34—*Town and Country Planning* (*Interim Development*) *Act,* 1943 (*c.* 29), *s.* 4 (1), (2). A

The plaintiffs were the present owners of certain land in Chessington forming part of the Chessington Hall estate and the borough council was the B interim development authority for the area for the purpose of the Town and Country Planning Acts. In 1938, the council had made a planning scheme under the Act of 1932 and submitted it to the Minister, but it had not yet been approved. On May 11, 1934, the Minister of Health, in exercise of powers conferred by s. 10 (5) of the Town and Country Planning Act, 1932, allowed an appeal from the refusal of the council C to grant permission for the development of the land in question under the Town and Country Planning (General Interim Development) Order, 1933, and gave permission for its development in accordance with the original lay-out plan or any lay-out plan approved by the council or the Minister. On May 19, 1939, the plaintiffs entered into two agreements with the council, one known as the development agreement and the other known as the roads and sewers agreement. The development agreement was D supplemental to and in consideration of the roads and sewers agreement by which the plaintiffs agreed (*inter alia*) to dedicate certain lands to the public for highways, to convey certain other lands to the council, and to expend money on the construction of sewers. The development agreement stated that it was intended to be made under s. 34 of the Act of 1932 (which is stated to empower "authorities and owners to enter into agreements restricting use of land") and that it was to be scheduled to the council's E planning scheme. By cl. 3 of the agreement: "The lands described in the first and second parts of sched. I hereto may be used for the purposes mentioned in and subject to the restrictions set out in sched. II hereto and in accordance with the lay-out in plan No. 2 hereto annexed." The schedules and plan provided for the erection on the plaintiffs' lands of a limited number of dwelling-houses, shops or business premises, as specified. Clause 4 (*a*) F provided: "Until the scheme shall come into force this agreement shall operate as if the owners and the development company had submitted an amended lay-out plan for the approval of the council and the council by this agreement had approved the said plan and had granted permission to the owners . . . to develop by virtue of s. 10 of the Act and the Town and Country Planning (General Interim Development) Order, 1933." Section 10 of the Act of 1932 deals with the interim development of land. G Pursuant to the development agreement and the roads and sewers agreement the plaintiffs withdrew objections they had lodged against the council's proposed planning scheme which included the Chessington Hall estate, and they dedicated certain lands as public highways, conveyed land to the council, and expended money on the construction of sewers, but, owing to the outbreak of the war, they were unable to start the development of their land. In January, 1946, one of the plaintiffs applied H to the council for permission to proceed with part of the development, but was refused on the ground that the proposed development would contravene the proposals of the Greater London Plan of 1944. By the Town and Country Planning (Interim Development) Act, 1943, s. 4, permissions for interim development may be revoked or modified by order made with the consent of the Minister, and by s. 4 (2) the Minister may initiate proceedings for the revocation of any permissions. By the Surbiton Town and Country Planning (Interim Development) Direction, dated July 12, 1946, the Minister, under s. 4 (2) of the Act of 1943, directed the council to submit for his consent under s. 4 (1) of the Act an order revoking the permission granted on May 19, 1939, to the plaintiffs for the development of part of the Chessington Hall estate. The council agreed to make this order and, on Aug. 8, 1946, wrote to the plaintiffs informing them of the fact. In an action against the council claiming damages for breach of contract, the plaintiffs contended that, under the development agreement, and, particularly, under cl. 3 thereof, the council had assumed a contractual obligation that it would not at any time thereafter exercise any existing or future statutory powers so as to restrict the development of the plaintiffs' lands to a greater extent than was provided for by the agreement :—

HELD : (i) on the true construction of the development agreement, cl. 3 applied only to the period after the proposed scheme came into force, while cl. 4 applied to the interim period. The effect of cl. 3 was that, under s. 34 of the Act of 1932, the council contractually debarred itself from interfering after the scheme came into force with the specified method of development by requiring, under s. 13 of the Act, the plaintiffs to pull down or alter buildings erected in conformity with that method. The agreement contained no undertaking by the council that it would in no circumstances avail itself of subsequent legislation to cancel the permission given under cl. 4 (*i.e.*, in reference to the interim period), and, therefore, there was no breach by the council of the plaintiffs' contractual rights under cl. 3, as the council's order revoking the permission granted on May 19, 1939, was made during the interim period under s. 4 of the Act of 1943.

(ii) the development agreement was, on its true construction, not merely restrictive, but both permissive and restrictive, and, although s. 34 of the Act of 1932 was primarily restrictive, agreements containing permissive as well as restrictive provisions were within its scope, and, therefore, the development agreement was authorised by the section and the council was empowered by the section to incur the obligation under s. 3 of the agreement, which it could not have undertaken in the absence of statutory authority.

A.-G. v. *Barnes Corpn. and Ranelagh Club, Ltd.* ([1938] 3 All E.R. 711), *considered.*

[AS TO INTERIM DEVELOPMENT, see HALSBURY, Hailsham Edn., Vol. 32, pp. 264-270, paras. 419-429, and 1947 Supplement.]

Case referred to :

(1) *A.-G.* v. *Barnes Corpn. and Ranelagh Club, Ltd.*, [1938] 3 All E.R. 711 ; [1939] Ch. 110 ; 107 L.J.Ch. 385 ; 159 L.T. 305 ; 102 J.P. 448 ; Digest Supp.

ACTIONS for damages for alleged breach of contract.

The plaintiffs entered into an agreement (dated May 19, 1939) with the defendants (the local authority) in regard to the development of their land. Pursuant to the Town and Country Planning (Interim Development) Act, 1943, s. 4, the defendants, on a direction from the Minister under s. 4 (2) of the Act, agreed to make an order revoking the permission granted by the agreement. The plaintiffs claimed that this revocation of permission was a breach of the defendants' contractual obligations under the agreement, and claimed damages therefor. ROMER, J., held that there had been no breach of contract by the defendants and dismissed the actions. The facts appear in the judgment.

Pascoe Hayward, K.C., and *Blain* for Chessington Development Co., Ltd.
Harold Williams, K.C., and *Blain* for Ransom and Luck, Ltd.
Capewell, K.C., and *Wilfrid Hunt* for the Surbiton Corporation.

Cur. adv. vult.

Apr. 21. **ROMER, J.,** read the following judgment. These actions are brought against the defendant council for damages for alleged breach of contract. In the first action the plaintiffs, Chessington Development Co., Ltd. (hereinafter referred to as " Chessingtons "), by their writ and statement of claim, also claimed declarations and ancillary injunctions, but at the hearing they did not pursue these remedies, confining their claim to damages alone. In the second action the plaintiffs, Ransom & Luck, Ltd. (hereinafter referred to as " Ransoms "), by their statement of claim, claimed only damages. There is no dispute on any question of fact, and agreed statements of fact were put in in both actions.

The defendants are, and they or their predecessors, the Surbiton Urban District Council, were, at all material times, the interim development authority for their area for the purposes of the Town and Country Planning Acts, 1932, 1943 and 1944. The borough of Surbiton was incorporated as from Nov. 9, 1936, by charter dated July 1, 1936. On May 11, 1934, the Minister of Health, in exercise of the powers conferred on him by s. 10 (5) of the Act of 1932, and on consideration of an appeal dated Mar. 22, 1934, made to him by MacDonald & Kennedy, Ltd., against the refusal of the Surbiton Urban District Council to grant permission for development under the Town and Country Planning (General Interim Development) Order, 1933 (S.R. & O., 1933, No. 236), of approximately 85 acres of land at Chessington, Surrey, known as the Chessington Hall Estate, in accordance with the lay-out submitted to the said council, made an order on the appeal granting to MacDonald & Kennedy, Ltd., the owners of such land :

> . . . permission for the erection of not more than 10 shops and 763 dwelling-houses on the said land in accordance with the said plan or with any amended lay-out plan which may be approved by the council, or by the Minister of Health on appeal, subject to the approval by the council under the said Order, or by the Minister of Health on appeal, of the particulars of the proposed development and to due compliance with any local Acts, regulations, building by-laws and general statutory provisions in force in the urban district and applicable to the development.

On Aug. 22, 1934, approximately 15 acres of the said Chessington Hall Estate were conveyed to the Surbiton Urban District Council by MacDonald & Kennedy, Ltd., for open space purposes. On May 8, 1935, the remainder of the said land, in area approximately 70 acres, was conveyed by MacDonald & Kennedy, Ltd., to Chessingtons in fee simple. On Dec. 31, 1936, Chessingtons conveyed to Ransoms certain portions of the said land, in area about 23 acres, and at various dates between May 8, 1935, and May 19, 1939, Chessingtons conveyed to the Southern Railway Co. certain other portions of the said land. On Jan. 10, 1938, the defendants made a scheme under the Act of 1932, and on Feb. 7, 1938, submitted the said scheme to the Minister of Health for approval. The Minister, on July 26, 1938, began a local inquiry into the said scheme and certain objections thereto. As a result of subsequent legislation, the powers of the Minister of Health were transferred to the Minister of Town and Country Planning, but the Surbiton Planning Scheme of 1938 has not so far been approved by either Minister. By letter dated Feb. 10, 1937, Messrs. Montagu Evans & Son, surveyors to both of the plaintiffs, submitted to the defendants a formal and detailed application for permission for the development of their properties on the Chessington Hall Estate. Permission was refused by the defendants, but, following further correspondence with Messrs. Montagu Evans & Son, the town clerk of Surbiton wrote on Apr. 17, 1937, giving the defendants' approval to the development proposals subject to certain conditions. One of the conditions was that there should be an agreement under the Town and Country Planning Act, 1932, and the Restriction of Ribbon Development Act, 1935.

On May 19, 1939, two agreements under seal were executed. The first (hereinafter referred to as "the development agreement") was made between the defendants, of the first part, Ransoms, of the second part, and Chessingtons, of the third part. The second of such agreements (hereinafter referred to as "the roads and sewers agreement") was made between the defendants, of the first part, Ransoms, of the second part, Chessingtons, of the third part, the Southern Railway Co., of the fourth part, and Clement Hugh Bridge, of the fifth part. I shall have occasion hereafter to refer with some particularity to the development agreement, but for present purposes I may refer to the summary thereof which appears in Chessingtons' statement of claim. The points agreed were : (*a*) The development agreement was supplemental to and, as regards the three parties thereto, in consideration of the roads and sewers agreement. (*b*) Chessingtons and Ransoms were to be entitled to use their respective lands comprising the Chessington Hall Estate for the purposes mentioned in and subject to the restrictions set out in sched. II to the development agreement and in accordance with the lay-out in plan No. 2 thereto annexed. By the said development agreement the said lands, subject as therein mentioned, might be used for the erection of a limited number of dwelling-houses, shops or business premises as therein specified. (*c*) Pending the coming into force of a planning scheme submitted by the defendants to the Minister of Health under the Town and Country Planning Act, 1932, the development agreement was to operate as if the defendants had approved plans of Chessingtons and Ransoms to develop by virtue of s. 10 of the Act of 1932 and the Town and Country Planning (General Interim Development) Order, 1933. (*d*) The objections and representations of Chessingtons and Ransoms to the approval by the Minister of Health of the said planning scheme of the defendants were to be withdrawn. (*e*) No compensation should be payable by the defendants to Chessingtons and Ransoms and no betterment should be payable by Chessingtons and Ransoms to the defendants in respect of any matters arising from the development agreement. (*f*) Chessingtons and Ransoms should give to the defendants six weeks' notice of intention to build on any land adjoining Chalky Lane and Green Lane. The effect of the roads and sewers agreement is also summarised with sufficient accuracy in Chessingtons' statement of claim. The points agreed were: (*a*) Chessingtons and Ransoms dedicated certain lands therein described to the public for highways. (*b*) Chessingtons and Ransoms agreed to convey to the defendants on the terms therein set out certain other lands therein described. (*c*) Chessingtons, Ransoms, the Southern Railway Co. and C. H. Bridge agreed to construct a carriage-way, footpaths and sewer therein described. (*d*) The defendants agreed to construct certain subsidiary or service roads as therein described. (*e*) Chessingtons and Ransoms agreed to make certain payments therein set out to the defendants on completion of the said subsidiary or service roads. (*f*) The defendants agreed to construct an outfall soil sewer and an outfall surface sewer as therein described. (*g*) Chessingtons and Ransoms agreed to pay to the defendants the cost of construction of the said outfall sewers. (*h*) No compensation should be payable by the defendants to Chessingtons and Ransoms and no betterment should be payable by Chessingtons and Ransoms to the defendants in respect of any matters arising from the roads and sewers agreement.

At the date on which the said agreements were executed, Chessingtons were (as they still are) the owners in fee simple of about 42½ acres of the land which had been conveyed to them by MacDonald & Kennedy, Ltd., on May 8, 1935. Ransoms were at the said date (and still are) the owners in fee simple of substantially the whole of the land which they purchased from Chessingtons on Dec. 31, 1936. On June 29, 1939, Chessingtons notified the defendants, pursuant to cl. 7 of the development agreement, of their intention to build at the expiration of six weeks from the date thereof on the land fronting or adjoining Green Lane, aforesaid. After certain further correspondence, the defendants, on Nov. 16, 1939, notified Chessingtons that the notice given by Chessingtons as aforesaid would not, so far as the borough council were concerned, be deemed to be affected by reason of the fact that, as a consequence of the outbreak of war, building had not been commenced by Chessingtons. Included in the area covered by the defendants' proposed scheme as aforesaid was the Chessington Hall Estate, including the lands vested in Chessingtons and in Ransoms. Chessingtons and Ransoms had lodged, and intended to maintain, objections to so much of the said scheme as affected their respective lands. Pursuant to the development agreement and the roads and sewers agreement, Chessingtons and Ransoms withdrew such objections and performed the following acts, *viz.*, (*a*) Chessingtons dedicated certain lands as public highways and conveyed certain lands to the defendants, and (*b*) Ransoms also dedicated as public highways strips of land adjoining Chalky Lane and Leatherhead Road, and expended moneys in the construction of sewers, and in preparation for the construction of roads. For various reasons connected with the war, neither Chessingtons nor Ransoms were able to start development of their said lands in 1939. In exercise of the powers conferred by s. 3 of the Act of 1932 and of all other powers them enabling, the defendants, on Oct. 9, 1944, concurred with the Surrey County Council and with other planning authorities in north-east Surrey in appointing a joint planning committee known as the North-east Surrey Joint Planning Committee and in delegating to that committee all their powers and imposing on them all their duties in connection with the preparation of a scheme for the borough of Surbiton. The said committee became the planning authority in respect of the borough as from Nov. 1, 1944. In 1944 a plan known as " The Greater London Plan " was prepared by Professor Sir Patrick Abercrombie for the planning of the area of Greater London including the borough of Surbiton. In this plan, the Chessington Hall Estate was included in the local green belt therein referred to, and there were proposals for a " D " ring road round London, and a proposed radial arterial road from London to Portsmouth which would run through the estate. The Greater London Plan was submitted to the Minister of Town and Country Planning, but has no statutory effect. The Minister, however, on Dec. 14, 1945, sent to the defendants and all other interim development authorities in the area covered by the Greater London Plan a memorandum for the guidance of such authorities. Some 16½ acres of Ransoms' land were requisitioned by the War Department. It now forms the site of the Ordnance Survey Department and remains under requisition.

By letter dated Jan. 4, 1946, Ransoms inquired as to that part of the said land which had not been requisitioned " whether permission to develop in accordance with the agreement of 1939 " would be granted, subject to the submission of acceptable housing plans. The lay-out plan submitted with this letter showed proposals for 70 houses on approximately 6½ acres of land fronting Leatherhead Road and Chalky Lane. On Feb. 26, 1946, the defendants refused to permit the development of the said land by the erection of the said 70 houses on the ground that the proposed development would contravene the proposals of the Greater London Plan of 1944. On Feb. 27, 1946, the North-east Surrey Joint Planning Committee, as the planning authority concerned, resolved (with a verbal amendment on Dec. 18, 1946) that, under the scheme in course of preparation by them, an area which included the said land should be zoned in accordance with the proposals of the Greater London Plan. On Mar. 26, 1946, Ransoms' solicitors appealed to the Minister of Town and Country Planning under s. 10 (5) of the Act of 1932 against the defendants' refusal of permission as aforesaid. By the Surbiton Town and Country Planning (Interim Development) Direction, dated July 12, 1946, the Minister, pursuant to the powers conferred on him by s. 4 (2) of the Town and Country Planning (Interim Development) Act, 1943, and of all other powers enabling him, directed the defendants to submit to him for his consent under s. 4 (1) of the said Act an order revoking the permission granted on May 19, 1939, to Chessingtons and Ransoms for the development of part of the Chessington Hall Estate, and also the permission given as aforesaid by the Minister of Health to MacDonald & Kennedy, Ltd., on May 11, 1934. On July 29, 1946, the defendants decided that an order be made, with the consent of the Minister, revoking the said permissions. On Aug. 8, 1946, the defendants, by a notice in writing, informed Chessingtons and Ransoms that they proposed, by order made with the consent of the Minister of Town and Country Planning, to revoke the permissions referred to in the Minister's Direction of July 12, 1946. On Aug. 16, 1946, the defendants, in pursuance of the provisions of the Act of 1943, by letter of that date submitted to the Minister a draft of the order which they proposed to make in the event of the Minister's consent being given revoking the permissions referred to in the Minister's Direction dated July 12, 1946. On Nov. 12, 1946, a public local inquiry was held at Surbiton by direction of the Minister to inquire into the proposed revocation and the objections thereto of (*inter alia*) Chessingtons and Ransoms. The decision of the Minister has not yet been made known to the parties to these actions. On Jan. 8, 1947, Ransoms issued the writ in their action. On Jan. 17, 1947, Messrs. Montagu Evans & Son, on behalf of Chessingtons, submitted to the defendants detailed plans for the erection of 10 houses " on the Chessington Hall Estate close to Chessington South Station," and gave notice under the building by-laws of intention to erect new buildings, and applied for permission to develop under the Town and Country Planning (General Interim Development) Order, 1946. On Jan. 20, 1947, the defendants gave to Chessingtons notice of the passing of the said plans for the purposes of the building by-laws and certain sections of the Public Health Act, 1936, but on Jan. 27 the defendants by notice refused permission under the Town and Country Planning Acts, 1932 and 1943, and the Town and Country Planning (General Interim Development) Order, 1946 (S.R. & O., 1946, No. 1621), for such development. On Mar. 19, 1947, Chessingtons commenced their action.

Chessingtons found their claim to damages on the following allegations in their statement of claim:

> (8) The plaintiffs and Ransom & Luck, Ltd., have been prevented by war conditions from proceeding prior to 1946 with the development authorised by the said agreements, but on Jan. 4, 1946, Ransom & Luck, Ltd., applied to the defendants for permission to proceed with part of the said development, and the defendants by letter dated Feb. 26, 1946, wrongfully and in breach of the said agreements refused to permit the said development.
>
> (9) In further breach of the said agreements the defendants by notices dated Aug. 8, 1946, informed the plaintiffs and Ransom & Luck, Ltd., that they proposed by order made with the consent of the Minister of Town and Country Planning to revoke the permission to develop contained in the development agreement.
>
> (10) In further breach of the said agreements the defendants, by letter to the Minister of Town and Country Planning dated Aug. 16, 1946, sought his purported consent to the making of an order purporting to revoke the said permission to develop.
>
> (11) On Jan. 17, 1947, Messrs. Montagu Evans & Son on behalf of the plaintiffs submitted to the defendants detailed plans for the erection of 10 houses in accordance with the development as agreed by the said agreements. On Jan. 20, 1947, the defendants gave to the plaintiffs notice of approval of the said plans, but in breach of the said agreements the defendants by letter from their town clerk dated Jan. 27, 1947, wrongfully purported to refuse permission for such development.
>
> (12) The defendants, subject to obtaining the aforesaid purported consent of the Minister of Town and Country Planning, threaten and intend to make an order purporting to revoke the said permission to develop. Any such order would be *ultra vires* the defendants and of no effect.
>
> (13) By reason of the facts aforesaid the plaintiffs have been and are prevented from developing the said lands as aforesaid and the value of the said lands has been reduced to not more than £4,250 in lieu of not less than £120,020 (being £43,200 in respect of the land on which the erection of shops or business premises was agreed and £76,820 in respect of the land on which the erection of dwelling-houses was agreed).

Chessingtons then claim certain further damages as therein mentioned. Ransoms' claim to damages is founded on similar grounds to those pleaded in Chessingtons' statement of claim.

In the course of the argument I was rightly referred by counsel to several of the provisions contained in the Town and Country Planning Acts, 1932, 1943, 1944 and 1947. At the time of the execution of the two agreements, the statute in force was the Act of 1932. For the purposes of this judgment the most relevant sections of that Act, though I need not refer to them in detail, are s. 10 (which relates to interim development orders) and s. 34 (which empowers certain authorities and owners to enter into agreements restricting use of land). It is, of course, clear that no subsequent legislation is relevant for the purpose of construing the development agreement on which the principal issues in these actions depend. The argument for the plaintiffs as to the effect of the development agreement may be summarised as follows. The agreement was, as stated by cl. 1 thereof, made by virtue of s. 34 of the Act of 1932, and regard must be had to the fact that the Surbiton Borough Council were the statutory authority in whom planning powers were vested. The contractual obligation which the council assumed under the agreement, and, in particular, under cl. 3, was that they would not at any time thereafter exercise any existing or future statutory powers so as to restrict the planning, development or use of the plaintiffs' land to a greater extent than was provided for by the agreement. Section 34 of the Act of 1932, on its true construction, authorised the council to incur this obligation which, admittedly, they could not, in the absence of statutory authority, have undertaken. The plaintiffs next say that the council, having legitimately bound themselves by contract in this manner, could not subsequently act in breach of the agreement unless (which did not happen) a duty, or, at least, a right, so to do was subsequently created by legislative authority. In furtherance of their contentions, as outlined above, the plaintiffs point to the fact that they were commercial enterprises acting by directors who would not, and, indeed, could not with propriety, commit their companies to the collateral obligations imposed by the companion agreement of the same date gratuitously, and the *quid pro quo* which it was intended they should receive was, it is said, the release by the council of their planning powers to the extent to which I have already referred.

It is clearly implicit in the arguments of the plaintiffs that the agreements which are contemplated and authorised by s. 34 of the Act of 1932 are not such as merely to restrict the planning, development and use of land, but include also agreements which, while partly restrictive in operation, are also, in part, permissive or enabling. Such agreements may, accordingly, permit something in the nature of interim development. This latter topic, however, is the subject of express treatment under s. 10 of the Act, and, while s. 10 is primarily enabling in its scope, s. 34, I should have thought, is, on the other hand, primarily restrictive. Nevertheless, s. 34 is couched in wide terms, and it is, I think, true that agreements would not be outside its proper scope even if they contained permissive, as well as restrictive, provisions. Indeed, this was the view of the section which was taken by LUXMOORE, J., in *A.-G.* v. *Barnes Corpn. and Ranelagh Club, Ltd.* (1). The agreement which was under consideration in that case and which was made, pursuant to s. 34, by the defendant council, of the one part, and Ranelagh Club, Ltd., of the other part, provided both what the club could do and what it could not do in the matter of developing its property, and the agreement was impeached on the ground (*inter alia*) that it was permissive in the sense that it simply permitted the club to develop its land without being obliged to obtain an interim development order. The learned judge rejected that contention. He pointed out that, until a town planning scheme has become effective (and he was, of course, speaking of the law as it then stood), all land proposed to be included in a proposed town planning scheme was free from restriction and the owner of it could develop it in any way he pleased, subject only to the risk of his being eventually compelled either to pull down buildings which he had erected or make them conform to the requirements of the scheme. On a consideration of the agreement as a whole, he rejected the argument to which I have referred on the ground, as I read the judgment, that the agreement was in substance and in fact restrictive, and, accordingly, within the powers of the defendant council under s. 34. Moreover, it is to be observed that, if only agreements of a purely restrictive character are authorised by s. 34, it is difficult to see what inducement is offered to landowners ever to enter into them. Unless such owners were to acquire some right or privilege that they did not possess already, it is not easy to see why they should be willing, or why Parliament should have contemplated that they might be willing, to subject their land to restrictions from which it had hitherto been free. Accordingly, I do not think that the argument which was addressed to me on behalf of the defendants to the effect that no agreement which is not purely restrictive in character is authorised by s. 34 is well-founded. Nor can I accept the further argument that the development agreement is, on its true construction, merely restrictive. In my judgment, the agreement is, as a matter of construction both permissive and restrictive. It is, however, drawn in a somewhat peculiar form, and I confess to having experienced considerable difficulty in arriving at a conclusion as to its exact effect.

The first recital is to the effect that the council has submitted to the Minister for approval a planning scheme for their borough which was thereinafter referred to as "the scheme." The second recital states the title of the plaintiffs to their respective lands. The third recital recites that by the instrument in writing of May 11, 1934, the Minister, in exercise of the powers reserved to him under s. 10 (5) of the Act of 1932, allowed an appeal to him under that section in relation to the lands in question and (in the words of the recital):

> . . . granted permission for the development of the said lands in accordance with a lay-out plan a copy of which accompanied the said appeal or with any amended lay-out plan approved by the council or by the said Minister on appeal:

The fourth and last recital states that it had been agreed between the parties to the agreement that the proposals as shown on the lay-out plan approved by the Minister should be superseded by the provisions of the agreement. Clause 1 of the operative part states in general terms that the agreement was intended to be made by virtue of s. 34 of the Act of 1932 and was intended to be scheduled to the scheme. Then, after cl. 2 (with its reference to the roads and sewers agreement), comes cl. 3 on which the plaintiffs principally found their case. It is as follows:

> The lands described in the first and second parts of sched. I hereto may be used

> for the purposes mentioned in and subject to the restrictions set out in sched. II hereto and in accordance with the lay-out in plan No. 2 hereto annexed.

To arrive at a correct conclusion as to the effect of this clause, it is necessary, in my judgment, to read it in the light of two considerations, namely, (i) the rights of the contracting parties under the then existing law, and (ii) the effect on cl. 3 of any other parts of the agreement. As to the rights of the parties, the plaintiffs were fully entitled to develop their lands in any way they chose, and without the council's consent, notwithstanding that the council had submitted a planning scheme for the Minister's approval. It, accordingly, follows that the words in cl. 3 "may be used"—which are, in my judgment, clearly words of permission—require some explanation. It is to be found, I think, in the fact that the council, or other the responsible authority, would have the right under s. 13 of the Act, after the scheme became operative, to pull down or alter any buildings which the plaintiffs might have erected on their own initiative and which might fail to conform with the scheme. The conferment by the defendants on the plaintiffs of the contractual right to build in a specified manner would *prima facie* preclude the defendants, when the scheme came into force, from exercising their powers under s. 13 of the Act, and would, accordingly, afford the plaintiffs a corresponding measure of security. The consent in cl. 3, therefore, to do that which the plaintiffs could do without consent is, in my view, thus explained.

Next arises the question whether the council were purporting to give this consent by virtue of s. 34 of the Act, or by virtue of s. 10. For certain reasons which arise on the construction of the agreement as a whole, I am of opinion that the council were consenting by virtue of s. 34. In the first place, cl. 1 states generally that the agreement was made by virtue of that section. Secondly, cl. 3 operates, in my judgment, in relation to a period to which s. 10 of the Act is not applicable, *viz.*, the period after the proposed scheme came into force. Thirdly, cl. 4, which relates to the interim period to which s. 10 of the Act is applicable, does expressly refer to and invoke that section. In the light of the foregoing considerations, the effect which I attribute to cl. 3 of the agreement is, accordingly, that the council, by virtue of s. 34 of the Act, contractually debarred itself from interfering, after the scheme came into force, with the specified method of development by requiring the plaintiffs to pull down or alter buildings erected in conformity with that method. I have already indicated that cl. 3 was not directed, in my judgment, to the immediate future, but to the position as it would exist after the scheme became operative. This view is founded not on cl. 3 itself (which is perfectly general in its terms), but on cl. 4 which is explicitly referable to the interim period between the date of the agreement and the coming into force of the proposed scheme. As force and meaning can be attributed to cl. 3 by excluding from its scope matter which is specifically dealt with by cl. 4, ordinary principles of construction require that its effect should be limited accordingly. Clause 4 (*a*) is as follows:

> Until the scheme shall come into force this agreement shall operate as if the owners and the development company had submitted an amended lay-out plan for the approval of the council and the council by this agreement had approved the said plan and had granted permission to the owners and the development company to develop by virtue of s. 10 of the Act and the Town and Country Planning (General Interim Development) Order, 1933.

Clause 4 (*a*) at once makes apparent the object and purpose of the third recital. Under the Order recited, the Minister, by virtue of s. 10 (5) of the Act, granted permission for the development of the lands in accordance with the original lay-out plan or with any amended lay-out plan approved by the council. The original lay-out plan was, as stated in the fourth recital, agreed to be superceded. In these circumstances, it seems to me to be reasonably plain that the council were intending to do by cl. 4 (*a*) what the Minister's Order contemplated that they should do, namely, approve an amended lay-out so that the Minister's permission for interim development might be brought into effective operation. The method adopted for carrying this intention into effect was, as appears from cl. 4 (*a*), to assume that the amended lay-out plan had been submitted for the council's approval and that the council had approved it and had granted permission to develop by virtue of s. 10 of the Act and the Order of 1933, and during the interim period between the date of the agreement and the coming into force of the scheme the agreement was to operate accordingly.

In view of the assumption to which I have referred, and which, as between the parties, was equivalent to established fact, the Minister's instrument in writing had been brought to effectual fruition, and it was, accordingly, provided by cl. 4 (*b*) that it should thenceforth cease to have effect except to the extent to which the agreement might fail to operate or be invalid. Notwithstanding then the apparent generality of cl. 1, I think, therefore, that it is reasonably clear that the interim development permitted by cl. 4 of the development agreement was referable to the powers conferred by s. 10 of the Act of 1932, and to those powers alone, and, unless this view is sound, I am unable to understand why the third recital and cl. 4 (*a*) and (*b*) were introduced into the agreement at all. In these circumstances, unless I can spell out of the agreement as a whole an undertaking by the council that, however strongly circumstances might require that they should avail themselves of subsequent legislation to cancel the permission which they had given under cl. 4 of the agreement, they would not do so, these actions must fail, for the acts of the defendants of which the plaintiffs complain were done during the interim period by virtue of the Act of 1943, and, consequently, the contractual rights, as I have construed them, conferred on the plaintiffs by cl. 3 of the agreement are of no avail. I am unable to imply any such undertaking by the council from the terms in which the agreement is expressed. I must take the agreement as I find it and I am not justified in importing obligations into it which are not there unless it is necessary so to do in order to give it business efficacy.

Why the agreement took the form it did, I do not know. Whether or not cl. 3, as I have interpreted it, was within the scope of s. 34 of the Act, it is not necessary for me to decide, though I see no reason to doubt it. On the face of it, however, the plaintiffs were fully protected after the then proposed scheme should come into force, while the permission for interim development gave them the advantages attaching to such permission which could not, as the law then stood, be revoked. Such advantages would be of especial value if cl. 3 should, for any reason, be invalid. These considerations much diminish the force of the plaintiffs' argument founded on the commercial improbability of their directors agreeing, in effect, to give something for nothing. They got less than they thought they had got, and it is not proper that I should express any view on the ethics of the matter. As the enabling provisions of cl. 4 of the agreement were created under s. 10 of the Act, they had not only the advantages, but were necessarily subject to all disadvantages incident to that particular origin of which liability to cancellation under subsequent legislation was, as it subsequently transpired, one.

From the conclusions above expressed it follows that these actions, founded as they are on breach of contract, must fail. The defendants have not contravened the negative obligations which, I think, were imposed on them by reason of cl. 3 of the agreement, if only for the reason that the scheme has never come into force, while, with regard to cl. 4, the council did not, in my judgment, as I have indicated, either expressly or impliedly promise not to cancel the permission which they thereby gave if circumstances required it, and if subsequent legislation authorised them so to do. I would add in conclusion that, even if I had been able to accept the plaintiffs' arguments as to the construction and effect of the agreement, I should find considerable difficulty in seeing how the large depreciations which they allege in the value of their lands could be said to be legally attributable to any of the pleaded acts of the defendants. It is not, however, necessary for me to pursue this aspect of the matter further, and I refrain from doing so. Both the actions must be dismissed.

Actions dismissed with costs.

Solicitors: *Bennett & Bennett* (for the plaintiffs in both actions); *Lees & Co.*, agents for *R. H. Wright*, town clerk, Surbiton (for the defendants in both actions).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

Re BIDIE (*deceased*), BIDIE *v.* GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION LTD., AND OTHERS.

[CHANCERY DIVISION (Jenkins, J.), April 15, 16, 19, 1948.]

Husband and Wife—Maintenance—Separation order—Arrears—Recovery—Claim by widow to recover against estate of husband—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), *ss.* 5 (*c*), 9.

On Dec. 17, 1923, a separation order was made by justices under the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (*a*), on the ground of the husband's persistent cruelty, and under s. 5 (*c*) the husband was ordered to pay the wife £2 a week. Section 9 of the Act provides that such payment "may be enforced in the same manner as the payment of money is enforced under an order of affiliation," in effect, by distress and committal. The husband made some payments under the order down to 1928, but he then disappeared and the wife received no further payments. On Jan. 16, 1945, the husband died. The wife claimed against his estate for arrears of maintenance.

HELD: (i) the wife's claim, as a creditor of the husband's estate, to arrears of maintenance under the order of 1923 failed.

Re Hedderwick, Morton v. *Brinsley* ([1933] Ch. 669; 149 L.T. 188) and *Re Woolgar, Woolgar* v. *Hopkins* ([1942] 1 All E.R. 583; [1942] Ch. 318; 167 L.T. 60), *followed.*

Re Stillwell, Brodrick v. *Stillwell* ([1916] 1 Ch. 365; 114 L.T. 604), and *Firman* v. *Royal* ([1925] 1 K.B. 681; 133 L.T. 48), *not followed.*

(ii) nor could the wife claim against the husband's estate for sums which she ought to have received during his life in respect of his common law liability to maintain her or in respect of any equitable right of her so to be maintained.

Family Provision—Time for application—Lost will—Grant of letters of administration—Will found—Revocation of grant—Grant of probate—Inheritance (Family Provision) Act, 1938 (*c.* 45), *s.* 2 (1).

The Inheritance (Family Provision) Act, 1938, s. 2 (1) provides: ". . . an order under this Act shall not be made save on an application made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out."

A testator, who made a will dated Feb. 10, 1937, died on Jan. 16, 1945. The will was not found, and on Apr. 13, 1945, on the assumption that the testator had died intestate, a full grant of administration was made to the widow and one of her sons. When the will was discovered, the grant of administration was revoked, and on Sept. 7, 1946, a grant of probate was made to the executor named in the will, which made no provision for the widow. On Jan. 8, 1947, a summons was issued by the widow claiming that some provision should be made for her under the Act of 1938.

HELD: on construction of s. 2 (1) of the Act, the date on which representation in regard to the testator's estate for general purposes was first taken out was Apr. 13, 1945, when letters of administration were granted, and, notwithstanding the subsequent revocation thereof, time began to run for the purposes of that section from that date, and the widow's claim was, therefore, barred.

[AS TO RECOVERY OF ARREARS OF MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 794, 795, para. 1260; and FOR CASES, see DIGEST, Vol. 27, pp. 540-541, Nos. *5897-5910*.]

Cases referred to:

(1) *Re Harrington, Wilder* v. *Turner*, [1908] 2 Ch. 687; 78 L.J.Ch. 27; 99 L.T. 723; 72 J.P. 501; 52 Sol. Jo. 855; 21 Cox C.C. 709; 3 Digest 404, *375*.

(2) *Re Stillwell, Brodrick* v. *Stillwell*, [1916] 1 Ch. 365; 85 L.J.Ch. 314; 114 L.T. 604; 60 Sol. Jo. 322; 27 Digest 541, *5901*.

(3) *Re Naters, Ainger* v. *Naters*, (1919), 88 L.J.Ch. 521; 122 L.T. 154; 83 J.P. 266; 63 Sol. Jo. 800; 19 Digest 335, *1469*.

(4) *Re Hedderwick, Morton* v. *Brinsley*, [1933] Ch. 669; 102 L.J.Ch. 193; 149 L.T. 188; Digest Supp.

(5) *Linton* v. *Linton*, (1885), 15 Q.B.D. 239; 54 L.J.Q.B. 529; *sub nom., Re Linton, Ex p. Linton*, 52 L.T. 782; 49 J.P. 597; 27 Digest 541, *5913*.

(6) *Re Woolgar, Woolgar* v. *Hopkins*, [1942] 1 All E.R. 583 ; [1942] Ch. 318 ; 111 L.J.Ch. 209 ; 167 L.T. 60 ; 86 Sol. Jo. 161 ; 2nd Digest Supp.

(7) *Firman* v. *Royal*, [1925] 1 K.B. 681 ; 94 L.J.K.B. 649 ; 133 L.T. 48 ; 27 Digest 564, *6228*.

(8) *Re Dorgan, Dorgan* v. *Polley*, [1948] 1 All E.R. 723.

Adjourned Summons by which the widow of the testator claimed as a creditor against the testator's estate arrears of maintenance at the rate of £2 a week payable to her under a separation order made by the Banbury justices on Dec. 17, 1923, on the ground of the testator's persistent cruelty to her. The widow also claimed under the Inheritance (Family Provision) Act, 1938, that such provisions as the court thought fit should be made for her maintenance out of the testator's estate on the ground that his will made no such provisions. Jenkins, J., dismissed the summons. The facts appear in the judgment.

Mulligan for the plaintiff.

B. S. Tatham for the defendants, the executors.

J. H. A. Sparrow for the second defendant, the testator's daughter.

Oliver Lodge for the third defendant, the testator's son.

JENKINS, J.: The justices' order of Dec. 17, 1923, on which the widow's claim as a creditor of the testator's estate is founded, was made pursuant to the Summary Jurisdiction (Married Women) Act, 1895, under which the justices are empowered, by s. 5 (*a*), to make a separation order, and are further empowered, by s. 5 (*c*), to make an order to the effect :

> . . . that the husband shall pay to the applicant personally, or for her use, to any officer of the court or third person on her behalf, such weekly sum not exceeding £2 as the court shall, having regard to the means both of the husband and wife, consider reasonable.

The order made in the present case was a separation order on the ground of the testator's persistent cruelty to his wife and it included a provision under s. 5 (*c*) for the payment of £2 a week by the testator to his wife. By s. 9 of the same Act :

> The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation.

The reference in s. 9 to the manner in which the payment of money is enforced under an order of affiliation was, in effect, a reference to s. 4 of the Bastardy Amendment Act, 1872, which provides machinery for enforcing orders under that Act by distress and committal.

It appears that the testator made some irregular payments under the order of Dec. 17, 1923, down to the year 1928, but he disappeared from 1929 onwards and his wife heard nothing of him until she received news of his death which occurred on Jan. 16, 1945. For some 16 years, therefore, no payment was made of the £2 a week, and the arrears amount to a considerable sum. The actual figures are not material for my immediate purpose, but, if 12 years' arrears were recoverable, the amount would be upwards of £1,200, while, if the limit be 6 years, the amount would be upwards of £600.

From the provisions of the Act of 1895 one might gather by way of first impression that what it does is to impose a statutory liability to pay maintenance and to provide a statutory method of enforcing that liability. If one reached a conclusion in accordance with that *prima facie* impression, there would, I think, be an end of the widow's claim on the principle that where a statutory liability is created and the statute creating it provides a method whereby it is to be enforced, *prima facie* that method is the only method to which recourse can be had. Counsel for the widow is concerned to avoid that conclusion, and he has argued that this is not a case of a new statutory right or statutory liability being created. He says that both at common law and in equity a husband is under an obligation to maintain his wife and the Act of 1895 does no more than quantify, so to speak, that liability and provide a particular means whereby it may be enforced. From these submissions he adduces the conclusion that the case is one of those in which a pre-existing right is recognised by statute, and the statute provides a remedy in respect of it. He submits, and I think rightly, that in cases of that class the remedies are cumulative, and the pre-existing right can be still enforced in any way in which it could have been enforced if the Act had not been passed. He has referred me to the common law obligation of the husband to maintain his wife and the recognised common law principles under which, to make that obligation effective, the wife was accorded power to pledge her husband's credit for necessaries. He has also referred me to some old cases in equity, in which the court directed maintenance to be paid by a husband. So far as the equity cases are concerned, I think the latest of them is well over 100 years old, and certainly no such order is ever heard of today. The common law right of the wife to pledge her husband's credit for necessaries is unquestionable, but nothing that counsel has said, either about the common law right or the former equitable procedure, has satisfied me that either common law or equity would have supported a claim by a wife against a deceased husband's estate, either for the price of necessaries for which he ought to have paid but failed to pay in his lifetime, or for some lump sum representing the total of the maintenance which a court of equity, if recourse had been had to it in his lifetime, would have ordered him to pay. I do not think that either the common law right or the equitable practice to which I have been referred would have sufficed of themselves to support such a claim against the estate of a deceased husband.

On what I may describe as the merits, there is no doubt something to be said for the view that it is a little unreasonable if a husband who has been ordered to pay maintenance should be able to evade his obligations in one way or another during his lifetime and ultimately by his death deprive the aggrieved wife of all means of recovering anything under the order. On the other hand, it is pointed out that orders for maintenance, whether made by justices or in the divorce court, are subject to review, and it is said that it would be an anomaly if a wife could allow arrears to mount up for a long period and then sue the husband for them, or prove in the husband's bankruptcy for them as if they were a liquidated amount, whereas, if recourse had been had to the tribunal which ordered the payments, the payments would have been open to review at that tribunal's discretion. Be that as it may, I have been shown no case in which an action of debt was brought *inter vivos* between a wife and a husband for recovery of arrears or in which a proof had been admitted in bankruptcy for arrears. So far as bankruptcy is concerned, there seems to be authority that in such a case there is no provable debt. So far as an action *inter vivos* is concerned, one can at all events say it would be strange, if that ready method of enforcement were indeed available, that it should never have been resorted to.

Those are the general considerations applicable to the case. It is unnecessary for me to say what conclusion I myself would have come to on general principles if the matter were at large, because from the authorities to which I have been referred, I do not think it is at large, and I have no doubt as to the course which I, as a judge of first instance, ought to take. The authorities are in a rather curious position, but I think the conclusion to which they point is reasonably plain. In *Re Harrington* (1) Warrington, J., held, without any doubt, that the liability of a putative father under a bastardy order was purely personal, and, if the father died, the mother had no right to claim against his estate for arrears or future payments. That is a clear authority so far as payments under the Bastardy Law Amendment Act, 1872, are concerned. It is, no doubt, true in a way that the obligation to make payment for the maintenance of a putative child is purely and simply a creature of statute and there is no common law foundation for it corresponding to the common law obligation of the husband to maintain his wife. On the other hand, payment under that Act resembles payment under the Summary Jurisdiction (Married Women) Act, 1895, to the extent that under the latter Act the statutory method of enforcement is precisely the same, incorporating as it does, by reference, the provisions of the Act of 1872. In *Re Stillwell* (2) Sargant, J., held that ([1916] 1 Ch. 365):

> Where an order has been made against a husband for judicial separation and for payment of alimony, his widow may recover against his estate, if solvent, any arrears of alimony due at his death. *Quaere* whether the arrears are recoverable if the husband's estate is insolvent.

Re Naters (3), decided by Eve, J., in 1919, was a decision to the effect that (88 L.J.Ch. 521):

> An order of a Consistory Court to pay costs followed by a monition to pay the

amount creates a debt upon which a creditor's suit for administration of the debtor's estate can be founded.

Eve, J., said at the conclusion of his judgment (*ibid.*, 522):

> I think the case is really governed by the decision of Sargant, J., in *Re Stillwell* (2) and I hold that the claim of the plaintiff can be enforced against the testator's estate.

Re Naters (3) was, of course, concerned with an entirely different subject-matter, and its relevance for the present purpose lies solely in its implied approval of *Re Stillwell* (2). In *Re Hedderwick* (4), a case of alimony *pendente lite*, Luxmoore, J., held ([1933] 1 Ch. 669), following *Linton* v. *Linton* (5): A

> . . . that the only means by which a wife can enforce payment of arrears of alimony is under s. 5 of the Debtors Act, 1869, and that that remedy ceased on the death of the husband.

Luxmoore, J., discussed the question very fully in a considered judgment and reviewed a number of authorities. In particular, he dealt with the decision of Sargant, J., in *Re Stillwell* (2), and declined to follow it in terms which show he was clearly of opinion that it was wrong. Finally, so far as the cases in the Chancery Division are concerned, in *Re Woolgar* (6) ([1942] 1 Ch. 318): B

> A widow sought to recover arrears of alimony payable to her under an order of the Probate, Divorce and Admiralty Division in Divorce by taking out a summons in the Chancery Division for the administration of her husband's estate: *Held*, that the arrears were not recoverable in such proceedings and that the position had not been altered by the Matrimonial Causes Rules, 1937. C

In that case (which concerned permanent alimony) Simonds, J., seems to have had no hesitation in following *Re Hedderwick* (4), and, in effect, agreeing with Luxmoore, J., in his disapproval of *Re Stillwell* (2). If the matter rested there, it seems to me that as a judge of first instance I should be bound to follow the conclusion reached in *Re Hedderwick* (4) and *Re Woolgar* (6) and to reject the present claim unless there is some relevant distinction between maintenance payable on an order of the justices and the alimony with which the cases in the Chancery Division were concerned. D

Before considering that question, I must refer to *Firman* v. *Royal* (7), in which Finlay, J., held ([1925] 1 K.B. 681) that (following *Re Stillwell* (2)):

> Where a separation order has been made by justices under the Summary Jurisdiction (Married Women) Act, 1895, against a husband and also an order for maintenance, his widow may recover against his estate arrears of maintenance due under the order at his death. E

This is a decision which, if it can be regarded as authoritative, is, of course, directly in favour of the contention of counsel for the widow, because the learned judge held that payments under the very Act with which the present case is concerned were recoverable by the widow of the defaulting husband against his estate, but when one comes to look at the judgment I think it is no over-statement to say that the learned judge founded himself entirely on *Re Stillwell* (2), as the following passage shows. After a reference to *Re Harrington* (1), which, it will be remembered, was a bastardy case, the learned judge said (*ibid.*, 684): F

> On the other hand Mr. *Leighton* for the plaintiff says that there is a distinction between sums of money payable under the Bastardy Act and sums of money payable by the husband to his wife. The latter sums of money are paid by the husband under his liability at common law to support his wife, whether payable as alimony or by virtue of a maintenance order under the Act of 1895. The liability of the husband does not seem to me to be affected by the mode in which the payments are made. There is also this further distinction that an appeal is given to the Probate, Divorce and Admiralty Division of the High Court of Justice from an order of justices in respect of a maintenance order. Mr. *Leighton* contends that there is a direct authority on the point in the case of *Re Stillwell* (2), where Sargant, J., held that where an order has been made in favour of a wife against her husband for judicial separation and for payment of alimony, arrears of alimony due at the death of the husband can be recovered by the wife from her husband's estate. I am unable to see any distinction between the sums of money payable to a wife under an order for alimony and sums of money payable to a wife under an order of magistrates for maintenance. I do not think that the fact that an additional remedy has been given by the Summary Jurisdiction (Married Women) Act, 1895, enabling a wife to obtain a maintenance order from justices takes the sums of money payable under that order out of the category of things that are recoverable from the estate of the husband after his death. I am of opinion that the judgment of Sargant, J., in *Re Stillwell* (2) is directly in point in the present case, and following it I decide this case in favour of the plaintiff. G H

It seems to me, therefore, that *Firman* v. *Royal* (7) is founded entirely on *Re Stillwell* (2). If the authority of *Re Stillwell* (2) is destroyed by the two later cases, *Re Hedderwick* (4) and *Re Woolgar* (6), it necessarily follows that *Firman* v. *Royal* (7) can no longer be regarded as of any authority and it is my duty to decline to follow it. Apart from the decision, the case seems to me to show that, in the view of the learned judge, there was no distinction for the present purpose between payments under an order for alimony and payments under a justices' order for maintenance, and, if the authority of *Re Stillwell* (2) is destroyed by *Re Hedderwick* (4) and *Re Woolgar* (6), with the result that arrears of payments of the kind dealt with in *Re Stillwell* (2) cannot be recovered against a deceased's estate, it must, I think, follow so far as I am concerned, that arrears of payments of maintenance under the Act of 1895 are equally irrecoverable, there being no distinction between the two kinds of claims for the present purpose. Independently of authority, it does not seem to me that there is for the present purpose any real difference between the two kinds of payment, and that view, I think, is reinforced by the authorities.

For these reasons, in my judgment, the widow's claim in this case to arrears of maintenance under the order of Dec. 17, 1923, fails. I should add that counsel for the widow presented, though I think somewhat tentatively, an alternative claim for some payment not actually under the order but representing the capital value of the maintenance which the wife ought to have received from the husband under his common law obligation to maintain her for I do not know how many years prior to his death, or, alternatively, a sort of retrospective capitalisation of her alleged equitable claim to be paid maintenance by him. In my judgment, neither of those claims will really bear examination. It is one thing to say that while both spouses are living the wife had a right at common law to pledge her husband's credit for necessaries, and quite another thing to say that after the husband is dead the wife has a right to claim against his estate a sum representing the expenses she has been at in buying necessaries for which he refused or neglected to pay. It seems to me that is a claim entirely without precedent. Similarly, assuming it were true that a court of equity in these days could make an order against a living husband to pay sums towards the maintenance of his wife, it by no means follows that where no claim of that kind has been made in the husband's lifetime, the wife could come and claim a corresponding lump sum, as it were, *ex post facto* after the husband's death. Therefore, it seems to me that this part of the widow's claim must be held to fail.

A preliminary objection is taken to the widow's application under the Inheritance (Family Provision) Act, 1938, on the ground that the application is out of time by virtue of the provisions of s. 2 of the Act, which provides :

> (1) Except as provided by s. 4 of this Act, an order under this Act shall not be made save on an application made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out.

It is agreed that for the present purpose s. 4 is not material, and it is further agreed that if the application in this case, on the true construction of s. 2 (1) of the Act, has been made more than six months from the date on which representation in regard to the testator's estate for general purposes was first taken out, there is no jurisdiction in the court and the claim is irremedially barred. That conclusion accords with the recent decision of HARMAN, J., in *Re Dorgan* (8). The question which I have to determine, therefore, is whether on the facts of this case and on the true construction of s. 2 (1) of the Act the widow's application is or is not out of time.

The testator made a will dated Feb. 10, 1937. He died on Jan. 16, 1945. The will was not found and it was assumed that he had died intestate. On Apr. 13, 1945, on the assumption that there was no will, a full grant of administration was made to the widow and one of her sons. That grant stood for some time, but the will ultimately came to light, and, when it was found, the grant of administration was revoked and on Sept. 7, 1946, a grant of probate was made to the executor named in the will. The present summons was issued on Jan. 8, 1947, that is to say, within six months after the date of the grant of probate but more than six months from the date of the grant of administration made on Apr. 13, 1945, on the footing of an intestacy. The question, therefore, resolves itself into whether, for the purpose of s. 2 (1) of the Act, " the date on which representation in regard to the testator's estate for general purposes

[was] first taken out " was Apr. 13, 1945, when the grant of administration was made or Sept. 7, 1946, when the grant of probate was made. In the former alternative the application is out of time ; in the latter alternative it is within time. I am invited by counsel for the widow to hold that the material date here is Sept. 7, 1946. He says, with some force, that the Act from beginning to end, including its title, is concerned with testamentary dispositions and nothing else, with persons who die testate and not persons who die intestate. It is entitled : " An Act to amend the law relating to testamentary dispositions," A and, from first to last, it is concerned with persons who die leaving a will. Counsel, therefore, says that, as the Act is concerned exclusively with testators as opposed to intestates, it follows that s. 2 (1) must be construed as referring to the date on which a grant of probate or letters of administration with the will annexed for general purposes is first taken out in respect of the estate of the testator concerned. That is a proposition to which, I confess, I should like to accede if I were able to do so, because, until it is known whether a given deceased B person has left a will or not and until the validity of that will has been established by probate, no " dependant " can have any *locus standi,* so far as I can see, to make any application to the court under the Act. It is only when a will is known to exist and that will has been proved and is in such terms as not to make reasonable provision for a " dependant " that he or she can bring the matter before the court. The construction which counsel invites me to adopt would C have the advantage of making time run from the date on which a dependant is first in a position to exercise his or her remedy under the Act, and, as a period of assumed intestacy—during which a grant of letters of administration on that footing was in force—would have no relevance for the purpose of bringing proceedings under the Act, so also it would have no relevance for the purpose of the limitation imposed by the Act. For these reasons, counsel's submission is, to my mind, an attractive one, but the function of the court in exercising a D statutory jurisdiction of this character is to construe the Act without any pre-conceived ideas as to what it means or as to what it ought to say, giving plain language its plain effect. Ambiguous or obscure expressions may, no doubt, be resolved in the manner best suited to the apparent policy and intention of the enactment, but where the words used are plain the court has no business to construe them otherwise than in accordance with their plain meaning merely because the plain meaning may not appear to the court to produce an E ideal result or to involve a *casus omissus.*

Turning again to s. 2 (1), one finds that it contemplates in terms the possibility of a succession of representations being taken out, so that, if there is more than one grant of representation, the date of the taking out of the first one is the material date. One finds, further, that the representation has to be representation in regard to the testator's estate for general purposes. That would, F presumably, exclude a grant in respect of settled land or a grant *pendente lite,* or otherwise for some special purpose. Apart from grants, otherwise than for general purposes, anything which is representation in regard to the testator's estate is included and the date of taking out such representation, or the first date of such representation if there is a succession of them, is the date from which time is, in express terms, made to run. The key stone of counsel's argument, as I understand it, is the reference to " *the testator's* estate." He says G it follows that s. 2 (1) can only refer to grants of probate or of letters of administration with the will annexed as only then can representation be representation to the estate of a testator. Otherwise it is representation to the estate of an intestate.

It seems to me, with respect, that this argument, attractive as it is at first sight, really begs the question. If one looks back to the beginning of the Act, one finds that " the testator " is simply a person who, after the commencement of the Act, dies domiciled in England leaving a dependant or dependants within H the meaning of the Act and leaving a will. Anyone who comes within that definition is a " testator " for the purposes of the Act. I think it necessarily follows that the estate of a person answering that description is the testator's estate within the meaning of s. 2 (1), whether the fact that he has left a will is or is not known. That is simply a question of fact. The given estate is " the testator's " if it is the estate of a person who, in fact, dies in the circumstances contemplated in s. 1 of the Act. A grant of representation is, according to the natural, and, I think, necessary, meaning of the language used in s. 2 (1), a grant of representation in regard to such a person's estate—or, in other words, "the testator's estate"—whether it is a grant of administration before the discovery of the will left by him or a grant of probate or letters of administration with the will annexed after the discovery of the will. Therefore, in my opinion, the use of the expression "testator's estate" in s. 2 (1) cannot have the effect, as a matter of construction, of limiting the comprehensive terms of the sub-section to grants of probate or of letters of administration with the will annexed. A Moreover, when counsel's argument is further examined, there is no logical reason for adopting that construction. It seems to me that the logical alternatives (leaving aside for the moment difficulties of construction) are that the legislature should either have made time to run from the date of any grant of representation for general purposes to the estate of the person in question or else should have made time to run only from the first grant for general purposes of probate or of letters of administration with the will annexed in respect of B the will which the court has before it in the given Inheritance (Family Provision) Act application. I say that for this reason. While a grant of administration to a given person's estate, made on the assumption that he died intestate, is, no doubt, wholly irrelevant for the purpose of founding proceedings under the Act, a grant of probate of a will of a given person believed to be his last will, but subsequently found not to be his last will in fact, might well be equally C irrelevant for that purpose. The case I have in mind—quite a possible case—is that of a will leaving everything to the testator's widow and appointing her sole executrix and a later will leaving everything to somebody else. The widow, in all good faith, believing the will under which she is sole beneficiary to be the testator's last will, takes out a grant of probate. So long as that grant stands, obviously there can be no question of the widow making an application under the Act inasmuch as, according to the will which has been proved, she is the sole D beneficiary and the testator has provided for her to the full extent of everything of which he died possessed. Assume that at some later date the second will comes to light and is proved by whoever is named therein as the executor, the grant to the widow being revoked. It seems to me that in such a case it must, as a matter of construction, be clear that the first grant, made to the widow, would be a grant of representation "in regard to the testator's estate" within the meaning of s. 2 (1) and the date of that grant would be the date on which repre- E sentation was first taken out within the meaning of the sub-section. Counsel in effect admitted as much in conceding that a grant in respect of a will—that is to say, a grant of probate or administration with the will annexed—would be a grant "in regard to the testator's estate" within the meaning of the sub-section whether the will, in fact, turned out in the end to be his last will or not. If in such a case time would run from the date of the grant in respect F of the supposed last will so that the widow would be barred by the lapse of six months from that date, although she was never in a position to take any proceedings under the Act founded on what subsequently turned out to be the last will, it seems to me that the ground for arguing that the same is not the case where the first grant is a grant of administration made on the assumption of intestacy is really destroyed.

My conclusion is that the grant taken out on Apr. 13, 1945, in the present case, G was a grant of representation in regard to the testator's estate within the meaning of s. 2 (1), that is to say, in regard to the estate of the person, namely, Francis William Bidie, who brought himself within the provisions of the Act by dying, leaving a dependant (within the meaning of the Act), and also leaving a will, and was, therefore, a "testator" for the purposes of the Act. The date of that grant was the date on which representation within the meaning of s. 2 (1) was first taken out. The taking out of the representation seems to me to fix H the date, and to make the time run once and for all, and it cannot be affected by subsequent revocation. April 13, 1945, was the date when the representation in regard to the testator's estate for general purposes was first taken out,—and none the less so because that grant of representation was afterwards superseded by a grant of probate.

I think the conclusion to which I have come on the construction of s. 2 (1) is really the only conclusion possible as a matter of construction of the words of the sub-section itself, but I think it is reinforced by the language of s. 3, which provides :

> (3) An office copy of every order made under this Act shall be sent to the principal probate registry for entry and filing, and a memorandum of the order shall be endorsed on, or permanently annexed to, the probate of the will of the testator or the letters of administration with the will annexed, as the case may be.

There, it will be observed, the reference is in terms to "the probate of the will . . . or the letters of administration with the will annexed, as the case may be." That language is precise and susceptible of only one meaning, which is, in effect, the meaning counsel seeks to attribute to the different words used in s. 2 (1), but, if the draftsman of s. 2 (1) had really meant to confine the very general expression "representation in regard to the testator's estate" to the two possibilities of probate of the will and letters of administration with the will annexed, it seems to me that he would inevitably have said so. The contrast in the terms of the two sub-sections fortifies me in the conclusion to which I have come on the construction of s. 2 (1), though I would have been happy if I could have come to a different conclusion. There is no doubt in the present case that the time-limit, as I construe it, does inflict a hardship on the widow and it seems to me it is a kind of case which the legislature (if the point had been considered) would have wished to bring within the Act and not to exclude it, but, as I said at the beginning of this judgment, my function is to construe the Act and not to supply what seem to me to be deficiencies or to make improvements or redress hardships unless they can be done within the four corners of the Act itself. I cannot speculate as to what the legislature really had in mind when s. 2 (1) was enacted. It may be that what was really intended was that a given dependant should have six months from the date of probate or letters of administration granted in respect of the particular will which failed to make reasonable provision. If that was the real intention, it certainly was not expressed in the Act as passed, and, therefore, I cannot give effect to s. 2 (1) as if it had been so expressed. On the other hand, it is not impossible that the legislature—considering the innovation introduced by this Act and considering the restrictions it imposes, or the inroads it makes, on the rights of property as previously understood—thought that the nature of the case demanded a reasonable short and certain period of limitation and assumed that, generally speaking, a period of six months from the first grant of representation to the estate of the testator (in the sense in which I have construed it) would leave sufficient time for any dependants to find out what the position was as regards any testamentary dispositions of the testator and also to bring proceedings. In the simple case it would provide a clear six months from probate of the undisputed last will, but there might be complications such as those that have arisen in the present case, or complications arising from a succession of testamentary dispositions of which one, which was not the last, was assumed in the first instance to be the last. It may have been thought by the legislature that, even if there might in some cases be complications of this sort, generally speaking, six months from the first grant should give sufficient time to clear up the position as regards the testacy or intestacy of a given deceased person and to ascertain the terms of his last will and also to bring proceedings under the Act. The legislature may have thought that an over-all period of six months from the first grant would, generally speaking, be enough—or at all events was as long a period as ought to be allowed—for applications of this character. But I must not speculate as to what the intentions of the legislature may have been. All I can do is to construe the actual language of s. 2 (1) in relation to the facts of the case, and, having done so, I hold, for the reasons I have stated, that the preliminary objection to the present application as being out of time is well-founded and the application must, accordingly, fail.

Application dismissed. Defendants' costs as between party and party to be paid by the plaintiff, and defendants costs as between solicitor and client not covered by the order against the plaintiff to be paid out of the estate.

Solicitors: *F. Duke & Sons* (for the plaintiff); *Henry Boustred & Sons* (for the first defendants); *A. J. Adams & Adams*, agents for *R. L. Frank & Co.*, Truro (for the second defendant); *W. R. Perkins*, agent for *Nelson L. Mitchell*, Southend-on-Sea (for the third defendant).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

BOISSEVAIN *v.* WEIL.

[KING'S BENCH DIVISION (Croom-Johnson, J.), April 13, 14, 15, 23, 1948.]

Trading with the Enemy—Currency control—Loan in foreign currency—Parties involuntarily resident in country in military occupation of enemy—Cheques on English bank payable "as soon as law permits"—Dealings in foreign currency—Trading with the Enemy Act, 1939 (*c.* 89), *ss.* 1 (2), 2 (1), 15 (1) —*Defence* (*Finance*) *Regulations,* 1939 (*S.R. & O.,* 1939, *No.* 950), *regs.* 2 (1), 3A (1), 3C (1).

While, owing to war conditions, the parties were involuntarily resident in Monaco, which was in the military occupation of the enemy, the plaintiff, a Dutch subject, lent to the defendant, a British subject, a sum of money in the local currency. The defendant drew cheques in blank for the full amount on an English bank (at which, in fact, she had no account); wrote a letter addressed to the bank informing it of the circumstances and instructing it, on presentation or as soon as the law permitted, to honour the cheques in sterling; and signed a document acknowledging the debt, certifying that she had posted the letter to the bank, and undertaking, in case the plaintiff failed to obtain payment on presentation, to repay the sum borrowed in cash not later than one month after the declaration of an armistice, with additional provisions in the event of her death before payment was made. The cheques were never completed, presented, negotiated, or dealt with in any way. In an action by the plaintiff for recovery of the amount lent :—

HELD : (i) the contract was governed by the law of Monaco and, in the absence of evidence to the contrary, was enforceable under that law.

(ii) the contract was not illegal under English common law or under the Trading with the Enemy Act, 1939, s. 1.

(iii) no offence had been committed by the defendant under the Defence (Finance) Regulations, 1939, regs. 2 (1), 3A (1) and 3C (1), and, consequently, the contract was enforceable.

[AS TO TRADING WITH THE ENEMY IN TIME OF WAR, see HALSBURY, Hailsham Edn., Vol. 1, p. 460, para. 779 ; and FOR CASES, see DIGEST, Vol. 2, pp. 162-174, Nos. *330-400*.

FOR THE DEFENCE (FINANCE) REGULATIONS, 1939, regs. 2 (1), 3A (1), and 3C (1), see HALSBURY'S STATUTES, Vol. 33, pp. 703, 707, 709.]

Cases referred to :

(1) *Santos* v. *Illidge*, (1860), 8 C.B.N.S. 861 ; 29 L.J.C.P. 348 ; 3 L.T. 155 ; 11 Digest 404, *744*.

(2) *Ertel Bieber & Co.* v. *Rio Tinto Co., Dynamit Act.* v. *Same, Vereinigte Konigs und Laurahutte Act.* v. *Same*, [1918] A.C. 260 ; 87 L.J.K.B. 531 ; 118 L.T. 181 ; 2 Digest 176, *408*.

(3) *Robson* v. *Premier Oil & Pipe Line Co., Ltd.*, [1915] 2 Ch. 124 ; 84 L.J.Ch. 629 ; 113 L.T. 523 ; 2 Digest 169, *379*.

(4) *Porter* v. *Freudenberg, Kreglinger* v. *Samuel* (*S.*) *& Rosenfeld, Re Merten's Patents*, [1915] 1 K.B. 857 ; 84 L.J.K.B. 1001 ; 112 L.T. 313 ; 2 Digest 140, *155*.

(5) *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* (*Gt. Britain*), *Ltd.*, [1916] 2 A.C. 307 ; 85 L.J.K.B. 1333 ; 114 L.T. 1049 ; 2 Digest 145, *195*.

(6) *Re an Arbitration, N. V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij* v. *Sovfracht*, [1941] 3 All E.R. 419 ; [1942] 1 K.B. 222 ; 111 L.J.K.B. 152 ; 166 L.T. 69, C.A. ; *revsd., sub nom., Sovfracht* (*V/O*) v. *Van Udens Scheepvaart en Agentuur Maatschappij* (*N. V. Gebr.*), [1943] 1 All E.R. 76 ; [1943] A.C. 203 ; 112 L.J.K.B. 32 ; 168 L.T. 323 ; 2nd Digest Supp.

(7) *Re Anglo International Bank, Ltd.*, [1943] 2 All E.R. 88 ; [1943] Ch. 233 ; 112 L.J.Ch. 305 ; 169 L.T. 82 ; 2nd Digest Supp.

(8) *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122 ; [1943] A.C. 32 ; 111 L.J.K.B. 433 ; 167 L.T. 101 ; 2nd Digest Supp.

(9) *Parkinson* v. *College of Ambulance, Ltd. & Harrison*, [1925] 2 K.B. 1 ; 93 L.J.K.B. 1066 ; 133 L.T. 135 ; Digest Supp.

(10) *Re Mahmoud & Ispahani*, [1921] 2 K.B. 716 ; 90 L.J.K.B. 821 ; 125 L.T. 161 ; 12 Digest 271, *2220*.

ACTION for money lent by a Dutch subject to a British subject while the parties were involuntarily resident in Monaco during the military occupation of that principality by the enemy. The facts appear in the judgment. The learned judge held that the contract was enforceable in this country.

Sir David Maxwell Fyfe, K.C., and *B. M. Goodman* for the plaintiff.
Gardiner, K.C., and *Stenham* for the defendant.

Cur. adv. vult.

Apr. 23. **CROOM-JOHNSON, J.:** This is an action brought to recover a sum of £6,000 and interest as money lent in three several sums of £2,000 each, the equivalent of 320,000 French francs at an agreed rate of 160 francs to the £. The plaintiff is a banker and is and was at all material times a Dutch national with a Dutch domicil. After the year 1937 he was occupied in business in France as a representative of a Dutch firm, and at the outbreak of war in September, 1939, he was living on the south coast of France. In 1941, after France had been over-run by the Germans, he was assisted into Monaco and thereafter he remained at Monte Carlo in that principality. The defendant is a British subject who took up her residence on the Riviera about twenty years ago. On the outbreak of war she removed to Monte Carlo and became (and has ever since remained down to the present time) ordinarily resident there. The parties became acquainted and shortly before June 10, 1944, the defendant invited the plaintiff to go to her house to discuss a loan, a sum of £10,000 being mentioned. The defendant told the plaintiff that her son, a Jew, was in a concentration camp in Paris and that she wanted to arrange to pay some money to somebody to ensure that he was not transferred from that camp. The plaintiff agreed to lend the defendant about half of what she wanted, and on June 10, 1944, handed to the defendant 320,000 French francs in notes of the Bank of France. At that time the landings of the Allies in Normandy had started, and the parties were in some doubt as to how much longer the war would last. The defendant represented to the plaintiff that her funds were in her banking account at the Baker Street, London, branch of the National Provincial Bank. The parties estimated that the war would last two years if everything went in favour of the Allies. There was, apparently, a fixed rate of exchange, known to both of them, in Monaco at that time. The plaintiff said that that would apply to the loan, but that he would like to have a discount for the years that the war was to last at the rate of 5 per cent., which would be 10 per cent. for two years, and which would have reduced the rate to 159 francs to the £. The parties agreed to put it at 160 francs in order to calculate the amount in pounds sterling which the defendant was to repay to the plaintiff after the war was over. She had purported to explain her financial position to the plaintiff. The plaintiff prepared and typed certain documents which the defendant signed, and paid over the 320,000 francs.

The documents were as follows :—a document in the French language included in the bundle of exhibits signed by the defendant and duly certified by the Commissioner of Police of Monte Carlo ; a letter which was written by her in the English language, and, so far as I know, dispatched by her to the National Provincial Bank, Ltd., at the branch to which I have already referred ; a letter of the same date addressed to her solicitors, Messrs. Freeman, Haynes & Co. ; and a form of cheque, blank as to the date, blank as to the payee, uncrossed, filled in for £2,000 in words and in figures, and signed by the defendant. So far as the first document, the French document, is concerned, I read from an agreed translation, which is as follows :

> Municipality of Monaco. " I, the undersigned, Mrs. Dora Weil, nee Lewis, of the Palais Belvedere, 20 Boulevard d'Italie, Monte Carlo, Principality of Monaco, certify having addressed my letter of June 10, 1944, to the manager of the National Provincial Bank, Ltd., Baker Street branch, 69 Baker Street, London, W.1, and having given my cheque No. —— for the sum of £2,000 sterling on the said bank to —— with a view to the repayment of the said sum of £2,000 sterling to him or to his assigns, which sum he has kindly lent to me without interest for the purpose of meeting my personal expenses and the payment of doctors' fees. In thus lending me the sum of £2,000 sterling —— has genuinely helped me in a very difficult situation and has rendered me a great service. If, for any reason, —— or his assigns is or are unable to obtain payment of the said sum of £2,000 sterling on presentation of my letter of June 10, 1944, or of my above mentioned cheque I undertake to pay to him or them directly and in cash, not later than one month after the declaration of an armistice in the present war between Great Britain and Germany, and even earlier if my account at the National Provincial Bank Limited has been released prior to the said armistice. After the lapse of the said period of one month, the said sum of £2,000 sterling shall bear interest at the rate of 5 per cent. per annum, payable annually. In the event of my dying before the presentation of my said letter of June 10, 1944, or of my above-mentioned cheque for the sum

of £2,000 sterling, with a view to the refund of the said sum of £2,000 sterling to —— or his assigns, I irrevocably acknowledge that the said sum of £2,000 sterling is a debt which constitutes a charge on my estate and that it shall be refundable by priority and before any payment of legacies. Monte Carlo. June 10, 1944. Read and approved. (Signed) D. Weil."

The letter to the bank is in the following terms:

> I beg to inform you that today I have issued my cheque No. —— on your good selves
> A for the sum of £2,000 sterling to the order of —— who lent me this money for my living expenses and doctors' bills during the time of financial restrictions in Europe and who thus helped me out of a very difficult position and rendered me a great service. Will you please honour this cheque on presentation or as soon as the law permits it. These instructions are irrevocable and said cheque has priority over all other payments. In the event of my death before presentation of this letter or of the above mentioned cheque, I recognise this debt of £2,000 sterling as a binding obligation upon all my heirs,
> B executors and estate in any country.

The letter to the solicitors, after referring to the drawing of the cheque, says this in the second paragraph:

> I desire you to give your full attention to the payment of this cheque as soon as the law permits it. I have given my word of honour to my friend, from whom I borrowed this money, that he will be reimbursed at the first possible moment. You will doubtless understand that this money was lent to me in good faith and that everything must be
> C done to be agreeable to my friend, who has helped me in most awkward circumstances, and to whom I am greatly indebted.

Then follows the statement that she recognises this sum irrevocably as a binding obligation upon her heirs, executors and estate in any country. On June 15, 1944, and July 8, 1944, the plaintiff paid to the defendant two other sums of 320,000 francs on the same terms or terms to the same effect. Under those
D documents, the defendant agreed to repay to the plaintiff in effect "one month after the declaration of an armistice in the present war between Great Britain and Germany and even earlier if my account at the National Provincial Bank, Ltd., has been released prior to the said armistice." None of these cheques was ever presented for payment or was sued on.

I am satisfied that the defendant has never had a banking account at the National Provincial Bank, Ltd., Baker Street branch. There was no proof,
E nor was it suggested, that she had a banking account at any other branch. The story she told the plaintiff about it was untrue. The plaintiff did not know, and there was no other evidence as to, the use to which the defendant had put the moneys she had obtained from the plaintiff. I am also satisfied that the three transactions in question were, in truth and in fact, transactions of loan and were so intended, that they were not, nor were they intended to be, in any sense exchange transactions or transactions in currency, direct or indirect.
F The loans were intended to be repayable out of the defendant's capital in England (if any) in English currency and in accordance with and not against the law. I am satisfied that the whole basis of the transactions, notwithstanding the terms of the documents, was that the money should be repaid after an armistice, or when the Germans had been expelled from France, and the calculations and agreement were arrived at accordingly. The parties considered
G together whether the general transaction was illegal or not, and, apparently, came to the conclusion that it was not.

The contract or contracts in question were made in Monaco, the law of which, accordingly, applies. The first defence raised was that the transactions were prohibited by French law, and, therefore, by Monegasque law to which it was applied by decree. The defendant has wholly failed to satisfy me that those transactions are prohibited or are illegal or unenforceable by Monegasque law
H or by French law.

The second defence raised was that the transactions are illegal in English law, and that, therefore, the plaintiff, a foreigner not subject to English law, cannot sue here even although the transactions are enforceable by the law of Monaco, where made: *Santos* v. *Illidge* (1); *Ertel Bieber & Co.* v. *Rio Tinto Co.*, (2). The House of Lords in the latter case decided that certain contracts, which were pre-war contracts, were abrogated on the outbreak of war inasmuch as their performance would involve trading with the enemy. The argument on this defence dealt (*a*) with the position at common law, (*b*) under the Trading with the Enemy Act, 1939, and certain regulations made thereunder or under the Defence of the Realm Regulations. It was contended that, at common law, a state of war between this country and another abrogates or puts an end to all executory contracts which for their further performance require intercourse (not necessarily commercial intercourse) between a British subject and an enemy alien or anyone voluntarily residing in enemy country. LORD DUNEDIN said in the *Ertel Bieber* case (2) ([1918] A.C. 260, 267) :

> My Lords, the proposition of law on which the judgment of the courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country. I use the expression " often phrased commercial intercourse " because I think the word " intercourse " is sufficient without the epithet " commercial." As to this I agree with the judgment of the Court of Appeal in the case of *Robson* v. *Premier Oil and Pipe Line Co.* (3), where PICKFORD, L.J., delivering the judgment of the court, LORD COZENS-HARDY, M.R., himself and WARRINGTON, L.J., said : " The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction."

Reference may also be made to *Porter* v. *Freudenberg* (4) and a further passage in the speech of LORD DUNEDIN in the *Ertel Bieber* case (2) in which he says ([1918] A.C. 260, 274) :

> From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law.

It was further contended that the mere making of a contract in enemy occupied territory by a British subject with a Dutch subject detained there by the submergence of war was enough to bring this principle into play and make that contract unenforceable here. The defence argued that performance would not be enforced by an English court even when the war was over or hostilities had ceased or the enemy had been expelled from the occupied territory. It has been observed, however, that performance would be illegal only in so far as it afforded assistance to the enemy during the war, and that it is no objection to the contract that it may profit the enemy after peace is restored : *per* LORD PARKER OF WADDINGTON in *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co., Ltd.* (5) ([1916] 2 A.C. 307, 347). It was further contended that the parties were each of them, or, at least, the plaintiff, although a Dutch subject, voluntarily residing in the principality of Monaco, and that that was enemy territory. The defendant failed to satisfy me that the plaintiff was voluntarily so residing. He was in Monaco (Monte Carlo), as I find, because he could not escape. No doubt, he and the defendant made the best they could of the involuntary situation in which they found themselves, but, if the proposition advanced is correct, it would seemingly have prevented the defendant from incurring a debt for food or personal expenses, such as clothing or doctors' fees, from anyone not an alien enemy or a person voluntarily residing in alien territory or enemy occupied territory for which she could be sued in this country. I cannot believe that for a British subject to borrow money for vital necessities from one who, in effect, is a fellow prisoner in enemy territory is to trade with the enemy.

The three documents in this case which the defendant signed and gave to the plaintiff describe the moneys sued for as " lent to me without interest for the purpose of meeting my personal expenses and the payment of doctors' fees." Possibly this was not the whole truth, but with German spies about (which I was told was the fact) it would obviously not be advisable to refer to the reason given originally to the plaintiff by the defendant for her request for the loan. I draw no inference adverse to the plaintiff or to the defendant from that circumstance, nor from the fact that it was thought better that the plaintiff's name should not be inserted in any of the documents in case, as I understood, they got into the hands of the Germans who might descend on him. No authority was cited to me, on behalf of the defendant, which goes as far as the propositions contended for. My attention was called to some observations by LORD GREENE, M.R., in the Court of Appeal in the *Sovfracht* case (6) ([1941] 3 All E.R. 419, 423). The decision itself was over-ruled, but the observations I have referred to were not, apparently, criticised. The military position in Monaco was not elucidated. Apparently, at most there was a military occu- A pation, but the Prince and his officers of state were free to legislate, to act, to rule and to govern, subject to military exigencies. I was asked from my own general knowledge to find that Monaco was, at the material time in 1944, enemy occupied territory. I have no general knowledge which enables me to do so even if I had felt inclined to substitute that knowledge for evidence which possibly could quite well have been obtained either from cross-examining the plaintiff or from calling the defendant. Neither of these courses was adopted. B I was referred to the judgment in *Re Anglo International Bank, Ltd.* (7), where a similar question arose as to the position in Monaco. The court there did not find that it was in enemy occupation. It will be useful to refer to certain passages in the judgment of the court in that case, read by LORD GREENE, M.R. After referring to passages in the opinion of LORD WRIGHT in the *Sovfracht* case (6) ([1943] 1 All E.R. 76, 84, 85, 89), in which the House of Lords was dealing with the position of Holland, the learned MASTER OF THE ROLLS said C this ([1943] 2 All E.R. 88, 92):

> One object of the common law rule is to prevent advantage to the enemy. Such an advantage may accrue if the occupation is of a character which enables the enemy to deal with the inhabitants of the occupied country and their civil rights in such a way as to secure profit to himself, whatever his ultimate intentions as to the future of the occupied country may be. It is for this reason that a mere military occupation is insufficient to brand the inhabitants as alien enemies since such an occupation does D not affect the civil rights of the inhabitants beyond what may be necessary for the purpose of conducting military operations. That we are right in construing the word "keep" as used by LORD WRIGHT in a restricted sense is, we think, shown by a consideration of the opinions of the other members of the House.

LORD GREENE, M.R., then refers (*ibid.*) to the following passages from the opinion of LORD PORTER in the same case ([1943] 1 All E.R. 76, 93, 95, 97):

> E The inevitable conclusion must I think be drawn that Holland has been for some two years and is at present enemy-occupied territory controlled and administered by the enemies of this country . . . The solution in my view depends on the quality of the occupation, to be judged by the time it endures, the amount of control exercised, and the extent to which the former government is superseded . . . It is enough in my view, if it appears from the known circumstances, that the civil and military jurisdiction of the country is being exercised by the enemy to the exclusion of the former civilian rulers.

F The MASTER OF THE ROLLS then goes on ([1943] 2 All E.R. 88, 92):

> In view of these expressions of opinion, we hope that we are justified in reading the language of LORD WRIGHT in a way which will bring it into conformity with that used by the other members of the House who, while agreeing with his opinion, expressed their own views in different language. But even so, apart from the special case of Monaco, we have no evidence of the nature of the occupation.

G He then deals with the case of Poland, Czecho-Slovakia and Belgium, and after that with what is sometimes called Vichy France, and proceeds as follows (*ibid.*, 93):

> What the exact position is in that part of France which was previously unoccupied seems obscure. We have no information as to the extent to which civil rights are being interfered with by the enemy in that part of France, save what is generally known with regard to conscription of labour.

H LORD GREENE, M.R., then deals with the case of Monaco (*ibid.*):

> In the case of Monaco, where there is one shareholder, we have some information. His name is Giuseppe Cogito, his profession that of *ragioniere* or accountant. His earlier registered address was in Milan and the notepaper on which he notified his change of registered address to Monte Carlo gave two addresses in Italy as well as an address at Monte Carlo. We were invited to infer from these facts that he is an Italian national, but I do not think that we should be justified in doing so. The Foreign Office was unable to give any information as to the date or conditions of the occupation of the Principality by Axis troops which, it said, had clearly been there for some time. The

Consul General of Monaco in London, in reply to an inquiry says that, so far as he is aware life is normal in the Principality which is, he understands, "not occupied," although Italian troops are there. From this information, for what it is worth, we would infer that the occupation of Monaco is at present only a military occupation, although the Italian claims to the French coast as far as Nice may well suggest an ultimate intention on the part of Italy to annex the Principality as well.

Finally, assuming that Monaco was enemy occupied territory, I cannot find that the common law rule prevents a British subject involuntarily in an enemy occupied country from lawfully making a contract of the nature made here with some one not an enemy. I was not satisfied by any evidence, or by the arguments of counsel, that the arrangement between the parties could afford assistance to the enemy during the war or at any other time. The arguments as to the way in which it might be of such assistance were more imaginative than real. It must be borne in mind that the *Ertel Bieber* (2) group of cases dealt only with contracts lawfully made before the outbreak of war which were executory. In the course of his speech in the *Ertel Bieber* case (2) Lord Dunedin says this ([1918] A.C. 260, 269):

> There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated.

The position under the Trading with the Enemy Act, 1939, is a little different inasmuch as the offence of trading with the enemy may be constituted by trading with any individual resident in enemy territory, but "enemy" does not include any person by reason only that he is an enemy subject: s. 2 (1). Section 1 (2) provides:

> For the purposes of this Act a person shall be deemed to have traded with the enemy (*a*) if he has had any commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy, and, in particular, but without prejudice to the generality of the foregoing provisions, if he has . . . (ii) paid or transmitted any money, negotiable instrument or security for money to or for the benefit of an enemy or to a place in enemy territory . . .

"Enemy territory" is defined in s. 15 (1) as follows:

> "Enemy territory" means any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power allied with His Majesty.

I remind myself that we were at war not only with the Germans, but also with the Italians. Under the Trading with the Enemy (Specified Areas) (No. 2) Order, 1940, Monaco was deemed to be enemy occupied territory: see, also, the Defence (Trading with the Enemy) Regulations, 1940. I do not think that borrowing money from a person in enemy territory as between private individuals is to trade with the enemy. On the facts I can see no payment, transmission of money, issuing of any negotiable instrument or security for money by the defendant to or for the benefit of an enemy or to a place in enemy territory. I was not directed to any express statement in the statute or in the regulations as to what is the position of a British subject involuntarily detained in enemy territory who makes a contract with a person similarly involuntarily detained not being an enemy alien. The statute seems to be aimed at preventing British subjects in this country or elsewhere (see s. 14) making a contract with enemy aliens or with any person residing in enemy occupied territory. Counsel for the defendant was unable to point to anything therein having, or to any language hinting at, an extra-territorial effect so far as British subjects in such a case as the defendant was in here, but he relied on what he said were general principles, meaning, I think, the duty of British subjects, wherever they may find themselves to be, not to help the enemy. As I have already said, I am satisfied that neither of these parties intended or wished to help the enemy—quite the contrary. It may very well have been that the plaintiff's rights were suspended during the war so that he could not have sued here on the contracts or the cheques, but that point does not arise. It was argued that all persons being British subjects are governed by the Emergency Powers (Defence) Act, 1939, s. 3 (1) (*b*), which reads as follows:

> Unless the contrary intention appears therefrom, any provisions contained in, or

> having effect under, any Defence Regulation shall . . . (*b*) in so far as they impose prohibitions, restrictions or obligations on persons, apply . . . to all persons in the United Kingdom and all persons on board any British ship or aircraft, not being a Dominion ship or aircraft, and to all other persons being British subjects . . .

It would, I think, be straining that provision and the regulations (which create criminal offences under severe penalties) to construe them as extending to such a transaction as I am engaged in investigating. Another reason is that a British subject in an enemy occupied country is himself a statutory enemy A having regard to s. 2 (1) (*b*) of the Trading with the Enemy Act, 1939, and this may be regarded as a transaction at the time it was entered into as between two statutory enemies : s. 1 (2) of the same Act.

It was contended by the plaintiff that, if there were difficulties in law in maintaining an action on the contract, he could still ask to have his money back as money had and received, and reliance was placed on certain observations of B LORD WRIGHT in the *Fibrosa* case (8) ([1942] 2 All E.R. 122, 135 *et seq.*) about the law of unjust enrichment. Whether the present rate of exchange between the French franc and the £ sterling—assuming, without deciding it, that that would be the appropriate rate—would afford the plaintiff, who, I am satisfied, was wishing to befriend the defendant, any consolation I leave untouched. In any event, the plaintiff is not subject to our law, and the defendant could not plead to such a claim for money had and received that she and the plaintiff C were *in pari delicto* : see the authorities collected in *Parkinson* v. *College of Ambulance* (9).

The last point taken on behalf of the defendant was that she was committing an offence under the Defence (Finance) Regulations, 1939, and that, accordingly, the transactions were prohibited and unenforceable. The regulations relied on in the first place are as follows :

> D 2 (1) Except with permission granted by or on behalf of the Treasury, no person other than an authorised dealer shall . . . buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer . . . 3A (1) Subject to any exemptions which may be granted by order of the Treasury, no person shall, either on his own behalf or on behalf of any other person, agree to transfer or acquire, or transfer, or acquire otherwise than by operation of law or by inheritance, any securities or any interest in securities, unless the Treasury or persons authorised by or on behalf of the Treasury are satisfied that E no person resident outside the sterling area has, immediately before the transfer, acquisition, or agreement, any interest in the securities . . .

The short answer to each of those regulations is that, on the facts as I find them to be, the transactions were not within the terms of either of those regulations. It was suggested that by handing over the three cheques, the defendant was exporting currency. I do not read the regulations as having any extra-territorial F effect on a British subject so as to prevent the handing over in enemy territory of cheques drawn on a British bank. Nor can I understand by reason of practical war-time difficulties how the Treasury could authorise a transaction between two persons residing at Monaco at the material time. The defendant did not buy or borrow foreign currency or agree to transfer any securities or interest in securities. Another regulation relied on is 3C (1) which reads as follows :

> G Subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by or on behalf of the Treasury :—(*a*) draw, issue or negotiate any bill of exchange or promissory note, acknowledge any debt, or make any payment, so that a right (whether actual or contingent) to receive a payment is created or transferred in favour of a person who is resident outside the sterling area ; or (*b*) make any payment to, or place any sum to the credit of, any such person . . .

H For the purpose of this regulation, I treat a cheque as a bill of exchange (Bills of Exchange Act, 1882, s. 73), and the three incomplete cheques given to the plaintiff as inchoate instruments subject to the provisions of s. 20 of the same Act. I think that the regulation is intended, however, to apply to methods by which a right to receive a payment is created or transferred in favour of a person outside the sterling area, without the permission of the Treasury. The regulation, therefore, would prevent the bank on whom the cheques were drawn from paying the same to a resident outside the sterling area—*e.g.*, the plaintiff—during the war. No express authority to the plaintiff to fill up and complete the three cheques in question was proved, nor was any such suggested to him in cross examination. If any such authority so to do is to be implied in all the circumstances, it must be so as to enable the cheques to be presented to the bank in England when it was lawful to present them and when it was lawful for the plaintiff to collect the proceeds. They never were completed or presented, negotiated or dealt with in any way. In their present form the cheques created or transferred nothing. I think that the words in the regulation "acknowledge any debt " do not mean anything more than some authority similar to bills of exchange or promissory notes—possibly orders to pay, or letters of credit —under which a banker or other agent is authorised to make a payment. In other words, I do not think that the three documents *inter partes* in French of June 10, June 15 and July 8 are within the regulations. There is nothing in them to suggest that they are negotiable instruments or authorities to third parties to pay or are otherwise transferable.

Looking at these Finance Regulations as a whole, I think they contemplate an authority being given by the Treasury to a person within the realm, permitting him to do what is otherwise prohibited so as to prevent the unauthorised export of sterling, and to control payments abroad in sterling or foreign currency. It is suggested that the regulation deals only with transfers from and to accounts with bankers, this being in practice the only way in which payment can be made to a non-resident. It was argued that the mere handing over of the three incomplete cheques constituted the transfer of a right within the meaning of reg. 3c (1). It is hardly open to the defendant to raise this contention. She purported to draw them on her own non-existent banking account and to hand them over possibly as collateral security for the money that she borrowed. She had no such banking account or any other anywhere which has been attempted to be proved to exist, and the less said on the defendant's representations to the plaintiff, express or tacit on the point, the better. Even if the cheques signed by the defendant had been drawn on a genuine banking account of hers which was in funds at any material time and even assuming that during hostilities in Europe they could have been presented, it is difficult to understand, in view of all our war-time regulations and restrictions, how the plaintiff could have got the proceeds out of this country, and, if he had done so, how it would benefit the enemy. No evidence or argument was offered to me on these points on behalf of the defendant. The contract in the *Mahmoud* case (10), cited by the defendant's counsel, was one made in England and sought to be enforced in England, and the decision does not seem to be in point. I have nothing to do with the de-merits of the defences raised. I approach the decision of this case from the point of view of protecting, so far as need be, the State in time of war. The result is that, in my judgment, the defendant has not committed any of the breaches suggested, and the transactions are now enforceable against her. I give judgment for the plaintiff for the £6,000 claimed with costs.

Judgment for the plaintiff with costs.

Solicitors: *William Charles Crocker* (for the plaintiff); *Pettiver & Pearkes* (for the defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

R. *v.* BLACKPOOL RENT TRIBUNAL. *Ex parte* ASHTON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 21, 29, 1948.]

Rent Control Furnished letting—" Furniture "—Electric clock —Curtains—Gas cooker—Ascot water heater—Furnished Houses (Rent Control) Act, 1946 (*c.* 34), *s.* 2 (1).

In an application to a rent tribunal for a reduction of his rent under the Furnished Houses (Rent Control) Act, 1946, s. 2 (1), the tenant of a flat set out, as the furniture in the flat, curtains in two rooms (which were supplied by the landlord because he wanted uniformity of appearance in the block of flats), a gas cooker and an electric clock. The flat also contained an

Ascot water heater which was the property of the landlord. There was no reference to any of these articles in the tenancy agreement.

Held: as regards the clock and the curtains, the principle *de minimis* applied; the cooker and Ascot heater were both part of the ordinary equipment of a dwelling-house; the flat, therefore, was not let "in consideration of a rent which includes payment for the use of furniture" within s. 2 (1); and the tribunal had no jurisdiction to entertain the tenant's application.

Observations of Viscount Simon *in Palser* v. *Grinling, Property Holding Co., Ltd.* v. *Mischeff* ([1948] 1 All E.R. 1, 9), *applied.*

Per cur.: In *R.* v. *Hampstead and St. Pancras Rent Tribunal, Ex parte Ascot Lodge, Ltd.* ([1947] 2 All E.R. 12), and *R.* v. *Croydon and District Rent Tribunal, Ex parte Langford Property Co., Ltd.* ([1948] 1 K.B. 60), which had to do with premises let at a rent which included payment for services, the court laid down that the only question was whether the tenant was contractually entitled to receive the services from the landlord, and not whether the landlord, in fact, supplied the same as a matter of grace or convenience. It is possible that different considerations apply in a case where a letting is alleged to be with furniture. The landlord, merely by omitting all reference to furniture in the tenancy agreement, cannot prevent the rent tribunal acquiring jurisdiction if, in fact, what is let is a house "in consideration of a rent which includes payment for the use of furniture."

[For the Furnished Houses (Rent Control) Act, 1946, see HALSBURY'S STATUTES, Vol. 39, p. 228.]

Cases referred to:

(1) *R.* v. *Hampstead and St. Pancras Rent Tribunal, Ex p. Ascot Lodge, Ltd.*, [1947] 2 All E.R. 12; [1947] K.B. 973; [1947] L.J.R. 1003; 176 L.T. 560.

(2) *R.* v. *Croydon and District Rent Tribunal, Ex p. Langford Property Co., Ltd.*, [1948] 1 K.B. 60; 177 L.T. 538.

(3) *Palser* v. *Grinling, Property Holding Co., Ltd.* v. *Mischeff*, [1948] 1 All E.R. 1; [1948] L.J.R. 600.

Motion by the landlord, Eric Sandiford Ashton, for an order of *certiorari* to bring up and quash an order of the Blackpool Rent Tribunal, dated Nov. 17, 1947, reducing the rent of certain premises.

The landlord applied for the order of *certiorari* on the ground that the tribunal had no jurisdiction to entertain an application by the tenant under the Furnished Houses (Rent Control) Act, 1946, s. 2 (1), because the premises had been let unfurnished. The Divisional Court now held that the letting was not a furnished letting and, therefore, the rent tribunal had no jurisdiction to entertain the application, and the order of *certiorari* was granted. The facts appear in the judgment of the court delivered by Lord Goddard, C.J.

P. C. S. Kershaw for the landlord.
H. L. Parker for the tribunal.
The tenant did not appear.

Cur. adv. vult.

Apr. 29. **LORD GODDARD, C.J.,** read the following judgment of the court. In this case counsel for the landlord moved for an order of *certiorari* to bring up and quash the determination and order, dated Nov. 17, 1947, of the rent tribunal for Blackpool and some other districts of Lancashire constituted under the provisions of the Furnished Houses (Rent Control) Act, 1946, whereby the tribunal reduced the rent payable under an agreement of Mar. 8, 1947, made between Eric Sandiford Ashton, the landlord, and Gabriel Watson, the tenant. The rent reserved under the original agreement was £30 16*s.* per lunar month. By a subsequent agreement dated Apr. 5, 1947, the landlord agreed to accept a reduced rent of £21, equivalent to £5 5*s.* a week, and the tribunal reduced the rent to £3 3*s.* a week. The question is whether the tenancy was one to which the Furnished Houses (Rent Control) Act, 1946, applies. As its title states, it is:

> An Act to make provision with respect to the rent of houses or parts thereof let at a rent which includes payment for the use of furniture or for services,

The material section of the Act is s. 2, which provides :

> (1) Where a contract . . . grants to another person . . . the right to occupy as a residence a house or part of a house . . . in consideration of a rent which includes payment for the use of furniture or for services . . . it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district . . .

There is no question that, if the contract was one the consideration for which was a rent which included payment for the use of furniture, the tribunal had jurisdiction and, in reducing the rent as they did, they did not go beyond it.

The agreement under which the flat was let was an ordinary common form of agreement for the letting of unfurnished premises and from first to last there is no mention of furniture in the contract. There is a covenant which is usually found in an unfurnished letting whereby the tenant covenants to keep the interior of the premises and the doors, window fittings and landlord's fixtures thereof in good and tenantable repair and condition, and another covenant to deliver up the said premises at the end of the said tenancy together with the stoves, grates, cupboards, shelves and other landlord's fixtures and fittings in such good and tenantable repair. From the affidavit of the chairman of the tribunal it appears that, when they inspected the premises, they found an electric clock with a plug which fitted into a wall socket connected with the electric supply, curtains in at least two rooms, a gas cooker, and an Ascot water heater. The gas cooker appeared to be new and was connected to the supply pipe by a short length of pipe which could easily be detached and was of an ordinary type known as a " main." The Ascot water heater, which is a gas heater of the geyser type for the supply of hot water, was fastened to the wall by screws and its removal could be effected by uncoupling three unions and unscrewing two nuts. There is no question that all these articles which we have mentioned were on the premises at the time when the tenant took possession. In the application to the rent tribunal in which the tenant had to state whether the premises were let with use of furniture, he set out, as the furniture, curtains in two rooms, stove and clock, and no reference was made to the Ascot water heater. From one of the exhibited letters in the case, it appeared that the landlord had put curtains in two rooms because he wanted uniformity of appearance in the building in which the demised premises were situate, the premises being a flat. There was no covenant or agreement by the landlord to supply them, nor was there any covenant or agreement by the tenant to use them.

Two cases under this Act have previously been before this court, *R.* v. *Hampstead and St. Pancras Rent Tribunal, Ex parte Ascot Lodge, Ltd.* (1) and *R.* v. *Croydon and District Rent Tribunal, Ex parte Langford Property Co., Ltd.* (2). Both cases were dealing with services, the provision of services having the same effect as the provision of furniture in giving a tribunal jurisdiction. In those cases the court laid down that the only question was whether the tenant was contractually entitled to receive the services from the landlord, and not whether the landlord, in fact, supplied the same as a matter of grace or convenience. In our opinion, it is quite possible that some different considerations may apply in the case of furniture. For instance, the landlord, merely by omitting all reference to furniture in the agreement, could not prevent the tribunal acquiring jurisdiction if, in fact, what was let was a furnished house, or, to use the words of the Act, a house " in consideration of a rent which includes payment for the use of furniture." At the same time it by no means follows that what was ordinarily an unfurnished letting would be turned into a furnished letting because a chattel, which belonged to the landlord and could be dignified by the name of a piece of furniture, was left on the premises. The question would be whether the letting was in consideration of a rent which included payment for the use of furniture.

How the clock came to be left on the premises is not explained. In our opinion, it is impossible to say that, because an electric clock, which, no doubt, would be a great convenience to the tenant, is found in a flat and belongs to the landlord, the rent of the flat must have included payment for its use. Similarly, with regard to the curtains. In any case, in our opinion, the doctrine of *de minimis* would apply in regard to the curtains, as we think it would to the clock. It is impossible to suppose that the rent includes payment for their use any more than it would, *e.g.*, for window boxes outside the windows in the front of the

building, if the landlord had put some there to make the whole building in which the flats are situate attractive. The gas cooker and Ascot water heater stand in a somewhat different position. With regard to the Ascot water heater, it is to be observed that the tenant, in making his application to the tribunal, made no reference to it and, in our opinion, he was quite right in omitting to do so. We can see no reason why a heater of that description should be in any different position from that of a boiler, which would be part of the ordinary equipment
A of a flat to which there was not a constant supply of hot water provided, and, indeed, in our opinion, the same considerations apply to the gas cooker as apply to the water heater.

In considering whether these articles are to be considered as furniture, it is necessary to refer to *Palser* v. *Grinling, Property Holding Co., Ltd.* v. *Mischeff* (3) in the House of Lords. Those were cases under the Rent Restrictions Acts, which would not apply if there was a furnished letting. The Act which
B we have to consider applies only where there is a furnished letting. The wider the definition given to furniture, the more difficult it is for a tenant who seeks the protection of the Rent Restrictions Acts, and the better it is for one who seeks to take advantage of the Furnished Houses (Rent Control) Act, 1946. That anyone would consider that this flat was let as a furnished flat in the ordinary acceptation of that term, it is impossible to believe. At the same time,
C if the words of the Act oblige us to hold that it is brought within its terms, we must do so, whatever a person not a lawyer would say. In his speech in *Palser* v. *Grinling, Property Holding Co., Ltd.* v. *Mischeff* (3), VISCOUNT SIMON, in considering whether articles are to be regarded as furniture, said ([1948] 1 All E.R. 9) :

> . . . the first question is whether the articles in question are commonly regarded as "furniture" ; if so, loose articles are necessarily included in the expression, while
> D articles which are not loose will or will not be furniture according to the nature and degree of attachment . . .

In our opinion, a gas cooker is not commonly regarded as furniture. Is there any more reason why it should be regarded as furniture than a kitchen range ? A kitchen range, very likely, could be removed without damaging the fabric of the house, as, assuredly, can many fireplaces. A gas cooker is provided
E because a person who takes a flat naturally expects to find as part of the flat something on which he can cook. It is part, indeed, of the ordinary equipment of the tenement, as much as a door or a window or the pedestal in the lavatory, although the latter may be fixed more permanently and firmly than a gas stove. It is not, we feel convinced, what is ordinarily called furniture, and we think that the Ascot heater (which, as we have already said, the tenant did not consider furniture) is *a fortiori* not furniture.

F We venture to think it is not part of a tribunal's duty to endeavour to find, by giving a strained construction to ordinary language, a means of exercising their control over unfurnished lettings. Parliament has given tenants of unfurnished houses within certain rents and rateable values a large degree of protection by means of the Rent Restrictions Acts. Although no limit of rent or rateable value is fixed in the Furnished Houses (Rent Control) Act, 1946, it cannot be doubted that Parliament was really concerned with the exorbitant
G rents which people may be called on to pay for a few furnished rooms, the furniture of which is often of a very poor description and of little value. If the letting comes within the terms of the Act, it is our duty to give effect to it, but, in our opinion, it would be quite wrong to say that there was here a letting in consideration of a rent which included payment for the use of furniture, and for these reasons, in our opinion, the rent tribunal assumed a jurisdiction which
H they did not possess and the order for *certiorari* must go.

Certiorari granted. No order as to costs.

Solicitors : *Boxall & Boxall*, agents for *C. M. Philipps & Son*, Blackpool (for the landlord) ; *Solicitor, Ministry of Health* (for the tribunal).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

GREEK GOVERNMENT *v.* MINISTER OF TRANSPORT. THE ILISSOS.

[King's Bench Division (Sellers, J.), April 9, 23, 1948.]

Charterparty—Time charter—Payment of hire—Suspension of hire clause—Hire not payable in respect of time lost owing to " deficiency of men . . . or other accident "—Refusal of officers and men to sail during war except in convoy.

A clause in the charterparty of a ship, hired under a time charter, provided: " In the event of dry-docking or other necessary measures to maintain the efficiency of the vessel, deficiency of men or owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing for more than 24 consecutive hours, no hire to be paid in respect of any time lost thereby during the period in which the vessel is unable to perform the service immediately required." An addendum to the clause provided that " in the event of loss of time due solely to inability to get or to complete a crew," full hire would be paid for the first 72 hours of such loss of time and half hire, in certain cases, for the next 72 hours. When the ship was due to sail from Newcastle, Australia, on Dec. 16, 1943, she was delayed for a week owing to the refusal of her officers and crew to sail except in convoy and she was thus unable to perform the service immediately required, although numerically there was a full complement of officers and crew. The charterer contended that the delay was due to " deficiency of men " or " other accident " within the meaning of the suspension of hire clause, and that, therefore, he was not liable to pay hire for that period:—

Held: (i) the words " deficiency of men " in the suspension of hire clause meant numerical insufficiency, and their inclusion in the clause was directed to putting the vessel off hire when a full complement of officers and crew for working the ship was not available; they did not apply where there was a complete crew, but the men for some reason refused to work; and, accordingly, the delay was not due to a " deficiency of men " within the meaning of the suspension of hire clause so as to relieve the charterer from his obligation to pay hire for the period from Dec. 16 to Dec. 23, 1943.

(ii) the wilful refusal of the officers and crew to sail except in convoy was not an " accident " within the meaning of the suspension of hire clause.

The Torbryan ([1903] P. 194; 89 L.T. 265), *distinguished.*

[As to Payment of Hire under Time Charter, see HALSBURY, Hailsham Edn., Vol. 30, pp. 308-312, para. 500; and for Cases, see DIGEST, Vol. 41, pp. 357-363, Nos. *2060-2106.*]

Cases referred to:

(1) *Inman S.S. Co., Ltd.* v. *Bischoff*, (1882), 7 App. Cas. 670; 52 L.J.Q.B. 169; 47 L.T. 581; 41 Digest 357, *2064.*

(2) *The Torbryan*, [1903] P. 194; 72 L.J.P. 76; 89 L.T. 265; 41 Digest 430, *2705*; *affg.*, [1903] P. 35.

Special Case stated by an arbitrator under the Arbitration Acts, 1889-1934. The claimants, the Greek Government, as disponent owners of the ship Ilissos, claimed from the charterer, the Minister of Transport, hire for the vessel under a time charter for the period Dec. 16 to Dec. 23, 1943, while the vessel was detained at Newcastle, Australia, because the officers and crew refused to sail except in convoy. The charterer claimed that under a suspension of hire clause in the charterparty he was relieved from his obligation to pay hire during that period because the inability to sail was due to a " deficiency of men . . . or other accident " within the meaning of the charterparty, and he counterclaimed to recover a sum paid by him as hire. The arbitrator made his award in favour of the claimants and Sellers, J., now upheld the award. The facts appear in the judgment.

Sir Robert Aske, K.C., and *Mocatta* for the shipowners.

Sir William McNair, K.C., and *E. W. Roskill* for the charterer.

Cur. adv. vult.

Apr. 23. **SELLERS, J.,** read the following judgment: This case comes before me on an award in the form of a Special Case. The dispute arises under a time charter. The shipowners claim hire and the charterer resists the claim and counterclaims to recover a sum paid by him as hire, but which he alleges relates to a period when the vessel was off hire. The controversy arises over the meaning and effect and application of the words " deficiency of men . . . or other accident " in the suspension of hire clause.

By a time charter dated Aug. 29, 1941, the claimants, as disponent owners, agreed to let and the charterer agreed to hire the vessel Ilissos for a hire of 16*s*. 6*d*. per ton per month. The charterparty provided, by cl. 4, that while the vessel was on hire the charterer was to provide and pay for all coal, and it included the following provisions relating to suspension of hire and deficiency of crew :

> 11 (*a*). In the event of dry-docking or other necessary measures to maintain the efficiency of the vessel, deficiency of men or owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing for more than 24 consecutive hours, no hire to be paid in respect of any time lost thereby during the period in which the vessel is unable to perform the service immediately required . . . 34. (Addendum to cl. 11 (*a*)). Notwithstanding the provisions of cl. 11 (*a*), it is agreed that in the event of loss of time due solely to inability to get or to complete a crew (*a*) full hire will be paid for the first 72 hours of such loss of time, and (*b*) in the event of such loss of time taking place at a port in the United Kingdom or in ports in the British Empire overseas and continuing beyond such 72 hours, half hire will be paid for a further period of 72 hours, but thereafter hire shall cease until the vessel is again ready to resume her service.

The Special Case finds as follows :

> On Dec. 16, 1943, while the vessel was subject to the charter and was ready to sail from Newcastle, Australia, her officers and crew refused to sail except in convoy, and because of this refusal the vessel remained at Newcastle until, on Dec. 23, 1943, the officers and crew agreed to proceed without convoy. There was at all material times a full complement numerically of officers and crew, but they were not willing to work, and consequently the vessel was unable to perform the service immediately required.

The only point argued before the learned arbitrator was whether cl. 11 (*a*) and its addendum operated to relieve the charterer in whole or in part from his obligation to pay hire during the period of the delay at Newcastle and to provide and pay for coals consumed during that period. The learned arbitrator found :

> In so far as it is a question of fact I find, and in so far as it is a question of law I hold, that there was not at any material time a deficiency of men or other accident, either hindering or preventing the working of the vessel, or any liability to get or to complete a crew.

He also held :

> . . . that cl. 11 (*a*) and its addendum do not relieve the charterer in whole or in part from his obligation to pay hire, that the claim succeeds, and that the counterclaim fails.

He made an award in favour of the shipowners in these words :

> Subject to the decision of the court, I award that the charterer do pay to the claimants the sum of £388 17*s*. 6*d*.

In argument here both sides invited the court to look at the charterparty as a whole and referred to various other clauses. The shipowners had, under this charterparty, to place the vessel at the disposal of the charterer in every way fitted for ordinary cargo service, with a full complement of officers and crew, which means officers and crew of reasonable skill and competence in their respective duties. Clause 13 is directed to limiting the shipowners' liability to the charterer for loss, damage or delay, and excludes loss arising or resulting from " strikes, lock-outs or stoppage or restraint of labour (including the master, officers or crew) " whether partial or general. That clause is made expressly subject to cl. 11 (*a*) and the addendum thereto, but it was not suggested by either side that these words had any significance, except, perhaps, to emphasise that the suspension of hire clause stands unimpaired. No breach of contract was alleged, and the position is that the charterer is liable to pay hire unless there is a provision in the contract by which it has been agreed that hire shall be suspended and the charterer brings himself within the provision. The charterer accepted this obligation and alleged that the facts found established either " deficiency of men " or " other accident." If he is right about this, he relies on the finding of fact that there was no inability to get or complete a crew, and, therefore (it is submitted) he is not liable for the limited hire under cl. 34. It was argued by counsel on his behalf that the view taken by the arbitrator that " deficiency of men " means " numerical insufficiency " was a narrow view ; that " deficiency " could be, and was here, both quantitative and qualitative ; and that, in its context, it required, not only sufficiency in numbers, but also that the men should be able and willing to work. It was submitted that the dictionary meaning was wide enough to cover not only insufficiency in numbers, but also lack of willingness to work for whatever reason. Reference was made to Lord Blackburn's well-known observations in *Inman Steamship Co., Ltd.* v. *Bischoff* (1), where, citing Maude and Pollock on Shipping (3rd ed., p. 235), he said (7 App. Cas. 670, 685) :

> " Constructions . . . leading to absurd and unreasonable results will be avoided, if this can be done without violence to the terms used, because, where the intention is not clearly expressed, the parties are not to be presumed to have meant to make an absurd or unreasonable contract."

The arbitrator's view, it was said, would involve that, if so many of the officers and crew were sick on board that the vessel could not be worked, the vessel would not be off hire because the numbers would be there, whereas, if the sick men were removed to hospital on shore, it would be different. A comparison was made between " deficiency of men " and " deficiency of owners' stores," and counsel illustrated the case of stores being present on board, but bad and unfit for human consumption, and of lubricant which was of a wrong quality or kind for the engines and, therefore, unserviceable. It was said that the stores would be numerically there and in that sense not deficient, but that they would properly be described as deficient.

Notwithstanding some attractiveness in this argument, I do not find it on examination to be acceptable. The comparison between " deficiency of men " and " deficiency of stores " does not, in my view, assist the charterer's contention. Stores which are bad or unfit for consumption or use can be regarded as no longer existing, and, therefore, any shortage in the remaining supplies would be " deficiency of stores." Failure to provide lubricant which was suitable for the vessel would be a breach of the charterparty by the shipowner, for which he would be liable, subject to any protection provided by cl. 13. The inability of officers and men to work through sickness or injury would, in my view, amount to " deficiency of men " and the clause would apply if the working of the vessel was hindered or prevented thereby, and it would make no difference if the incapacitated members of the crew were in the ship or in hospital on shore. Physical inability to work is different in quality and character from refusal to work when full capacity to work exists. In my opinion, the provision " deficiency of men " in the suspension of hire clause is directed to putting the vessel off hire when a complement of officers and crew for working the ship is not available. Here there was no failure in the complement. The complete crew was present in the ship and able to work, but, for the time being, they were unwilling to take the ship to sea, except in convoy. On these facts the learned arbitrator has found that there was not at any material time a " deficiency of men." I am of opinion that his decision was right in law. No real guidance on the point seems to be available in any of the authorities. I think that different or additional words would have been used if it had been intended to place the vessel off hire because, for some reason, the men refused to work. Clause 13 refers to " strikes, lock-outs or stoppage or restraint of labour (including the master, officers or crew)." No such words occur in the suspension of hire clause. " Deficiency " in its plain meaning means " numerical insufficiency," and I am of opinion that that is its meaning in this clause of the charterparty, although in some usages it may mean something more. Inability to get or complete a crew may be due to a variety of causes, including a refusal of men to sign on because of war conditions or the nature of the voyage. If a deficiency or shortage of men had arisen in that way, then it would seem that the charterer would be liable only for the limited hire under cl. 34, but here the arbitrator has found no inability to get or to complete a crew, for the vessel at all times had her full complement.

Further, or alternatively, the charterer relies on the provision " or other accident." Notwithstanding that the crew's refusal to work was wilful and intentional, it was said that the event, as far as the parties to the contract were

concerned, was fortuitous and unexpected and was properly described as an accident. Reliance was placed on *The Torbryan* (2) in the Court of Appeal, but that was a very different case, as appears from the findings of PHILLIMORE, J., in the court of trial. In that case the Court of Appeal seem to have found [*per* COLLINS, M.R. ([1903] P. 194, 201)] that the parties swept all the enumerated exceptions "into the category of 'accidents'." I do not find it possible to do so here. The wilful refusal of the officers and crew to sail except
A in convoy does not appear to me to have any element of "accident." It is not an accident and it in no way resembles any of the other enumerated events which would serve to put the vessel off hire. I am, therefore, of the opinion that the learned arbitrator's decision on this point also was right in law.

The two questions asked of the court are set out in the Special Case as follows:

> (1) Whether on the facts found by me and on the true construction of the charterparty the claimants are entitled to recover £388 17*s.* 6*d.* from the respondent? (2) Whether
> B on the facts found by me and on the true construction of the charterparty the charterer is entitled to recover £964 6*s.* 1*d.* from the claimants?

The result of this judgment is that the answer to the first question is "Yes" and the answer to the second question is "No." Therefore, the award stands.

Judgment for the claimants with the costs of setting down and arguing the special case.

C Solicitors: *Holman, Fenwick & Willan* (for the shipowners); *Treasury Solicitor* (for the charterer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

D BROOKS AND ANOTHER *v.* PRESCOTT AND OTHERS.

[COURT OF APPEAL (Somervell and Cohen, L.JJ.), May 5, 6, 1948.]

Discovery—Production of documents—Documents relating solely to defendants' case—Police officer's notebook—Action against officer—Claim for damages for false imprisonment.

On an order for discovery in an action for damages for false imprison-
E ment and assault, the defendants, police officers, set out in their affidavit as documents which they objected to produce their police notebooks, stating that those documents related solely to their own case and not to the case of the plaintiffs and did not in any way tend to support or prove the plaintiffs' case or to impeach their own:—

HELD: assuming that the notebooks related solely to the defendants' case, the defendants were entitled to resist the application for their pro-
F duction, since the plaintiffs were not entitled to the production of documents which related solely to the defendants' case and did not support the plaintiffs' case, and this privilege was not confined to documents which were admissible in evidence.

Frankenstein v. *Gavin's Cycle Cleaning & Insurance Co.* ([1897] 2 Q.B. 62) and *O'Rourke* v. *Darbishire* ([1920] A.C. 581), *followed.*

G *A.-G.* v. *Emerson* (1882) (10 Q.B.D. 191), *explained and distinguished.*

[AS TO DOCUMENTS RELATING SOLELY TO THE CASE OF THE PARTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 400, 401, para. 482; and FOR CASES, see DIGEST, Vol. 18, pp. 148, 149, Nos. *983-990.*

AS TO CONCLUSIVENESS OF AFFIDAVIT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 367, 368, para. 445; and FOR CASES, see DIGEST, Vol. 18, p. 87, Nos. *389-391.*]

Cases referred to:

H (1) *Frankenstein* v. *Gavin's Cycle Cleaning & Insurance Co.*, [1897] 2 Q.B. 62; 66 L.J.Q.B. 668; 76 L.T. 747; 18 Digest 87, *391.*

(2) *O'Rourke* v. *Darbishire*, [1920] A.C. 581; 89 L.J.Ch. 162; 123 L.T. 68; 18 Digest 84, *377.*

(3) *A.-G.* v. *Emerson*, (1882), 10 Q.B.D. 191; 52 L.J.Q.B. 67; 48 L.T. 18; 18 Digest 87, *389.*

(4) *Re Strachan*, [1895] 1 Ch. 439; 64 L.J.Ch. 321; 72 L.T. 175; 59 J.P. 102; 60 J.P. 36; 18 Digest 63, *198.*

(5) *Benbow* v. *Low*, (1880), 16 Ch.D. 93; 50 L.J.Ch. 35; 44 L.T. 119; 18 Digest 195, *1429.*

Interlocutory Appeal by the defendants from an order of Cassels, J., in chambers, dated Apr. 6, 1948.

On an application by the plaintiffs in an action for damages for false imprisonment and assault, Cassels, J., made an order for the inspection of documents set out in the schedule to the defendants' affidavit. The defendants, police officers, appealed from the order on the ground that the documents, described as police notebooks, related solely to their own case and not to the plaintiffs' case. The Court of Appeal now allowed the appeal. The facts appear in the judgment of Somervell, L.J.

Blackledge for the defendants.
Selwyn Lloyd, K.C., and *J. Glyn Burrell* for the plaintiffs.

SOMERVELL, L.J.: This is an appeal from an order of Cassels, J., made on Apr. 6, 1948. The action is one brought by two plaintiffs against five police constables and a police superintendent, and the claim is for damages for false imprisonment and assault in connection with events which took place on Jan. 10, 1948. Put shortly, the plaintiffs say that the police constables assaulted them and falsely imprisoned them at the police station where the superintendent was involved in the alleged tort. The defence is a denial of any tort and it is said that the constables "requested the plaintiffs to alight from the car in the course of inquiring whether they, or either of them, were drunk or under the influence of drink to such an extent as to be unfit to have charge of the said vehicle," that the car was drawn up in a cul-de-sac off the main road without lights, that the man who was driving was intoxicated, and that, as he was being taken to the police station, inquiries were made of the others to see whether they were fit to be left in charge of the car. It is common ground that the plaintiffs were taken into the police station, but the defendants deny that they did anything wrongful.

An order was made for discovery, and the defendants put in an affidavit, two paragraphs of which I will read:

> (2) We each object to produce the said documents set forth against our respective names in part II of sched. I hereto. (3) The last-mentioned documents consist solely of memoranda which will be referred to by us or any of us only when it is necessary for us or any of us to refresh our memories on matters in question in this suit.

The documents set out in pt. II of sched. I are:

> Notebooks issued to us by the Chief Constable, Wallasey, and headed "County Borough of Wallasey. Police general notes, reports, enquiries, statements" as follows . . .

Six notebooks are set out, but one of them contains nothing which has any reference to the matters in dispute. On that affidavit the plaintiffs applied under R.S.C., Ord. 31, r. 15, for inspection of the notebooks. The matter came before the learned judge and he ordered "that the plaintiffs by their solicitors be at liberty to inspect the documents set out in pt. II of sched. I" to which I have referred. In my opinion, on the matter as it was then before the learned judge, that order was rightly made. There seems to me to be nothing in the paragraphs which I have read which entitles the defendants to refuse to produce these documents. An appeal was made against that order and a further affidavit was sworn. Counsel for the plaintiffs raised the question whether the defendants should be allowed to rely on this affidavit sworn after the learned judge's order. We decided that if leave were necessary to enable the defendants to rely on that affidavit it was a case in which leave should be given, and, therefore, the appeal comes before us on the basis of this second affidavit. In this affidavit there is this paragraph referring to the documents in question: "To the best of the knowledge, information and belief of us," and then the names of the five defendants whose notebooks are now involved are set out:

> . . . the last mentioned documents relate solely to our own . . . case and not to the case of the plaintiffs, and do not in any way tend to support or prove their case or to impeach our own . . . case.

That paragraph is based on principles which have been laid down in various cases, but I think that it will only be necessary for me to refer to two of them. The first is *Frankenstein* v. *Gavin's Cycle Cleaning and Insurance Co.* (1), which was decided by the Court of Appeal, consisting of LORD ESHER, M.R., A. L. SMITH, L.J., and CHITTY, L.J. The headnote is as follows:

> In an action for an alleged mis-representation in the prospectus of a company the statement complained of was that 12,500 persons had enrolled themselves as annual subscribers to the company. In an affidavit of documents the defendants stated that they had in their possession 12,500 applications by persons wishing to be enrolled as annual subscribers to the company, but that they objected to produce them on the
A ground that they were part of the evidence supporting the defendants' case, and did not support or tend to support the plaintiff's case, and contained nothing impeaching the case of the defendants:—*Held*, that the plaintiff was not entitled to inspection of the applications.

In the course of his judgment, CHITTY, L.J., said ([1897] 2 Q.B. 62, 65):

> The defendants mention in their schedule of documents 12,500 applications by persons
B wishing to become subscribers, and they object to allow inspection of those applications on the ground that they form part of the evidence in support of the defendants' case, and do not support or tend to support the plaintiff's case, and contain nothing impeaching the defendants' case. That is the proper affidavit to make in support of the claim of privilege.

It will be noticed that in that passage CHITTY, L.J., mentioned that part of the objection was that the documents "form part of the evidence in support
C of the defendants' case." In the House of Lords in *O'Rourke* v. *Darbishire* (2) a number of points were argued, and, among them, whether, in this class of privilege, it was necessary that the documents in respect of which inspection was resisted should be documents which in themselves were admissible as evidence, and it was held that the claim against production for inspection was not restricted to documents which were in themselves admissible in evidence. The point was fully argued and, although I think that most of their Lordships took the
D view that the matter could have been decided, so far as that particular part of the case was concerned, on other grounds, it was dealt with, I think, in all the speeches of the noble and learned Lords. VISCOUNT FINLAY set out ([1920] A.C. 581, 605) the affidavit, the validity of which was under consideration. It was in these terms:

> To the best of our knowledge information and belief the said documents Nos. 434
E and 436 and (so far as we object to produce the same) 437 either do not in any way relate to the matters in issue in this action or in so far as they do relate to the same relate solely to our case and to the case of our said co-defendants and not to the case of the plaintiff and do not in any way tend to support the plaintiff's case or impeach our own.

As will be seen, in all essential matters the affidavit in the present case follows the form which was considered in that case.

F I might say a word in passing on the expression "relate solely to our case." What that means is, I think, perfectly clear in the context. The same word, "relate," is also used by VISCOUNT FINLAY. Of course, in one sense a document which assists the defence to make out its case relates to the plaintiff's case in that the defendant hopes that it will destroy the plaintiff's claim, but what is clearly meant by the word "relate" here (having regard to the words which follow) is that there is nothing in these documents which helps
G the plaintiff to establish his case or which tends to defeat the defence. VISCOUNT FINLAY held (*ibid.*, 606) that this "privilege"—that is the word which he uses—was not confined to documents which are admissible in evidence. He said (*ibid.*):

> A party is entitled to get inspection of any documents relating to his own case. He is not entitled to see documents relating exclusively to his opponent's case in order
H that he may prepare means of meeting it or try to discover flaws in it.

It is claimed by the defendants that these documents are not to be produced on the ground stated in this paragraph in the affidavit, which, in terms, has been held in the House of Lords to be a proper ground on which the production of documents can be resisted. In answer to this claim, counsel for the plaintiffs dealt, first, with the admission of the further affidavit, which I have mentioned. He also suggested that this was a case in which this court would not interfere with the learned judge's discretion, but I do not think that that is a principle which can assist us in this case, because, having admitted the second affidavit, we are dealing with the matter on a different basis from that on which the learned judge dealt with it and, therefore, there is no question of any discretion which he may have exercised, when the matter was presented in a different form, assisting us in coming to our conclusion on the matter as it is now presented to us.

Counsel for the plaintiffs stressed the word "exclusively" in the passage which I have read from VISCOUNT FINLAY'S judgment, but I think that that is merely expressing in one word what appears in the affidavit in that case, as in this case, *viz.*, the statement that the documents :

> . . . relate solely to our case and to the case of our said co-defendants and not to the case of the plaintiff and do not in any way tend to support the plaintiff's case or impeach our own.

He then took the point (and this was his main point) that no contemporary record, such as it may be assumed is contained in a policeman's notebook, can be the subject-matter of this form of privilege from production, and he cited *A.-G.* v. *Emerson* (3). I do not think that it is necessary to go into the facts of that case, but counsel for the plaintiffs referred to a passage in the judgment of BRETT, L.J., where he said (10 Q.B.D. 191, 204, 205) :

> Where therefore from the nature and description of the documents the court feels certain in the sense that I have described that the documents will assist the plaintiff's case, or will negative the defendant's case, of course then they will not act upon the affidavit . . .

I agree with that, with respect. Indeed, it is the *ratio decidendi* and is binding on us. If, from the nature of the document, it is plain that the deponent, in claiming the privilege which he seeks, must have misconceived the law, the court will not, of course, accept it as a valid claim against production. I do not myself see how it can be said that that applies to this case. Let me take the case of a constable who is sued for assault. He puts in a defence. That defence may follow in all material matters, omitting nothing, the note which he has made at the time. If that were so, it seems to me that it falls precisely within the principles which have been laid down, *i.e.*, as a document which relates solely to his own case and does not in any way impeach it or assist the case which the plaintiff seeks to make. In fact, I think that, if one considers the nature of these documents, as one would assume them to be from their description, they are a class of document which, provided that their contents justify the swearing of such an affidavit as has been sworn in this case, might well fall within the principle enunciated by more than one learned judge. A note taken at the time, such as is presumably contained in these books, may well be in substance the evidence which the defendant will give to the court in support of his defence to the claim. It also might—though not necessarily—contain the names of other witnesses whom he desires to call.

In *Re Strachan* (4), to which we were referred, LINDLEY, L.J., used some words which I will read in this connection. I do not think that that case really helps, because it was dealing with documents in the custody of the court in lunacy, the right to see which depends on different principles, and the court has a different and wider discretion in dealing with them than in the kind of case with which we are at present concerned, but LINDLEY, L.J., said ([1895] 1 Ch. 439, 445) :

> In England it is considered contrary to the interests of justice to compel a litigant to disclose to his opponent before trial the evidence to be adduced against him (see *Benbow* v. *Low* (5)). It is considered that so to do would give undue advantages for cross-examination and lead to endless side issues ; and would enable witnesses to be tampered with, and give unfair advantage to the unscrupulous.

There may be no question of witnesses being tampered with if these notebooks do not contain the names of any other people who were present at the time, but they are very much, or may be very much, in the nature of evidence that is to be given. I think, therefore, that, having regard to the terms of the affidavit, this appeal succeeds.

I should like to make it clear (and I am sure that it is clear from the authorities) that that does not, of course, mean that production of any policeman's notebook can be refused in circumstances of this kind or could properly be covered by a paragraph such as we have in this affidavit. Such a notebook might well contain entries helpful to the plaintiff in that they enabled him to establish his case, and it might contain entries which were damaging to the defendant's case. But, if this affidavit, on which we are deciding this issue, is accurate (and I have no reason to suggest that it is not), it seems to me that it covers these documents, and, accordingly, the principle to which I have referred enables the defendants to resist the application for production. In my opinion, therefore, the appeal must be allowed.

COHEN, L.J.: I agree. Counsel for the plaintiffs relies for his argument on the decision of BRETT, L.J., in *A.-G.* v. *Emerson* (3), to which SOMERVELL, L.J., has referred. The effect of that decision was summarised by BRETT, L.J., when LORD ESHER, M.R., in *Frankenstein* v. *Gavin's Cycle Cleaning & Insurance Co.* (1) to which my Lord has also referred. LORD ESHER, M.R., there summarised the effect of the decision in *A.-G.* v. *Emerson* (3) as follows ([1897] 2 Q.B. 62, 64) :

> Each of the judges who decided that case held in effect that such an affidavit as the defendants in this case have made must be accepted as conclusive, unless the court can see, that is to say, is reasonably certain, from the statements of the party making it, that he has erroneously represented or has misconceived the character of the document in question, and that it is of such a character that the party cannot properly swear to the effect to which he is bound to swear in order to claim protection. That being so, the case depends upon the question whether we are reasonably certain that the defendants' allegation that the applications in question have nothing to do with the plaintiff's case but support the defendants' case alone is not true.

Applying that statement of the law to the present case, the only ground on which it is suggested that we could be reasonably certain that the defendants' allegation that the notebooks have nothing to do with the plaintiffs' case, but support the defendants' case alone, is not true, is the description of the notebooks in the first affidavit. In my opinion, for the reasons given by my Lord, it is impossible to draw any such inference, and, therefore, it seems to me that, applying the principle of *Emerson's* case (3) as summarised in *Frankenstein's* case (1), it necessarily follows that this appeal succeeds.

Appeal allowed. Costs of the appeal to be costs in the cause.

Solicitors : *Chamberlain & Co.*, agents for *Emrys Evans*, town clerk, Wallasey (for the defendants) ; *Walford & Co.*, agents for *J. Norton*, Liverpool (for the plaintiffs.)

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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versed. C.A. [1948] 2 All E.R. 593.

Re CHATTERLEY-WHITFIELD COLLIERIES, LTD.

[CHANCERY COURT OF THE COUNTY PALATINE OF LANCASTER (Judge Peel, K.C.), April 6, May 4, 1948.]

Coal—Nationalisation of Industry—Colliery company—Reduction of capital—Rights of shareholders under Coal Industry Nationalisation Act, 1946 (c. 59), *s.* 25 (1).

A colliery company, whose capital of £400,000 was divided into 20,000 six per cent. preference shares of £10 each and the same number of ordinary shares of a like nominal value, passed a special resolution, as empowered by its articles of association, to reduce its capital to £200,000 by returning to the preference shareholders the whole capital paid up on their shares. The articles conferred on the preference shareholders a right to a cumulative preference dividend of 6 per cent., and, on winding-up, in priority to ordinary shareholders, to re-payment of capital and an amount equal to the difference between the total amount of dividends paid on their shares and 6 per cent. per annum on the capital paid up thereon as from the time of payment of such capital, but to no other participation in the assets. On Jan. 1, 1947, under the Coal Industry Nationalisation Act, 1946, the company's colliery undertaking became vested in the National Coal Board, and, pending the payment of compensation, the company was entitled under s. 22 (3) of the Act to interim income, and, under s. 22 (2), to interest on the amount of the compensation. The Act provides by s. 25 : " (1) Provision shall be made by regulations for due regard being had, as between classes . . . of members . . . of a company being an owner of transferred interests, to what their relative expectations of income yield from their respective interests in the company would have been if this Act had not been passed, and for that purpose the regulations shall provide facilities for adjusting the respective interests of such classes in the company's assets as affected by the substitution of the compensation under this Act for the transferred interests of the company so as to give effect, so far as may be, on the one hand to the said expectations and on the other hand to the rights of priority conferred on such classes respectively by . . . the memorandum and articles of association of the company." Certain preference shareholders dissented from the resolution to reduce capital in the proposed manner and opposed the petition to confirm it. It appeared that the company was not contemplating liquidation, but was prospecting for coal in Ireland, and had other activities. It was not questioned that the preference shares would have been, but for the Act of 1946, of a greater value than par.

Held: (i) section 25 did not merely express an intention, but it also imposed on the Minister a duty, to make regulations for the determination and adjustment of the rights of the shareholders in the company's assets, and it was incumbent on the court to take into account, as one of the material circumstances in considering the fairness of the proposed reduction, the prospects of the preference shareholders obtaining an adjustment under that section of their contractual rights under the articles.

Wilsons & Clyde Coal Co., Ltd. v. *Scottish Insurance Corpn., Ltd.* (1948 Session Notes 43), *not followed.*

(ii) the disadvantages accruing to the ordinary shareholders by a refusal of the sanction of the court to the proposed reduction by no means counterbalanced the unfairness which the reduction would entail to the preference shareholders by depriving them of their rights and prospects under s. 25, and the petition should be dismissed.

[As to Reduction of Capital, see HALSBURY, Hailsham Edn., Vol. 5, pp. 170-176, paras. 305-316; and for Cases, see DIGEST, Vol. 9, pp. 148-161, Nos. *833-936*.]

Case referred to:

(1) *Wilsons & Clyde Coal Co., Ltd.* v. *Scottish Insurance Corporation, Ltd., and Others*, 1948 Session Notes 43.

Petition by a company to sanction a reduction of its capital by returning to preference shareholders all capital paid up on their shares. Having regard to the rights of the preference shareholders under the Coal Industry Nationalisation Act, 1946, s. 25, Judge Peel, K.C., refused to sanction the reduction. The facts appear in the judgment.

Christie, K.C., and *Eric Griffith* for the company.

Ungoed-Thomas, K.C., and *Raymond Walton* for the dissentient preference shareholders.

Cur. adv. vult.

May 4. **JUDGE PEEL, K.C.**, read the following judgment. The capital of this company is £400,000 divided into 20,000 six per cent. preference shares of £10 each and a like number of ordinary shares of the same nominal value. The object of this petition is to obtain the sanction of this court to the reduction of that capital to £200,000 by the return to the preference shareholders of the whole of the capital paid up on their shares, thus leaving the ordinary shareholders as the only shareholders of the company. The creditors of the company will not be prejudiced, but the petition is opposed by the Prudential Assurance Company and the Yorkshire Insurance Company whose holdings amount in the aggregate to 6,000 preference shares. There is no question but that the court has ample jurisdiction to make the order, but the dissentient shareholders rely on the long and firmly established principle that the court ought to withhold its confirmation under the Companies Act, 1929, s. 56, in a case in which the reduction appears not to be a fair and equitable one as between the different classes of shareholders.

The company was incorporated in the year 1891 with the principal object of carrying on the business of colliery proprietors. All its 40,000 shares were issued and fully paid up shortly after its incorporation. It is a private company.

Its members number close on 50. Their rights are defined by the company's articles of association adopted in their present form in 1944. By art. 7 the holders of the preference shares are entitled to a cumulative preferential dividend of 6 per cent per annum, and, on a winding-up, in priority to the holders of the ordinary shares, to re-payment of capital and payment of an amount equal to the difference between the total amount of dividends paid on their shares and 6 per cent. per annum on the capital paid up thereon as A from the time of payment of such capital, but to no other right to participate in the company's assets. Articles 24 and 25 confer on the directors very wide powers of refusing sanction to the transfer of shares. Article 43 empowers the company by special resolution to reduce its capital in any manner authorised by law. Provision is made in art. 44 for the modification of the rights attached to any class of shares by extraordinary resolution passed at a separate meeting of the holders of shares of that class. Article 65 allots one vote to every share. B Article 100 provides that dividends are to be declared by the company, but are not to exceed the amounts recommended by the directors, and art. 109 empowers the directors, before recommending any dividend, to set aside any part of the net profits of the company to a reserve fund which was to be applicable (*inter alia*) to paying special dividends or bonuses and until applied was to remain undivided profit.

The company's principal business was that of working a large colliery in C Staffordshire. It met with very considerable success. In addition to the regular payment of the 6 per cent. preferential dividend it paid dividends to its ordinary shareholders which during the 12 years immediately preceding the year 1947 averaged rather more than 12 per cent. per annum. It also accumulated large reserves. There can be no doubt that, at any rate before the advent of nationalisation, the preference shares would have been regarded D as a well secured 6 per cent. investment. I have been given no evidence as to the prices at which they have actually changed hands. Sales of shares in a company of this nature are, doubtless, infrequent, but the dissentient shareholders have filed evidence with a view to arriving at a valuation of the preference shares by a comparison with the yields obtainable during a period of years on an investment in the preference shares of other colliery companies. That affidavit concludes with the statement :

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> It, therefore, appears that, had the 6 per cent. preference shares of the company been quoted on the Stock Exchange, they would, in my opinion, have stood at prices above par during the last six years, and that, if the Coal Industry Nationalisation Act, 1946, had not been passed, these shares would have been worth a sum of at least £12 per £10 share.

In considering that statement one must bear in mind the fact that these shares were not quoted on any stock exchange and that the wide powers of the F directors to refuse transfers would detract from their value. In other respects, however, that statement has not been criticised, and when one considers the low rates of interest which have obtained in recent years in the case of all well secured investments it appears difficult to escape the conclusion that re-payment at par would, at any rate on pre-nationalisation values, entail at least some sacrifice of capital value in addition to loss of income on the part of the G holders of these 6 per cent. preference shares.

Under the Coal Industry Nationalisation Act, 1946, the company's colliery undertaking became vested in the National Coal Board on Jan. 1, 1947, and for it the company will receive compensation partly in the form of government stock and partly in cash. The value attributed in the company's balance sheet to the assets so transferred is upwards of £380,000, but as yet it is impossible to arrive at any real estimate of the compensation which will eventually be found to be payable. H Meanwhile, in respect of each of the first two years from the vesting date the company is to receive, under s. 22 (3) of the Act, interim income amounting to one half of the profits of its colliery undertaking as computed for income tax purposes for the year ended Dec. 31, 1945. It is anticipated that that interim income, when finally ascertained, will amount to about £85,000 per annum, a figure which, incidentally, covers the preference dividend seven times over. It is also anticipated that a considerable time will elapse after the end of those two years before the compensation to which the company is entitled is ascertained and satisfied. In respect of that time the company will receive, under s. 22 (2) of the Act, interest on the amount of compensation computed at such rates as may be prescribed by the Treasury. The substitution of compensation for collieries as the source from which their dividends would be paid and as the security for their invested capital, might well entail considerable unfairness as between different classes of shareholders of the recipient companies, and, in passing the provisions of the Act relating to compensation, the legislature did not confine itself merely to providing for the ascertainment of the compensation payable to those companies. It looked beyond them and provided for adjustment—that is, alteration—being made in the respective contractual rights attached to shares of different classes. For that purpose s. 25 was inserted in the Act. I will revert to that section, on which the dissentient shareholders place great reliance, later in this judgment.

Although it has been divested of its principal business, the company is not contemplating liquidation, but, on the contrary, it is engaged in prospecting for coal in Eire and Northern Ireland, and has made arrangements to enable it to start mining operations if its prospecting proves successful. It is also carrying on the business of digging clay and manufacturing tiles and pottery through a subsidiary company in Northern Ireland. In addition to its investment in these new businesses and its claim to compensation under the Coal Act, the company holds liquid assets in the form of investments, tax reserve certificates, and cash of an aggregate value of £500,000. After providing the £200,000 it proposes to apply in paying off its preference shares it anticipates it will still have ample capital left available for the development of the new businesses to which I have made reference.

Those were the circumstances in which the special resolution, on which this petition is based, was passed. It was passed by 30,217 votes against the 6,000 votes recorded by the dissentient shareholders. The majority included 13,024 votes recorded in respect of preference shares, but of these votes by far the greater number were given by those who held ordinary as well as preference shares, 1,300 votes only being given in favour of the resolution by or on behalf of those who held preference shares alone. Doubtless the members who held both preference and ordinary shares exercised their voting rights, as they were entitled to do, in their own interests, and their interests as holders of ordinary shares may well have predominated. I do not feel that I can obtain much guidance from the way in which those holders voted.

As I have said, the dissentient shareholders place great reliance on s. 25 of the Coal Industry Nationalisation Act, 1946, which provides:

> (1) Provision shall be made by regulations for due regard being had, as between classes of debenture holders, or of members, or of both, of a company being an owner of transferred interests, to what their relative expectations of income yield from their respective interests in the company would have been if this Act had not been passed, and for that purpose the regulations shall provide facilities for adjusting the respective interests of such classes in the company's assets as affected by the substitution of the compensation under this Act for the transferred interests of the company so as to give effect, so far as may be, on the one hand to the said expectations and on the other hand to the rights of priority conferred on such classes respectively by the debentures and the memorandum and articles of association of the company.
>
> (2) The said provision shall include facilities for the taking effect of schemes for such adjustment if assented to within a prescribed period by such majorities as may be prescribed, on the basis of sub-s. (2) of s. 153 of the Companies Act, 1929, of the members of each of the classes concerned and either not objected to by any member of a class concerned or, if so objected to, approved by a tribunal to be established under the regulations, and in default of schemes so taking effect, for the giving of directions for such adjustment by the tribunal to be so established on application as may be prescribed of the company or of members of a class concerned.
>
> (3) Sub-section (6) of the last preceding section shall have effect in relation to the tribunal to be established for the purposes of this section.

The effect of that section has not, so far as I am aware, yet been the subject of any decision in the courts of this country. In Scotland, however, the First Division of the Court of Session has recently considered its provisions in *Wilsons & Clyde Coal Co., Ltd.* v. *Scottish Insurance Corpn., Ltd.* (1). That case also was one of a petition for the reduction of a colliery company's capital under the Companies Act, 1929, s. 56. There, too, the proposed reduction involved the payment off of the whole of the preference share capital. The reduction was sanctioned, the LORD PRESIDENT delivering a dissenting opinion. The circumstances of no two companies are the same, and, although that case bears a marked similarity to the case before me, there are in some respects material differences. Thus, the articles in that case contained a provision of which both LORD KEITH and LORD RUSSELL, who composed the majority of the court, made note, enabling the reserve fund to be applied for making provision for paying off the preference share capital. I am not, of course, bound by the decision in that case since it is the decision of a Scottish, and not of an English, court. I owe a duty to make up my own mind, although the opinions of those two great lawyers must necessarily bear great weight with me. Even if it were the decision of a superior court of this country I would be bound by it only if it enunciated principles of general application, and on reading the observations of LORD KEITH and LORD RUSSELL on s. 25, I am in some doubt whether they were intended to be observations on anything more than the bearing of the section on the facts of that particular case. If they are intended to be of wider application, the principle enunciated would appear to be that s. 25 does not confer on preference shareholders any rights or prospects which the court can take into account in determining whether confirmation of a reduction of capital should be withheld on the ground of unfairness between different classes of shareholders. The court should have regard only to the contractual rights attached to shares by the memorandum or articles of association. If that principle is intended to be enunciated it appears to be based on the following grounds. The regulations have not yet been made. Even when made they must—the reference is to s. 62 (2) of the Act—lie before Parliament for 40 days and have no statutory effect unless they survive that period without annulment by resolution of either House of Parliament. Section 25 does not amend s. 55 of the Companies Act, 1929, under which a company may still reduce its capital by the elimination of its preference shares, provided only that the holders of those shares are not, having regard to the terms of their contract with the company, and to those terms alone, treated with unfairness. If that principle is laid down in those opinions, I must, with the greatest respect, decline to subscribe to it. True it is that the preference shareholders cannot as yet have their claims for the adjustment—that is for the alteration—of their rights determined under s. 25 since the regulations have not been made, nor has the tribunal been constituted, but, as I read the section, it is not a mere expression of intention that the regulations shall be made. It imposes on the Minister a statutory duty to make them. The prospect of the annulment of regulations, when made, would appear to be an improbable contingency. The court would be justified in assuming that the regulations would be properly made and that neither House of Parliament would arbitrarily or improperly annul regulations properly made. The regulations must, under the terms of s. 25, provide facilities for adjusting the respective interests of the classes of shares in the company's assets as affected by the substitution of compensation for the transferred interests so as to give effect, so far as may be, to their prospects of income yield. The preference shareholders will be entitled as of right to have their case for adjustment, if not previously settled by agreement or under a scheme, determined by the tribunal.

The absence from the Coal Act of any amendment of s. 55 of the Companies Act, 1929, is, I think, fully explained by the fact that Parliament would scarcely anticipate that the court will lend its aid under that section to the elimination of those who have a proper claim for the adjustment of their contractual rights before they can bring their claim before the tribunal, except on terms which are just and equitable, regard being had to the substance of their claim for adjustment. Counsel for the petitioners based an argument on the absence from the Coal Act of any provision preventing the defeat by a previous winding-up of any rights or prospects conferred by s. 25, and made the point that the company could be put into liquidation without the assistance of the court. The answer to that is, I think, that put forward by counsel for the dissentient preference shareholders—that the liquidation of a colliery company can scarcely be completed until the compensation has been paid and before that the regulations will have been framed and the tribunal constituted.

For these reasons it is, in my judgment, incumbent on me, in considering the issue raised by the dissentient shareholders as to the fairness of the proposed reduction, to take into account as one of the material circumstances of this case and for what they are worth the prospects the preference shareholders have of obtaining the adjustment under s. 25 of their contractual rights under the articles. In my judgment, those prospects are such as ought to carry great weight with me in deciding this case. The proposed reduction of capital is occasioned by the fact that the company is in possession of capital in excess of its wants, and that fact is in its turn the direct result of the passing of the Coal Act. The shares for which these shareholders subscribed were not issued to them as redeemable preference shares. They could be redeemed only on a reduction of capital, and then only with the sanction of the court. Their dividends would also cease on a winding-up, but both a reduction and a winding-up would have appeared improbable or remote events to anyone who made an estimate of the income yield of these shares before the Coal Act was passed. Their dividends had always been paid, were well secured, and would have been expected to continue for quite an indefinite time. All this has been changed by the passing of the Coal Act and, in the words of s. 25, "the substitution of the compensation under this Act for the transferred interests of the company." In the place of their 6 per cent. dividend the preference shareholders would, if paid off, in all probability find it impossible to obtain any comparable return with equal security, and it would appear most probable that, unless previously eliminated, they would be able to secure under any scheme passed under s. 25, which entailed a reduction of capital, substantially better terms than the receipt of the par value of their shares. The company in its corporate capacity will scarcely benefit by divesting itself of the £200,000 required to pay off the preference shares. I have to consider the consequences to the ordinary shareholders of a refusal of the order prayed. If the company is left with the £200,000 in excess of its wants, that capital will doubtless yield far less than the 6 per cent. which would, if the reduction of capital is sanctioned, be saved for the benefit of the ordinary shareholders. A reduction of capital may, however, be expected to form a part or to be an immediate consequence of any scheme under s. 25, so that the retention of this surplus capital will be no more than a temporary disadvantage. It is one which might, perhaps, have been avoided altogether if the ordinary shareholders had put forward a scheme for reduction under which proper account was taken of the prospects of the preference shareholders under s. 25. True it is that any such scheme would have involved a modification of the rights attached to the two classes of shares by the articles of association, but the machinery provided for that purpose by art. 44 was waiting to be set in motion. The disadvantages accruing to the ordinary shareholders by a refusal of the court's sanction to the proposed reduction, in my judgment, by no means counterbalance the unfairness which this reduction would entail to the preference shareholders by depriving them of their rights and prospects under s. 25 of the Coal Act. I, accordingly, dismiss this petition on the ground that to grant the court's sanction would involve an infringement of the principle I mentioned at the commencement of this judgment. The company will pay the costs of the dissentient shareholders.

The order which will actually be made will be that the petition will be dismissed, and the costs of the Prudential Assurance Company and the Yorkshire Insurance Company will be paid by the company. Those costs will be costs as between party and party.

Order accordingly.

Solicitors: *Wilson, Cowie & Dillon*, Liverpool (for the company); *Slaughter & May* (for the dissentient preference shareholders).

[*Reported by* K. L. COGHLAN, ESQ., *Barrister-at-Law.*]

Re SKINNER (an infant). SKINNER *v.* CARTER.

[COURT OF APPEAL (Lord Greene, M.R., Somervell, L.J., and Jenkins, J.) April 27, 28, 1948.]

Adoption—Maintenance—Adoption order—Validity—Order made on application of two "spouses" jointly—"Spouses" bigamously married—Liability of "husband" for maintenance of child—Adoption of Children Act, 1926 (*c.* 29), *s.* 1 (3)—*Adoption of Children (County Court) Rules,* 1926 (*S.R. & O.*, 1926, *No.* 1602), *rr.* 8, 9, 12.

By the Adoption of Children Act, 1926, s. 1 (3): "Where an application for an adoption order is made by two spouses jointly, the court may make the order authorising the two spouses jointly to adopt, but save as aforesaid no adoption order shall be made authorising more than one person to adopt an infant."

On July 19, 1937, S. gave birth to a child. On Nov. 12, 1941, she went through a ceremony of marriage with C. In June, 1942, an adoption order with regard to the child, which certified that all the requirements of the Act had been complied with, was made in favour of S. and C. on their joint application, they representing themselves to be husband and wife. On Sept. 9, 1947, C. was convicted of bigamously marrying S. On Nov. 13, 1947, C. was adjudged by justices to be the guardian of the child and was ordered, to pay 10*s.* a week for her maintenance :—

HELD : even if the adoption order could be challenged by appropriate process (as to which *quaere*) it was not competent for the justices to challenge it, and, therefore, they had jurisdiction to make the maintenance order on the basis that the adoption order was valid.

Decision of VAISEY, J. ([1948] 1 All E.R. 42), *reversed.*

[AS TO ADOPTION BY SPOUSES, see HALSBURY, Hailsham Edn., Vol. 17, p. 686, para. 1417 ; and FOR CASES, see DIGEST, Supp.]

APPEAL by the plaintiff from an order of VAISEY, J., dated Dec. 17, 1947, and reported [1948] 1 All E.R. 42, discharging, on the ground that the adoption order was invalid, a maintenance order made against the defendant as guardian of an adopted child. The Court of Appeal held that the justices had jurisdiction to make the maintenance order on the basis that the adoption order was valid. The facts appear in the judgment of LORD GREENE, M.R.

Ashkenazi for the plaintiff.
McKinnon for the defendant.

LORD GREENE, M.R.: This appeal raises a curious and important point under the Adoption of Children Act, 1926. The plaintiff is Margaret Rose Skinner, the natural mother of an infant, Joyce Ann Skinner. The defendant is William James Carter, with whom she went through a ceremony of marriage on Nov. 12, 1941. On June 6, 1942, these two parties presented a petition to the county court for an adoption order in respect of the infant, Joyce. In support of that petition they filed affidavits in which they asserted that they were married to one another.

I will now turn to examine one or two of the provisions of the Adoption of Children Act, 1926. The first relevant provision is to be found in sub-s. (3) of s. 1, which reads as follows :

> Where an application for an adoption order is made by two spouses jointly, the court may make the order authorising the two spouses jointly to adopt, but save as aforesaid no adoption order shall be made authorising more than one person to adopt an infant.

The county court, therefore, had to be satisfied that the parties were married. It had before it sworn evidence that they were married and it made the order, but before making such an order the court has to satisfy itself as to a number of other matters, and the matter which is specially relevant to the present situation is that relating to the child proposed to be adopted. Under sub-s. (3) of s. 8, a section which provides for the making of rules by the Lord Chancellor, the following provision appears :

> For the purpose of any application under this Act and subject to any rules under this section, the court shall appoint some person or body to act as guardian *ad litem*

of the infant upon the hearing of the application with the duty of safeguarding the interests of the infant before the court . . .

The Adoption of Children (County Court) Rules, 1926, r. 8, provides :

> The infant shall be a respondent to the petition. As soon as practicable after the filing of the petition, the judge shall appoint a guardian *ad litem* to the infant ; and the registrar shall thereupon cause the petition to be served on the guardian *ad litem.*

By r. 9 :

> When a guardian *ad litem* has been appointed, the registrar shall appoint a day for the hearing of the petition, and shall give notice to all parties, including the guardian *ad litem,* of the day so appointed.

By r. 12 :

> It shall be the duty of the guardian *ad litem* to investigate as fully as possible all the circumstances of the infant and the petitioner, and all other matters relevant to the proposed adoption with a view to safeguarding the interests of the infant, and, in particular, it shall be his duty to include in his investigation the following questions . . .

There follow a number of questions, all of them pertaining to the desirability of making an adoption order in the interests of the infant. The object of that machinery for safeguarding the interests of the infant is to be found in the very nature of the adoption for which the Act provides. Under s. 5 (1) of the Act the adoption of an infant has this effect :

> Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians, of the adopted child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock . . .

There is a proviso for the case where two spouses are the adopters and it decides how they may make application for the matters there stated relating to custody, and so forth. It is to be observed that the effect of the adoption order is serious and fundamental. It divests the infant of its legal rights against its natural parents. It deprives the natural parents of their legal rights in respect of the infant and confers on the infant legal rights against the adopting parties as though they were the natural parents. It is obvious that the legislature, in view of the serious effect on a child of an adoption order, has taken the appropriate method of ensuring that the interests of the child shall be protected. The child is to be a party to the application on which the order is to be made and a guardian *ad litem* is to be appointed, charged with the duty of making all investigations relevant to the welfare of the child in connection with the proposed adoption. The adoption order, therefore, when made, is not a mere order operating *inter partes* and affecting only the status of the new adopters. It is essentially a thing which alters the status of the infant who is the person primarily affected and interested. The adopting parents, of course, get various advantages. They get what is, no doubt, the valuable sentimental advantage of being able to bring up a child. They get the advantage that the child, by the adoption order, incurs certain obligations towards them as though they were the natural parents. Nevertheless, the person primarily affected by the order is undoubtedly the child. The order does not affect the status of the two parties, except in the sense that they acquire the liabilities of a natural parent and the rights of a natural parent.

Remembering that, I now proceed with a further statement of the facts of the case. The adoption order was made on July 16, 1942. It was made on reading the petition which contains allegations that the parties are spouses and on reading the affidavits. The court heard the solicitor for the petitioners, and it heard Mr. Brace, of the Middlesex Education Committee, as guardian *ad litem.* The order recites that the judge was satisfied that the allegations in the petition were true. He was satisfied with the undertaking of William James Carter and Margaret Rose Carter, described as his wife, as to the provision to be made for the infant and for the securing thereof, and that it would be for the benefit of the infant that it should be adopted. It was further stated that all the requirements of the Adoption of Children Act, 1926, had been complied with. He, therefore, made the order authorising the adoption and directing the adoption to be entered in the register which has to be kept under the Act. This is followed by a direction that the Registrar-General shall make an entry recording this adoption in the Adopted Children Register in the form set out in the schedule to the Act. That solemn and important order was made in accordance with the directions of the Act and rules, after careful and responsible investigation into the question of the benefit to the infant by an officer of the local authority as the guardian *ad litem*, and on evidence which, on the face of it, was adequate and sufficient to found jurisdiction.

The defendant was prosecuted for bigamy and he was convicted, the bigamous marriage being the ceremony which he went through with the plaintiff. On Nov. 13, 1947, an application was made to Edmonton petty sessions by the plaintiff. She complained that she was the mother of the infant Joyce and that the defendant was the guardian, and she said that she was desirous of having the legal custody of the infant. The justices found that the complaint was proved and, having regard to the welfare of the infant, ordered that its legal custody be committed to the plaintiff. The order proceeds:

> The father shall henceforth pay to the complainant, through the collecting officer . . . under the provisions of s. 30 (1) of the Criminal Justice Administration Act, 1914, the sum of 10*s*. 0*d*. weekly for the maintenance of such infant whilst under the age of 16 years. The guardian shall have access to the said infant.

That order was clearly made on the footing that there was in existence a valid adoption order. It could not have been made if the justices had regarded him merely as a man who was living with the mother of the child. They describe him as the father, a correct description of him on the footing of the adoption order. The defendant appealed, and his appeal came before VAISEY, J., who took the view that, as the plaintiff had, before the justices, stated that the defendant had bigamously married her, she could not be heard to assert the validity of the adoption order, because by that statement she was asserting the existence of a state of facts which, if it existed, would have deprived the county court, under s. 1 (3) of the Adoption of Children Act, 1926, of jurisdiction to make the adoption order. The result is curious. The adoption order had never been set aside or pronounced to be void by any competent court. Counsel for the defendant argued before us that the justices ought to have disregarded that order because the plaintiff, when before the justices, said that she was bigamously married. That, says counsel, compelled the justices to regard the order as having been made without jurisdiction, and they ought to have refused to treat the defendant as being under the obligations imposed by the Adoption of Children Act, 1926, and to have made no order against him for payment of maintenance. Even if it be right—and I shall have a word to say about it in a moment—that it was competent to the justices to disregard an order of the county court which had never been set aside and never appealed from, they could only have done so on being satisfied as to certain matters of fact. There is not a particle of evidence here that they were satisfied that these parties were not duly married. The point was never in issue before them. Nobody seems to have argued the question whether or not the marriage was valid. It is a mistake to suppose that because one of the parties comes along and says: "I am not married to this man who is supposed to be my husband," the justices are bound to believe it. It is clear that if, which I do not believe was the case, the justices did direct their minds to the question of the validity of the alleged marriage, they came to their decision on the footing that they found the marriage to be a valid one. I think myself the more probable view is that the justices took what, in my opinion, is the correct view, *viz.*, that they had no jurisdiction to disregard the order of the county court judge so long as that order stood.

To return to the judgment of VAISEY, J., he treated the matter as a sort of estoppel on the lines that the plaintiff, having asserted facts which would have deprived the county court judge of jurisdiction, could not thereafter ask from the justices an order based on the county court order which, on her statement, would have been made without jurisdiction. With respect, I do not think that is the proper way of approaching this question. As I have said, the most important effect of an adoption order is the consequence it has on the status of the infant. If an order cannot be made without the presence of the infant properly represented by a guardian *ad litem*, that order, in my opinion, cannot be revoked or disregarded (if, indeed, there be a court competent to disregard it) in the absence of the infant. It would be most extraordinary if the important matter of changing an infant's status by an adoption order were safeguarded by the legislature while the reverse process of depriving the infant of the benefits of that adoption, if, indeed, such a process is competent, could be carried out without any safeguard for the infant and in his absence. It is to be observed that the result of what VAISEY, J., has held is that, in her absence, the infant has been deprived of the important benefits of the status conferred by the Act and the adoption order without ever being heard. The sum of 10*s.* 0*d.* a week for her maintenance has been ordered on the basis that the adoption was a valid adoption. If it were a valid adoption, the infant is entitled under the Act to the benefit of that 10*s.* 0*s.* According to VAISEY, J.'s view of the case, that benefit could be taken away from her without her ever being heard.

Counsel for the defendant suggested the case could be treated in the same way as the case of an ordinary bigamous marriage, with a consequential result on the status of the adopted child similar to that which takes place when a bigamous marriage is held by the court to be no marriage. It seems to me that there is all the difference in the world. Natural children are natural children, and they are entitled to whatever right the law confers on them at their birth. The adoption of children is a very different thing. It is not concerned with the natural consequences of a ceremony of marriage. It is concerned with an order of a court which has the effect of taking away from the infant whatever legal benefits nature conferred on it and transferring all obligations towards it to adopting parents, who, by nature, have no obligations towards it at all. The two cases are not in *pari materia*. It is not for us to consider here by what procedure, if any, the adoption order could be got rid of on the ground that it was made without jurisdiction, if, in fact, it was made without jurisdiction. It may be that the only remedy is *certiorari*. It may be that either of the petitioners or the infant could get leave to appeal to this court out of time, if they were out of time. I do not know, and I do not stop to consider. One thing, however, is clear, and that is that, if there be any appropriate proceedings as the result of which the order can be either set aside or lawfully disregarded by another court, that can be done only in the presence of the infant, who was a party to the making of the order and must be a party to any proceedings taken to set it aside. If there be a competent method of getting rid of such an order on the ground of lack of jurisdiction, or if that question be raised before some court competent to deal with it, many matters—matters of some difficulty, I venture to think—would fall to be discussed. At the outset it is, I think, by no means certain that the statutory directions, if not adhered to by the county court judge, would necessarily have the result of making the order void or voidable. It might very well be thought by the legislature that, in dealing with questions of status, an order should remain a valid order when it has been made after proper investigations, notwithstanding that later on it is found that there was no jurisdiction to make it. This adoption order is not like a judgment for damages or anything of that kind. Status is a serious and important thing and it might well be thought to be more consistent with public policy that, once a status is purported to be changed, changed it should remain. However, I am not expressing any opinion. I am merely pointing out that it is by no means certain that the court would hold the order to be void or voidable on the ground of lack of jurisdiction.

However that may be, and assuming that the order can be challenged by appropriate process, it was not competent, in my opinion, for the justices to challenge it. I know of no statute or rule of law by which the justices would be competent to disregard this order of the county court. The jurisdiction of the county court under this Act is a jurisdiction parallel with that of the High Court. Supposing the High Court had made an adoption order as the result of an allegation of marriage which was subsequently said to be untrue. Could a bench of justices say that the High Court had no jurisdiction to make that order and disregard it? If the county court, without jurisdiction, makes an order, I cannot see that the justices have any greater power to disregard it so long as the order remains undisturbed. Counsel for the defendant, quite rightly, said that in an ordinary case of bigamy any court before whom the question is relevant can decide subsequently on the evidence before it that the marriage was invalid. The advantage of getting a decree of nullity from a Divorce Court is that it binds all the world. A judgment finding as a fact that a particular marriage did not validly take place in an action *inter partes* does not bind all the world and it may be that in another case where the same issue arose another court might come to a different conclusion. Counsel for the defendant says that where the issue of the validity of an ordinary marriage comes up any court is entitled to investigate it if it is relevant. That, no doubt, is true, but what the court is pronouncing on then is the effect of what purports to be a ceremony of marriage. What the court would be pronouncing on if counsel is right in this case would be the validity of an order of the court, which is a very different thing. To conclude, I cannot see how the order of the county court in the present case could have been disregarded by the justices, and I think, with all respect to VAISEY, J., the way he treated it is inadmissible owing, if for no other reason, to the fact that he took the view that the justices ought to have disregarded the order in view of the assertion, in the absence of the infant, of one of the adopting parents that the marriage, on the basis of which they obtained the adoption order, was never a marriage at all. In my opinion, the appeal must be allowed.

SOMERVELL, L.J.: I agree that the justices had jurisdiction to make the order which they did make, *viz.*, an order on the basis that the adoption order was valid. The foundation of the submission of counsel for the defendant is that under the terms of s. 1 (3) of the Adoption of Children Act, 1926, where an order is made on the basis that the two persons asking for it are spouses and it subsequently turns out that they are not spouses, the order is invalid without any further declaration by any competent court and can, or must be, disregarded by any court in which those facts are proved. I think, if one considers this Act as a whole, there is an argument on which I do not desire to express an opinion as I have not formed one, that, notwithstanding those circumstances, the order originally made on the basis that the two were spouses will remain an effective order of which the adopted infant can take advantage and under which he or she can maintain his or her rights. Putting it in another way, a man who has induced the court by false representation to give him the right and impose on him the obligations which he has under the statute cannot thereafter, possibly to the detriment of the infant adopted, say: "I told you what was untrue and, therefore, this order is invalid." In my opinion, counsel for the defendant fails also on another point, because clearly, if he is right, the fact that these parties were not spouses would have to be proved. It could not be admitted as common ground. It seems to me clear from the notes which we have that it was not proved before the justices. Even if—and this is, perhaps more important—it had been proved before the justices. I take the view that an order of this kind is one which courts must treat as valid unless it is set aside by appropriate procedure. It may be that an order of this kind cannot be set aside. There does not seem to be any machinery laid down by the Act for setting it aside or declaring it to be invalid. This, in my view, is a valid order and must be regarded as such until proceedings are taken, if they can be taken, and succeed, expressly directed to set it aside or getting some declaration as to its invalidity. I am also of opinion that, if such proceedings are available, say, to the defendant in this case, then they are proceedings to which the adopted infant must be a party. For these reasons I think this appeal must be allowed. In my opinion, the learned judge was wrong, for the reasons which have been given by the MASTER OF THE ROLLS, and the decision of the justices must be restored.

JENKINS, J.: I also agree.

Appeal allowed with costs in Court of Appeal and below.

Solicitors: *H. W. Pegden & Co.* (for the plaintiff); *Nash & Co.* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Applied. DIXON *v.* TOMMIS. [1952] 1 All E.R. 725.

BROWN *v.* BRASH.

Dicta of ASQUITH, L.J., at p. 9 *applied.* THOMPSON *v.* WARD. [19 1 All E.R. 1169.

[COURT OF APPEAL (Scott, Bucknill and Asquith, I May 4, 1948.]

Rent Restriction—Statutory tenancy—Forfeiture—"Non-occupying tenant"—"Animus possidendi"—"Corpus possessionis"—Tenant serving term of imprisonment.

A "non-occupying" tenant *prima facie* forfeits his status as a statutory tenant under the Rent Restrictions Acts, but that term does not cover A every tenant who, for however short a time, or however necessary a purpose, or with whatever intention as regards returning, absents himself from the demised premises. Absence may, however, be sufficiently prolonged or unintermittent to compel the inference, *prima facie*, of a cesser of possession or occupation. The question is one of fact and of degree. Where the absence is sufficiently long to have this effect the onus is then B on the tenant to repel the presumption that his possession has ceased, and in order to do so he must at all events establish a *de facto* intention to return, but, neither in principle nor on the authorities, is that enough. If it were, the spirit and policy of the Acts would be frustrated. The authorities suggest that the effect of such an absence may be averted if the tenant clothes his inward intention with some formal, outward and visible sign of it, *i.e.*, instals a caretaker or representative with the status C of a licensee and with the function of preserving the premises for his ultimate home-coming, or leaves furniture on the premises as symbols of continued occupation. Apart from authority, in principle possession in fact requires not merely an "*animus possidendi*" but also a "*corpus possessionis*," *viz.*, some visible state of affairs in which the *animus possidendi* finds expression. If, however, the caretaker or the furniture be removed from the premises otherwise than quite temporarily, the D protection ceases, whether the tenant wills or desires such removal or not. A tenant serving a term of imprisonment cannot rely on the fact of his imprisonment as preventing him from taking steps to assert possession by visible action so as to be in a better position than if his absence and inaction had been voluntary.

The contractual tenancy of a dwelling-house was determined by notice E to quit expiring on Dec. 25, 1945, and thereafter the tenant became a statutory tenant under the Rent Restrictions Acts. On Sept. 20, 1945, the tenant was sent to prison to serve a sentence of two years. He left in occupation of the premises his mistress and their two children. On Mar. 9, 1946, the mistress left, taking with her a substantial quantity of the furniture. On Sept. 12, 1946, the tenant successfully resisted a claim for possession brought by the landlords' predecessors in title. Between F September and December, 1946, relatives of the tenant cleaned the premises two or three times a week for two or three hours at a time. On Dec. 9, 1946, the landlords' predecessors in title sold the premises to the landlords and shortly before the tenant's release from prison on Jan. 25, 1947, one of the landlords entered into possession of the premises. In an action by the tenant claiming possession and damages for trespass, in which the landlords counterclaimed for possession:— G

HELD: the tenant ceased to possess the premises or to enjoy the protection of the Rent Restrictions Acts when his mistress and the children left on Mar. 9, 1946; nothing which happened after that date could restore his possession or statutory status; and, therefore, the landlords were entitled to possession.

[AS TO STATUTORY TENANCIES, see HALSBURY, Hailsham Edn., Vol. 20, pp. H 334, 335, paras. 400, 401; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. *7226-7255*.]

Cases referred to:

(1) *Keeves* v. *Dean*, *Nunn* v. *Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 31 Digest 576, *7254*.

(2) *Haskins* v. *Lewis*, [1931] 2 K.B. 1; 100 L.J.K.B. 180; 144 L.T. 378; 95 J.P. 57; Digest Supp.

(3) *Skinner* v. *Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; Digest Supp.

(4) *Brown* v. *Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309; 113 L.J.K.B. 196; 170 L.T. 144; 2nd Digest Supp.
(5) *Newlands Bros. & Mumford* (a firm) v. *Radford*, (1944), Estates Gazette, vol. 1, p. 227.

APPEAL by the landlords from an order of His Honour JUDGE TUCKER, made at Hanley and Stoke-upon-Trent County Court, and dated July 25, 1947, granting to the tenant possession of premises and damages for trespass and A rejecting the landlords' counterclaim for possession. The appeal was allowed. The facts appear in the judgment of the court delivered by ASQUITH, L.J.

Vaughan, K.C., and *Smallwood* for the landlords.

Lloyd-Jones for the tenant.

Cur. adv. vult.

May 4. **ASQUITH, L.J.**, read the following judgment of the court. This is an appeal by the landlords from a decision of the county court judge B for Hanley and Stoke-upon-Trent whereby he upheld the tenant's claim to possession of certain premises and awarded him £100 damages for trespass, and from so much of his decision on the landlords' counterclaim as rejected the landlords' claim to possession of such premises. There is no cross-appeal as regards that part of the judgment which awards the landlords £40 damages on the counterclaim.

C The facts are mostly not in dispute. The premises in question are known as Roadhouse Cafe, Blythe Bridge, Staffs. They consist of a dwelling-house, cafe, and petrol pump station. In 1941 one Cooper was the freeholder and he let to the tenant on a quarterly tenancy at a quarterly rent of £26. The tenancy was an oral one. Cooper, in practice, performed the outside repairs. In August, 1945, Cooper served three months' notice to quit on the tenant, expiring Christmas Day, 1945, and it is not disputed that the tenant then D became a statutory tenant. How long he remained one is the main point in the appeal. Shortly after the notice to quit had been served, *viz.*, on Sept. 20, 1945, the tenant was sent to prison to serve a sentence of two years for stealing 6 tons of tea. On Jan. 11, 1946, Cooper sold the freehold to someone called Metters and two brothers called Plant. The tenant, when he went to gaol, left in physical occupation of the premises a Miss Mould—his mistress for seven years past—and two illegitimate children he had had by her. It is E reasonably plain that the tenant intended her to remain to maintain his home and carry on the petrol pump business, the cafe business being inhibited by his conviction. Miss Mould decamped in March, 1946, taking with her some part of a substantial quantity of furniture left on the premises by the tenant, and dropping the two children on the tenant's mother. Messrs. Metters and Plant, in July, 1946, brought an action against the tenant for possession on the ground that he had abandoned possession and on other grounds. On F Sept. 12, 1946, this action was heard and judgment given for the tenant. The learned county court judge in these proceedings was the same who tried the present action, and he based his decision on findings that the tenant had not abandoned possession and that, although he had failed in some of his obligations under the tenancy, it was not reasonable to make an order for possession against him. Between September and late December, 1946, a Mr. and Mrs. G Mulholland, relations of the tenant, came and did some cleaning on the premises two or three times a week for two or three hours each time. On Dec. 9, 1946, Messrs. Metters and Plant sold the freehold to the present landlords under a contract which provided that the purchasers might at their own risk (this means as regards any claim the tenant might assert) take immediate possession on paying a deposit of £500. On Jan. 25, 1947, the tenant was released from prison and sought to re-possess himself of the premises, but some days before-H hand, Brash, one of the landlords, had entered. He refused to leave and has remained in possession ever since. On Apr. 14, 1947, the tenant brought an action in the county court for possession and damages for trespass, with the results already described.

The landlords now rely on only two of the points set out in the notice of appeal. (i) The first is that from and after Mar. 9, 1946, when Miss Mould left, the tenant had, as a legal result of her action, abandoned possession of the premises and was no longer a statutory tenant. His contractual tenancy having terminated at Christmas, 1945, he no longer had any rights at common law after that date, while the statutory tenancy which then succeeded his contractual one had, it was contended, ended in March, 1946. Hence he had no right to possession or to sue for a trespass in January, 1947, the material time. This point relates to the claim in the action. (ii) The second, and only other, point relates to the counterclaim, and only arises if, contrary to the landlords' first contention, the tenant still enjoys the protection of the Rent Restrictions Acts. It is that in considering and rejecting the landlords' counterclaim for possession (a counterclaim anomalous in form since Brash was and is still actually in physical possession) the county court judge did not take A into account the relevant factors bearing on "relative hardship" (presumably under para. (*h*) of sched. I to the Act of 1933) and the reasonableness of making an order.

We will consider these points in turn. In support of his first point counsel for the landlords prayed in aid a number of cases which decide that the protection of the Acts is personal to the occupier and ceases when he B ceases to be in occupation. Thus, in *Keeves* v. *Dean* (1) it was decided by the Court of Appeal that a statutory tenancy is not assignable because it is not an estate or interest in the premises but merely a right enjoyed by some individual in possession not to be dispossessed, a right which would cease if he ceased to be in possession. In *Haskins* v. *Lewis* (2) a tenant moved out of premises, partly business and partly residential, and sub-let the whole of the residential part to two sub-tenants. The Court of Appeal held he had thereby C ceased to be a statutory tenant. In a well-known passage in his judgment, SCRUTTON, L.J., said ([1931] 2 K.B. 1, 13):

> One thing is quite certain, the original tenant is not residing in those floors; his sub-tenants are residing there. The consequence is that you have this position, that the original tenant is not occupying any part of the original tenancy, the original dwelling-house, so as to make him a tenant under the Act; he is not occupying the ground floor and the first floor as a residence, he is occupying them for business pur- D poses; he is not occupying the attic and the basement as a residence, those portions of the house are being occupied by the sub-tenants, he is therefore not in personal occupation of any dwelling-house. That being so, he appears to me to come within the fundamental principle of the Act that it is to protect a resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house, but is making money by sub-letting it.

Earlier in his judgment he had pointed out that the provisions of the Acts, E while in the main emphasising the personal and non-transferable character of the privileges conferred on a statutory tenant as such, are occasionally coloured by the opposite conception—witness the provision whereby a tenant is treated as including a member of his family residing in the house on the death of the tenant intestate. In *Skinner* v. *Geary* (3) recognition is given to the principle that a statutory tenant, by absenting himself from the premises even for prolonged periods, does not necessarily cease to be in possession so F as to forfeit his status as such. SCRUTTON, L.J., gives as an instance ([1931] 2 K.B. 546, 558): "a tenant who spends week-ends in a house, or a sea captain who is absent for months, it may be, but, in fact, returns between his voyages to the house and has his wife and family living there while he is away." It is true that the court held that this rule (or exception from the main rule) did not apply to the facts of that case, since the tenant absented G himself (unlike the sea captain in the illustration) without any *animus revertendi*, and, although he permitted certain of his relations to remain in physical occupation, the purpose of this occupation was not to preserve the house for his residence when he returned.

Counsel for the landlords relied on this case as by implication deciding that it is only where two separate and distinct conditions are fulfilled that a non-occupying tenant can continue to enjoy the protection of the Acts: (i) There H must be on his part an intention to return. (ii) There must be meanwhile a vicarious occupation by some token holder on his behalf to keep the place warm for him against the time of his intended return, or, perhaps, a symbolic occupation by chattels left to evidence that intention, and that, so soon as these conditions (i) and (ii) ceased to obtain and concur, the tenant ceased to be a statutory tenant. On the facts of this case he conceded that there was a continuous *de facto* intention to return on the part of the tenant, but he complained that the judge had wrongly thought this circumstance in itself conclusive. The second condition was equally essential, and after Miss Mould and the children left the premises in March, 1946, it was unsatisfied. Counsel for the landlords also referred to *Brown* v. *Draper* (4) which uses language suggesting that leaving furniture on the premises may have the same effect as leaving a licensee on them, and that the removal of the furniture may have the same effect as the removal of the licensee. Counsel claimed that the result of applying these principles to the present case was that the tenant's protection extended by the presence of Miss Mould and the furniture on the premises till Mar. 9, 1946, ended with her removal along with what he contended was the great bulk of the domestic furniture on that date. (There was no finding as to the amount left behind, but the uncontradicted evidence of the Mulhollands was, he argued, that only three pieces of domestic furniture were there when they intervened in September, 1946).

The argument on behalf of the tenant can be summarised more briefly. Counsel's main propositions were : (i) That clear proof of a persisting intention to return on the part of the absent tenant was the paramount, indeed the only, condition necessary to the continued enjoyment of the protection of the Acts. It was not further necessary to prove that a licensee or caretaker or furniture was left on the premises, and these matters were only relevant as evidence of the intention to return. We may observe at this point that the learned county court judge seems, in fact, to have acted on the view that a proved intention to return, without more, was decisive. (ii) That *Brown* v. *Draper* (4) decides that a statutory tenant can only lose his status and privileges as such in two ways, by a voluntary surrender of possession on his own part, or by an order of the court for possession made against him. Here there was no order of the court made against the tenant and there was no evidence that Miss Mould's removal (with part of the furniture) was his voluntary act or in any way caused or prompted by him. Counsel argued that the onus of proving that was on the landlords and had not been discharged. He also cited *Newlands Bros. & Mumford* v. *Radford* (5) in which the Court of Appeal had decided that a temporary removal by a tenant from a London House during the " blitz," there being on his part an intention to return so soon as the war was over, did not divest him of the protection of the Acts. It should be noticed, however, on the facts of this case that other members of the tenant's family continued to have their meals at the London premises. The facts of the present case disclose a situation clearly not foreseen or provided for by the Acts. Anomalous consequences result whether we adopt the principle contended for by the landlords or that contended for by the tenant. If the landlords' argument is accepted, the tenant must be taken, as at Mar. 9, 1946, simultaneously to intend to return and to be abandoning possession, and the latter, through the act on that date of some one, Miss Mould, who, so far as the evidence goes, was not authorised by the tenant to do that act. If the tenant's contention is accepted, then it would apply equally if the tenant had been sent to gaol (or had gone away) for 10 or 15 years, leaving no licensee or furniture, provided he intended to return at the end of that period, a result contrary to the clear policy of the Act which is to keep a roof over the tenant's or someone's head, not over an unoccupied shell, and to economise rather than sterilise housing accommodation.

We are of opinion that a " non-occupying " tenant *prima facie* forfeits his status as a statutory tenant. But what is meant by " non-occupying " ? The term clearly cannot cover every tenant who for however short a time, or however necessary a purpose, or with whatever intention as regards returning, absents himself from the demised premises. To retain possession or occupation for the purpose of retaining protection the tenant cannot be compelled to spend 24 hours in all weathers under his own roof for 365 days in the year. Clearly, for instance, the tenant of a London house, who spends his week-ends in the country, or his long vacation in Scotland, does not necessarily cease to be in occupation. Nevertheless, absence may be sufficiently prolonged or unintermittent to compel the inference, *prima facie*, of a cesser of possession or occupation. The question is one of fact and of degree. Assume an absence sufficiently prolonged to have this effect. The legal result seems to us to be as follows :—(1) The onus is then on the tenant to repel the presumption that his possession has ceased. (2) To repel it he must, at all events, establish a *de facto* intention on his part to return after his absence. (3) But we are of opinion that neither in principle nor on the authorities can this be enough. To suppose that he can absent himself for 5 or 10 years or more and retain possession and his protected status simply by proving an inward intention to return after so protracted an absence would be to frustrate the spirit and policy of the Acts as affirmed in *Keeves* v. *Dean* (1) and *Skinner* v. *Geary* (3). (4) Notwithstanding an absence so protracted the authorities suggest that its effect may be averted if he couples and clothes his inward intention with some formal, outward, and visible sign of it, *i.e.*, instals in the premises some caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his own ultimate homecoming. There will then, at all events, be someone to profit by the housing accommodation involved which will not stand empty. It may be that the same result can be secured by leaving on the premises, as deliberate symbols of continued occupation, furniture, though we are not clear that this was necessary to the decision in *Brown* v. *Draper* (4). Apart from authority, in principle possession in fact (for it is with possession in fact and not with possession in law that we are here concerned) requires not merely an "*animus possidendi*" but a "*corpus possessionis*," *viz.*, some visible state of affairs in which the *animus possidendi* finds expression. (5) If the caretaker (to use that term for short) or the furniture be removed from the premises otherwise than quite temporarily, we are of opinion that the protection, artificially prolonged by their presence, ceases, whether the tenant wills or desires such removal or not. A man's possession of a wild bird, which he keeps in a cage, ceases if it escapes, notwithstanding that his desire to retain possession of it continues and that its escape is contrary thereto. We do not think in this connection that it is open to the tenant to rely on the fact of his imprisonment as preventing him from taking steps to assert possession by visible action. The tenant, it is true, had not intended to go to prison. He committed intentionally the felonious act which in the events which have happened landed him there, and thereby put it out of his power to assert possession by visible acts after Mar. 9, 1946. He cannot, in these circumstances, we feel, be in a better position than if his absence and inaction had been voluntary.

Applying these general propositions to the facts of the present case, we hold that the tenant ceased to possess the premises or to enjoy the protection of the Acts when Miss Mould and the children left in March, 1946, and that nothing which happened after this date (*e.g.*, his resistance to the Metters and Plant action brought in July, 1946, or the visits of the Mulhollands starting in September of that year) could restore his possession or statutory status. As regards the three items of domestic furniture which on the evidence Miss Mould left behind (apart from questions of *de minimis*) there is no evidence that either the tenant or Miss Mould, or, indeed, anyone intended these to remain on the premises as symbols of continued possession by the tenant. Nor was it either pleaded or argued that the judgment of the county court judge in the previous proceedings (amounting to a decision in September that the tenant had not abandoned possession) was *res judicata* or created an estoppel in the present case. From March, 1946, on, in our view, the tenant lost the protection of the Acts and with it his only rights in respect of the premises. The order for possession and the award of damages for trespass in his favour cannot stand. As regards the counterclaim, the landlords in substance succeed. It is true that their claim for an order for possession of premises of which they are already in physical occupation is anomalous, but the question in substance is which of these parties is entitled in law to possession, and it follows from our decision on the claim that on this issue the landlords prevail. Questions of relative hardship and the reasonableness of making an order for possession by the landlords cannot arise where the tenant by abandoning possession has entirely removed himself from the protective orbit of the Acts. The appeal must be allowed with costs here and below.

Appeal allowed with costs in both courts.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *F. S. Hawthorn & Son*, Uttoxeter (for the landlords); *Simmonds, Church Rackham & Co.*, agents for *McKnight & Ryder*, Hanley (for the tenant).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

idered. CUSTOMS AND EXCISE
s. v. INGRAM. [1949] 1 All E.R.

COMMISSIONERS OF CUSTOMS AND EXCISE *v.* INGRAM AND OTHERS.

[COURT OF APPEAL (Lord Goddard, C.J., Tucker and Evershed, L.JJ.), May 3, 4, 1948.]

Purchase Tax—Discovery—Summary application to High Court—Power to order production of "records and documents"—Incrimination of taxpayer—Order where defendant not a "registered person"—Finance Act, 1946 (c. 64), *s.* 20 (2), (3)—*Crown Proceedings Act,* 1947 (*c.* 44), *s.* 14 (2) (*d*).

The Crown Proceedings Act, 1947, s. 14, provides: "(2) Subject to and in accordance with rules of court, the Crown may apply in a summary manner to the High Court . . . (*d*) for the delivery of any accounts, the production of any books, or the furnishing of any information, required to be delivered, produced or furnished under the enactments relating to purchase tax." In connection with the levying of purchase tax, the Commissioners of Customs and Excise issued summonses under s. 14 for orders to the defendants "to produce pursuant to the Finance Act, 1946, s. 20, all their books, accounts, records and documents in connection with any business carried on by them" at a given address.

HELD: (i) it was within the power of the court under s. 14 to order the production of accounts and books, but, while the word "accounts" therein extended to sales and purchase invoices, it did not extend to "records and documents," and in proceedings under s. 14 the court could not order their production.

(ii) it was no defence to a claim for the production of the accounts and books that such production would incriminate the defendant because the whole purpose of ordering production was to facilitate investigation to prevent the defrauding of the Revenue and knowledge of his position with regard to payment of the tax was specially within the knowledge of the defendant.

(iii) the form of the order was not affected by the fact that one of the defendants was not registered for the purposes of purchase tax, because under s. 20 (3) of the Act of 1946 "every person concerned with the purchase or importation of goods" could be required to produce his books and accounts, and it was sufficient under R.S.C., Ord. 54M (which was not *ultra vires*), that the affidavit in support of the summons showed that the defendant was a wholesale merchant selling chargeable goods.

[FOR THE CROWN PROCEEDINGS ACT, 1947, s. 14, see BUTTERWORTH'S ANNOTATED LEGISLATION SERVICE, Statutes Supplement No. 47, p. 75.]

APPEALS by the defendants from orders of DENNING, J., in chambers, dated Mar. 4, 1948, upholding orders of MASTER BAKER, ordering the defendants "to produce pursuant to the Finance Act, 1946, s. 20, all their books, accounts, records and documents in connection with any business carried on by them at" certain addresses. The Court of Appeal held that the orders should be varied by the insertion of the word "and" between "books" and "accounts," the deletion of "records and documents," and, after the word "accounts," the addition of "both purchase and sales invoices." The facts appear in the judgment of LORD GODDARD, C.J.

Gallop, K.C., and *A. L. Gordon* for the defendants, Ingram & Angel Warehouse Co., Ltd.

Gallop, K.C., and *Gillis* for the defendant, Buck.

H. L. Parker for the Commissioners of Customs and Excise.

LORD GODDARD, C.J.: This is an appeal from orders of DENNING, J., in chambers upholding orders made by MASTER BAKER on summonses taken out by the Commissioners of Customs and Excise against the Angel Warehouse Company, Ltd., in one case, a person named Ingram in another, and, in a third, against Terence George Buck. I will deal first with the two summonses in regard to the Angel Warehouse Co. and Ingram, because there is no difference between those two cases. There is a small difference in the case of Buck.

The summonses, which were taken out under the Crown Proceedings Act, 1947, s. 14, asked for orders against the defendants "to produce pursuant to the Finance Act, 1946, s. 20, all their books, accounts, records and documents in connection with any business carried on by them at," giving certain addresses. The matter arises out of the provisions of the statutes which deal with purchase tax. Purchase tax was first imposed by the Finance (No. 2) Act, 1940, and that Act, by s. 33, provided:

> (1) The commissioners may make regulations . . . (*h*) for requiring any persons concerned with the purchase or importation of goods or dealings with imported goods to furnish to the commissioners within such time and in such form as they may require such information relating to the goods or to the purchase or importation thereof or dealings therewith as they may specify, and to produce for inspection any books or accounts or other documents of whatever nature relating thereto. A

A penalty was provided for failure to produce. Under that section certain regulations were made in 1945, called Purchase Tax Regulations (S.R. & O., 1945, No. 517) and those regulations are still in force although s. 33 (1) (*h*) of the Act of 1940 has been repealed and replaced. Regulation 9 provides: B

> Every registered person shall keep full and true accounts, entered up to date, of all purchases made from or by him and of any appropriations or applications such as are mentioned in s. 25 of the Act made by him, containing such particulars in such form as the commissioners may generally or in any particular case approve or require including a purchase tax account showing the amounts of tax for which he is accountable and shall retain such accounts together with all purchase invoices, copy sales invoices and all other documents whatsoever relating to such purchases, appropriations C and applications as aforesaid for a period of not less than two years from the last date to which such accounts, invoices and documents refer.

Both the defendants in the two cases with which I am now dealing are "registered persons"—registered, that is to say, under the provisions of the Acts which deal with purchase tax.

The Finance Act, 1946, s. 20, provides:

> D (2) Every person who is required to be registered shall keep such records and accounts in such form, and shall preserve them for such period, as the commissioners may require, and shall produce them for inspection by any officer or other person authorised in that behalf by the commissioners, at such time and at such place as that officer or person may require. (3) Every person concerned with the purchase or importation of goods or with the application to goods of any process of manufacture or with dealings with imported goods shall furnish to the commissioners within such time and in such form as they may require information relating to the goods or to the purchase or E importation thereof or to the application of any process of manufacture thereto or to dealings therewith as they may specify, and shall, upon demand made by any officer or other person authorised in that behalf by the commissioners, produce any books or accounts or other documents of whatever nature relating thereto for inspection by that officer or person at such time and place as that officer or person may require.

In this Act as, indeed, by a previous Act, the penalties for non-production have been considerably increased. It was, no doubt, found that some persons were F minded to evade purchase tax or to reduce the amount of purchase tax for which they were liable if they could and preferred to pay a penalty rather than produce their books. It was, no doubt, for that reason that the Crown Proceedings Act, 1947, s. 14, provided for a summary method by application to the High Court for an order compelling people to produce the accounts and books and so forth.

G The only difficulty that has arisen is the question whether or not, where the commissioners apply for a summary order under s. 14, the court may make an order in as wide terms as DENNING, J., has made in this case, covering not only the production of books and accounts, but also records and documents. Those are matters which are mentioned in the sections to which I have referred in the Finance Act, but by the Crown Proceedings Act, 1947, s. 14, it is provided:

> (2) Subject to and in accordance with rules of court, the Crown may apply in a H summary manner to the High Court . . . (*d*) for the delivery of any accounts, the production of any books, or the furnishing of any information, required to be delivered, produced or furnished under the enactments relating to purchase tax.

If the commissioners take advantage of that section and adopt this summary method of obtaining these books, it seems to me that the court is limited to that which the section provides in ordering this summary remedy. Whether there is any other remedy we need not consider, but if the commissioners apply for this summary remedy in any particular case, we must see that the court does not go beyond that which it is given power to do under the section. At the same time, one does not want to stultify the order by attributing some narrow meaning to the words that are used.

The first thing which calls for consideration is the phrase in s. 14 (2) of the Act of 1947 : " . . . the delivery of any accounts . . . required to be delivered, produced or furnished under the enactments relating to purchase tax." It seems to me that, having regard to the Finance Act, 1946, s. 20 (3), which refers to
A the production of " any books or accounts or other documents of whatever nature relating thereto," and so on, the " delivery of any accounts . . . . required to be delivered, produced or furnished " must mean the production of accounts. They must produce any accounts and books which they have, and I think, therefore, that it was quite within the power of the learned judge to order that books and accounts should be produced.

The question that has been very much debated in this case is what is included
B in the word " accounts." The court think that it is desirable to make it clear what, in their opinion, is included in the word " accounts," and, indeed, to put it in the order. It seems to me that the word " accounts " must include invoices, whether sales invoices or purchase invoices, that is to say, invoices for goods supplied to the subject who is liable for purchase tax and invoices made out by him for sales which he makes. One of the material things that must be capable of being checked is purchases to enable the checking of sales, and,
C therefore, it seems to me that, in ordering production of accounts, one should include an order for the production of the invoices which may relate to these accounts or, at any rate, invoices relating to the subject's purchases and sales, because invoices are, in my opinion, accounts. I cannot find power under s. 14, which, as I say, produces a new and summary remedy, to order the production of records and documents. Whether it was intended or not may be open to
D question. It looks to me very much as though the draftsman of s. 14 has omitted to follow, probably accidently, the wording of sub-s. (3) of s. 20 of the Act of 1946, and it would be a very easy thing in any Act which may be contemplated to amend those words and give a wider power to the courts than they have at present with regard to the production of documents. It seems to me that at present the court must expunge from the order which DENNING, J., made the words " records and documents," but we shall make it clear in our
E order that " accounts " includes both invoices of goods sold and invoices of goods purchased.

The only other matter which, I think, I need deal with is the point which counsel for the defendants has argued, that the court would not order the production of documents which may incriminate the subject. In my opinion, one cannot make any such limitation here. The very object of the Finance Act, 1946, in the sections which relate to this matter, is to give to the Crown
F the power of investigating a person's accounts and so forth to see whether he is defrauding the Revenue by not paying that which he ought to pay. To my mind, no new principle here is introduced into the law. It is said that this is compelling a man to incriminate himself or putting an onus on a man to show that he has not been committing an offence, but, it is quite a commonplace of legislation designed to protect the revenue of the Crown, as it is realised
G that all the information must generally be within the knowledge of the taxpayer or the subject, to put an onus on him or to oblige him to do certain things which may have the effect of incriminating him. During the course of the argument I suggested a comparison with the procedure under the Customs Consolidation Act, 1876, which enables the customs to seize any goods if they are goods of a dutiable character and to call on the subject to show that he has paid duty on them. He can show whether he has paid duty or not, and,
H therefore, the onus is put on him. Here, it is not a question so much of onus. It is said that when a man is called on under s. 20 to produce his documents, his books, invoices or accounts, or whatever they may be, he is entitled to take objection and say : " I will not produce this one or that one because it may incriminate me." It seems to me that that would be stultifying the whole purpose of the section, and the claim for privilege, which, as between subject and subject in an action, may be made, has no application to this class of discovery or production. I do not think that any claim to privilege can be made, but I think that the order which the learned judge has made must

be varied by omitting the words " records and documents," because I cannot find any warrant in s. 14 for including those words. After the word " accounts," so that there may be no doubt as to what this court means, there will be included " both purchase and sales invoices."

With regard to Terence George Buck, the only difference in his case is that he has not been registered under the provisions relating to purchase tax although the Crown say he ought to have been registered. I do not think that any difference will be made in his case in the form of the order because, under s. 20 (3) of the Act of 1946, it is not only a registered person who can be required to produce his documents. It is " every person concerned with the purchase or importation of goods," and here there is an affidavit which swears that Buck is a merchant and a person concerned with the purchase of goods. In these circumstances it seems to me that he comes within the clear words of the section. Counsel for the defendants did say that the affidavit was not sufficient, but regard must be had to the new Ord. 54M of the Rules of the Supreme Court which reads :

> 4. Upon any such application an affidavit by a duly authorised officer of the department concerned setting out the state of facts upon which the application is based and stating that he had reason for thinking that such facts exist shall be *prima facie* evidence of such facts.

I am not sure whether counsel contended that that is *ultra vires*. I do not think it is *ultra vires*. It comes within the rule-making power and it also, in my opinion, is enough if the officer who makes the affidavit shows that the person against whom he applies is a person carrying on the business of an importer or of a dealer in and purchaser of goods. In Buck's case, he swears he is a wholesale merchant or manufacturer whose business includes the selling of chargeable goods, and, if he is a person selling chargeable goods and a wholesale merchant, then he is liable to make these returns, and to make a *prima facie* case the officer need not go on to show that the defendant has sold any particular chargeable goods and not accounted for purchase tax thereon. Section 20 (3) indicates the alternatives :

> Every person concerned with the purchase or importation of goods or with the application to goods of any process of manufacture or with dealings with imported goods . . .

It is sufficient to swear that he is a person who comes within one of the categories with which that sub-section is concerned. On this summons I think the order against Buck was properly made, subject to the variation which I have said should be made in it.

TUCKER, L.J. : I agree that the word " accounts " in the Crown Proceedings Act, 1947, s. 14 (2) (*d*), includes invoices. I also agree that it is not permissible for the purposes of an order made under that paragraph to incorporate into it all the language contained in the Finance Act, 1946, s. 20 (3). Counsel for the Commissioners of Customs and Excise has argued that s. 14 of the Crown Proceedings Act, 1947, would for present purposes be of no value unless the words were given that wide interpretation, and he said that para. (*d*) ought to be so widely interpreted that the word " accounts " would include " other documents of whatever nature relating thereto." I find it impossible to accept that argument because I think the legislature has shown throughout in dealing with this question of purchase tax that it realised that the commissioners were faced with difficulties in these matters at every stage and that it was necessary to give them very wide powers, and, accordingly, the Act of 1940, in s. 33 (1) (*h*), provided in terms that regulations might be made " requiring any persons concerned with the purchase or importation of goods or dealings with imported goods to furnish to the commissioners," certain information, " and to produce for inspection any books or accounts or other documents of whatever nature relating thereto." That is the first indication of a realisation that books of accounts would not by themselves be sufficient. The matter was carried a stage further in the regulations of 1945, in reg. 9 of which the words " all purchase invoices, copy sales invoices and all other documents whatsoever " are introduced. In s. 20 (3) of the Act of 1946 the words are " produce any books or accounts or other documents of whatever nature relating thereto." Finally, in the Act of 1947, the words are limited to

> . . . any accounts, the production of any books, or the furnishing of any information, required to be delivered, produced or furnished under the enactments relating to purchase tax.

I do not find it possible to read the wider words into that provision having regard to the language which had been previously used. For these reasons I agree that the orders made should be modified in the way indicated by my Lord.

I only add one other word with regard to Buck's case. Counsel for the defendant argued that the affidavit of Mr. Frederick Robert Fisk in support failed to disclose that Mr. Buck had any books or accounts in his possession, and, Mr. Buck not having put in an affidavit, as was done in the other cases, in which the possession of books was admitted, counsel argued that the court had no power to make any order against him. I cannot accept that argument. The present complainant on behalf of the Commissioners of Customs and Excise is required by Ord. 54M to make an affidavit and it is provided that:

> 4. Upon any such application an affidavit by a duly authorised officer of the department concerned setting out the state of facts upon which the application is based and stating that he had reason for thinking that such facts exist shall be *prima facie* evidence of such facts.

I agree that that rule is *intra vires*, and that this affidavit complies with the requirements of that rule. In my view, it discloses circumstances from which the only inference which the court can draw is that Mr. Buck has in his possession or control books and accounts, because the affidavit has already sworn that he is a wholesale merchant or manufacturer whose business includes the selling of chargeable goods. The affidavit sets out that notice has been served on him requiring him to produce those documents and no affidavit in reply is put in. I think the only inference which a court can draw in those circumstances is that Mr. Buck, having regard to the business that he was carrying on, must have in his possession books and accounts. Therefore, I think that on this affidavit the learned judge and the master clearly had material on which they could make the orders in this case, but I agree that the orders should be varied in the manner suggested.

EVERSHED, L.J.: I also agree. As my Lord has pointed out, the application before the court is by way of invocation of the powers contained in the recent Crown Proceedings Act, 1947, particularly the powers contained in s. 14 (2) (*d*) of that Act. That paragraph deals with three things, accounts, books and information, of which the third may be neglected for present purposes. The principal point which has arisen relates to the formula "delivery of any accounts" which finds its place in that paragraph. In the earlier sub-section dealing with estate duties where the same formula is used it is natural and apt, and it may be that the formula was taken from the first sub-section without particular reference to the subject-matter, namely, purchase tax, with which sub-s. (2) was designed to deal. However that may be, it is clear that the phrase "delivery of accounts" of itself may be equivocal. It may refer to the rendering or making up of an account not previously in being, or it may mean manual delivery or handing over, that is, for practical purposes, the same as production, of an existing account. That doubt, I think, is solved in this way: the paragraph says: "for the delivery of any accounts . . . required to be delivered, . . . under the enactments relating to purchase tax." If you look at the relevant enactment relating to purchase tax, which is s. 20 of the Finance Act, 1946, it is plain that, as regards accounts, the obligation is production, not making up or rendering. It seems to me, therefore, that the equivocation in the formula must be solved by reading it as meaning the same thing as production of accounts. The learned judge in his order has plainly so construed it because he only uses the word "produce," and I think, therefore, on that matter he was right. That being so, the only other question is what was included in the word "accounts," or, perhaps, what was included in the phrase "books and accounts." The order contains the further words "records and documents." As regards the word "account," we are, I suppose, all familiar with receiving such letters as this: "We have pleasure in enclosing our account which we hope you will find in order," meaning thereby, a bill. Without attempting a definition, it seems to me that the word "account" must be meant to describe a bill or an invoice or any other statement of the financial position between two persons, whether it also involves a demand for payment or not. I, therefore, agree with what has been previously said that the word "accounts" in this context must include invoices. Counsel for the defendants pointed out that the word "invoice" is nowhere used in the section, but that, I think, is a double-edged sword, because in regard to purchase tax it is manifest that the main evidence of the seller having recovered the tax from his buyer would be found in his copy invoices. I also at one time wondered whether, by extending the word "account" beyond the ordinary use of the words "books or accounts," the words "or other documents" in s. 20 (3) would be rendered otiose. But I think that is not so. The word "documents," as has been pointed out, would include correspondence and other documents which are not in any sense financial statements. Since there is no reference in para. (*d*) to such documents, it seems to me that it would not be right to include any such reference in the order made under the section.

There is only one other point to which I refer. There are three cases. The first two, the Angel Warehouse Co., Ltd. and Ingram are within s. 20 (2) of the Finance Act, 1946, for the purpose of reference, because admittedly they are registered under the Act and, therefore, covered by the sub-section, which does not contain the word "document." So far as Mr. Buck is concerned, he may or may not be required to be registered, but the commissioners have made application on the alternative footing that he is or is not. In the latter event he would be within sub-s. (3). For the purpose of the present decision, in the result, it seems to me, it comes to the same thing when the form of order is considered. On the other points I desire to add nothing to what has already fallen from my Lord.

Order varied accordingly. No order as to costs of this appeal or of appeal to Denning, J. *Costs before the master to be the commissioners' as ordered by the master.*

Solicitors: *Albin Hunt & Stein* (for the defendants Ingram & Angel Warehouse Co., Ltd.); *B. A. Perkoff & Co.* (for the defendant Buck); *The Solicitor, Customs and Excise* (for the Commissioners).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re RUSHBROOK'S WILL TRUSTS. ALLWOOD *v.* NORWICH DIOCESAN FUND AND BOARD OF FINANCE (Incorporated) AND OTHERS.

[Chancery Division (Vaisey, J.), April 29, 30, 1948.]

Executors and Administrators—Contract entered into by testator—Disclaimer of contract—Right of devisee to performance of contract at expense of personal estate—Property damaged by fire before testator's death—Insurance moneys paid in respect of damage—Contract for repairs accepted by testator.

A testator devised to N. a freehold farm, which, after the date of the will but before the testator's death, was damaged by fire. The testator received £400 in respect of his claim under a fire insurance policy, and accepted a builder's estimate in the sum of £550 for the repairs. Before the work began, the testator died, and his executors repudiated the building contract.

Held: N. was entitled to have expended on the repairs indicated in the estimate such a sum not exceeding £550 out of the testator's personal estate as was necessary for that purpose.

Re Day, Sprake v. *Day* ([1898] 2 Ch. 510; 79 L.T. 436), *followed.*

Cooper v. *Jarman*, (1866) (L.R. 3 Eq. 98), *applied.*

[As to Devolution of Rights under Building Contract, see HALSBURY, Hailsham Edn., Vol. 3, p. 311, para. 576; and for Cases, see DIGEST, Vol. 7, p. 420, Nos. *346-349.*]

Cases referred to:

(1) *Holt* v. *Holt*, (1694), 2 Vern. 322; 1 Eq. Cas. Abr. 274, pl. 11; 23 E.R. 808; 24 Digest 619, *6492.*

(2) *Cooper* v. *Jarman*, (1866), L.R. 3 Eq. 98; 36 L.J.Ch. 85; 12 Jur. N.S. 956; 15 W.R. 142; 23 Digest 477, *5460.*

(3) *Re Day, Sprake* v. *Day,* [1898] 2 Ch. 510; 79 L.T. 436; 47 W.R. 238; *sub nom. Re Day, Day* v. *Sprake,* 67 L.J.Ch. 619; 23 Digest 477, *5461.*

(4) *Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia* v. *Estate & Trust Agencies,* (1927), *Ltd.,* [1938] 3 All E.R. 106; [1938] A.C. 624; 107 L.J.P.C. 71; 159 L.T. 428; Digest Supp.

ADJOURNED SUMMONS to determine *inter alia* whether the devisee of a freehold farm was entitled to have money expended out of the testator's estate A on the repair of farm buildings, the testator having entered into a contract for their repair. VAISEY, J., held the devisee so to be entitled. The facts appear in the judgment.

Michael Albery for the plaintiff, the executor under the will.
J. A. Brightman for the Norwich Diocesan Board of Finance.
A. P. McNabb and *N. S. Warren* for various legatees.

B **VAISEY, J.:** The testator gave a freehold farm belonging to him, known as Church Farm, to the first defendant, the Norwich Diocesan Board of Finance, partly for the use and benefit of that incorporated body and partly for the use and benefit of other persons. It is sufficient for the present point to say that it was devised specifically to the first defendants out and out. The testator gave the residue of his estate in equal shares to his sisters. After the date of the will there was a fire at the farm. The testator was insured C and before his death he received £400 in respect of his claim under the fire policy. On Nov. 18, 1946, a builder sent to the testator an estimate amounting to some £550 for the cost of the repair of the damage done to the farm. That estimate was accepted by the testator, but after his death his executors disclaimed responsibility for the repairs, and, as the result, they were never effected. The builders said no more about it, but it does appear that there D was a binding contract between them and the testator at the date of the testator's death. The question which arises is whether the persons interested under the devise of Church Farm are entitled, in the events which have happened, to require the sum of £550, or any, and what other, sum, to be applied out of residue in or towards the repair of the property.

I should have thought that this sort of thing must have happened many times having regard to the number of wills which contain specific devises and E the number of occasions on which property specifically devised is damaged by fire, but the authorities are decidedly meagre. The first is *Holt* v. *Holt* (1), the report of which is very short. It is as follows (2 Vern. 322):

> Plaintiff's father seised in fee of land, articles to pay J.S. £1,000 to build an house on the premises, and dies before the house is built. The plaintiff the heir, may compel the builder to build it, and his father's executor to pay for it.

F That case was decided on Nov. 19, 1694, at a time when the heir-at-law was always treated with very special favour. In *Cooper* v. *Jarman* (2), the headnote is (L.R. 3 Eq. 98):

> A person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished:—*Held,* that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate.

G That headnote is somewhat meagre and, perhaps, not quite accurate. The facts there were that the heir-at-law, who was also one of the legal personal representatives, paid the builder this sum out of the personal estate of the intestate for the completion of the contract. The question was whether the payment of that sum ought to be allowed to him as the legal personal representative of the intestate. LORD ROMILLY, M.R., in his judgment said H (*ibid.,* 100):

> The next of kin contend that this sum ought not to be allowed, and that the heir-at-law must personally bear the expense of completing the house. The ground . . . is that the contract was of such a character that the specific performance of it could not have been enforced against the intestate if he had thought fit to resist it . . .

At the end of the judgment the learned MASTER OF THE ROLLS says (*ibid.,* 102):

> The administrator has, in my opinion, a clear duty to perform. The moral duty is distinct. It is to perform the contract entered into by his intestate. The legal duty,

in this instance, as I believe it is in all cases where it is fully understood and examined, is identical with the moral duty. I am, therefore, of opinion that this sum has been properly allowed in the accounts of the administrator.

Two points arose in *Re Day* (3). The first was ([1898] 2 Ch. 510):

> A testator having in his lifetime entered into a contract for the erection of buildings on land belonging to him :—*Held*, on the authority of *Cooper* v. *Jarman* (2), that, the buildings not having been completed before the testator's death, the devisee of the land was entitled to have them completed at the cost of the testator's personal estate.

The other point was (*ibid.*) :

> The testator had also entered into a contract for the erection of buildings upon land belonging to the devisee by an independent title, and these buildings were not completed before the testator's death :—*Held*, that *Cooper* v. *Jarman* (2) did not apply, and that, it not being shown that the devisee had given valuable consideration for the contract, she was not entitled to have the buildings completed at the cost of the personal estate.

North, J., said (*ibid.*, 513) referring to *Cooper* v. *Jarman* (2) :

> It is said that that case stands by itself; but although, so far as I know, there has been no other case which supports it, on the other hand there is none against it, and it lays down an intelligible principle. It has been unreversed for a great many years, and though no doubt the point is one which does not often arise, still there the case stands, and I must follow it. But I do not think it applies to the Misterton property which was not given by the testator's will.

Those cases were reviewed and considered by the Privy Council in *Ahmed Angullia* v. *Estate and Trust Agencies* (1927), *Ltd.* (4), where the contract referred to land which was not part of the estate. I do not find anything relevant in the case, except a faint suggestion to the effect that *Re Day* (3) may not have been rightly decided. It seems to me, however, that it binds me and I propose to follow it.

What is the result ? The cost of carrying out the contract for this work has been estimated by the builder at approximately £550. It may come to more, for there are usually extras in these cases. It may come to less because the devisees may dispense with some items now included in the specification. I think the right of the devisees is to have applied in the repair of the buildings on this farm injured by the fire such sum as it is necessary to expend for the purpose not exceeding £550. If the personal estate of the testator is of less value than that, of course, the devisees will not be entitled to have more than there is. I think the proper order to make is to declare that the devisees of Church Farm are entitled to have expended on the repairs indicated in the estimate of the builder such sum, not exceeding the sum of £550, as it may be necessary to pay the builder for the purpose. Unfortunately, the residuary estate will also have to bear the costs as between solicitor and client of all parties.

Order accordingly.

Solicitors: *Haslewood, Hare & Co.*, agents for *Hood, Vores & Allwood*, East Dereham (for the plaintiff); *Field, Roscoe & Co.*, agents for *Hansell, Hales, Bridgwater & Preston*, Norwich (for the Norwich Diocesan Board of Finance); *J. A. Milner & Sons*, agents for *Sir Robert Gower*, Tunbridge Wells (for residuary legatees).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

Re VAN DEN BERGH'S WILL TRUSTS.
VAN DEN BERGH *v.* SIMPSON AND OTHERS.

[Chancery Division (Romer, J.), April 27, 1948.]

Satisfaction—Will—Covenant to pay annuity—Bequest of similar annuity.

On July 6, 1932, the testator entered into a deed of covenant with G.S., an old servant, that, in consideration of the faithful service which G.S. had given, the testator or his personal representatives would pay G.S. "or his assigns during his life an annuity of 20*s*. per week free of income tax payable quarterly in advance on the usual quarter days." The provision that the annuity should be free of income tax was invalid. On Aug. 7, 1936, the testator made his will, by cl. 9 of which he gave several annuities including one of £52 per annum to G.S., to be paid free of all deductions including income tax at the current rate by equal quarterly payments, the first to be made at the end of 3 months after the testator's death, providing that "(*d*) If any of the said annuitants shall commit permit or suffer any act default or process whereby but for this present provision the said annuity hereinbefore bequeathed to him or her or any part thereof would or might become vested in or payable to any other person or persons then such annuity shall immediately thereupon absolutely cease and determine as if such annuitant were dead . . . (*f*) Any annuity which I may hereafter during my lifetime provide for any one or more of the annuitants hereinbefore referred to shall be applied *pro tanto* in substitution for the annuity hereby bequeathed to any such respective annuitant." By cl. 11 he directed his trustees to hold his residuary estate on trust for sale and conversion and to pay thereout and out of his ready money his "funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto." The testator died on Mar. 12, 1937, and the question arose whether the annuity bequeathed to G.S. by the will was in satisfaction of his annuity under the deed of covenant.

Held: having regard to all the circumstances, the terms of the will, the fact that the annuity given to G.S. by the will was different in quality from the annuity under the deed, and the difference was not to his advantage, and, especially, to the fact that it was clear from cl. 9 (*f*) of the will that the testator considered the question of satisfaction and applied the doctrine expressly to annuities granted after the date of the will, G.S. was entitled to the bequest in addition to the annuity under the deed.

Dictum of Bowen, L.J., in *Horlock* v. *Wiggins* (39 Ch.D. 142, 147; 59 L.T. 710, 712), *applied.*

[As to Satisfaction, see HALSBURY, Hailsham Edn., Vol. 13, pp. 161-175, paras. 147-160; and for Cases, see DIGEST, Vol. 20, pp. 449-453, 469-473, 474-487, Nos. *1743-1768a, 1946-1999, 2010-2143.*]

Cases referred to:

(1) *Horlock* v. *Wiggins, Wiggins* v. *Horlock,* (1888), 39 Ch.D. 142; 58 L.J.Ch. 46; 59 L.T. 710; 20 Digest 481, *2064.*

(2) *Re Dowse, Dowse* v. *Glass,* (1881), 50 L.J.Ch. 285; 20 W.R. 563; 20 Digest 483, *2097.*

Adjourned Summons to determine whether an annuity given in the testator's will to a former servant was given in satisfaction of a covenant in a deed entered into by the testator during his lifetime to pay the servant an annuity of an equal amount, or whether the servant was entitled to both the annuities. Romer, J., held that the testamentary annuity was not in satisfaction of, but was additional to, the annuity under the deed. The facts appear in the judgment.

R. O. Wilberforce for the plaintiff (the executor under the will).
Chetwood for the first defendant (the annuitant).
E. I. Goulding for other defendants, interested in capital and income.

ROMER, J.: This summons raises a question which frequently comes up before the courts, namely, whether a gift by will is to be regarded as a satisfaction of a liability subsisting at the time of the will from the testator to the person benefited. The person benefited by the will in this case is an old man, George Simpson, who had been in the service of the testator for many years. The facts with regard to George Simpson, as stated in the plaintiff's affidavit sworn in support of the summons, are that he was employed by the testator, first, in 1895, as a button boy, then as a footman, later as a chauffeur, and, finally, as a gardener until 1925 or thereabouts when he retired from the testator's employment. So he had been in the testator's service, in one capacity or another prior to his retirement, for a period of over 30 years. On July 6, 1932, the testator entered into a covenant with George Simpson covenanting to pay him an annuity in a deed agreed between the testator, Henry van den Bergh, of the one part, and George Simpson, thereinafter called the annuitant, of the other part. The deed witnessed that :

> . . . in consideration of the faithful service which the annuitant has given to the grantor during 30 years in his employment the grantor hereby covenants with the annuitant that the grantor or his personal representative will pay the annuitant or his assigns during his life an annuity of 20*s.* per week free of income tax payable quarterly in advance on the usual quarter days, the first payment to be made on Sept. 29, 1932.

It is to be observed from that document that the provision that the annuity was to be tax free was expressed in language which defeated the intention of the parties because it infringed the relevant provisions of the Income Tax Acts.

On Aug. 7, 1936, the testator made his will, and by cl. 9 he said :

> I give the following annuities to the following persons for their respective lives to be paid free of all deductions including income tax at the current rate for the time being deductable at the source by equal quarterly payments the first whereof respectively shall be made at the end of three months after my death, that is to say (i) To Annie Pickett an annuity of fifty-two pounds.

There follow three more annuities, two of £52, and a third of £104. The fifth is an annuity to George Simpson of £52, followed by an annuity of £52 to a man called George Lee. Then :

> To my parlour maid Daisy Greig an annuity of £52 And I declare that the following provisions shall apply to each of the said annuities . . . (*d*) If any of the said annuitants shall commit permit or suffer any act default or process whereby but for this present provision the said annuity hereinbefore bequeathed to him or her or any part thereof would or might become vested in or payable to any other person or persons then such annuity shall immediately thereupon absolutely cease and determine as if such annuitant were dead . . . (*f*) Any annuity which I may hereafter during my lifetime provide for any one or more of the annuitants hereinbefore referred to shall be applied *pro tanto* in substitution for the annuity hereby bequeathed to any such respective annuitant.

In cl. 10 there are gifts of varying amounts to each of his servants other than those hereinbefore mentioned if in service with him at the time of his death. By cl. 11 the trustees are directed to hold the residuary estate on trust for sale and conversion :

> . . . and shall with and out of the moneys produced by such sale calling in and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto.

Counsel for the defendants other than George Simpson, in the course of his argument, drew my attention to cl. 19 of the will where the testator directed the trustees to raise out of the share of his residuary estate given to his daughter Elsie the sum of £5,000 and pay it to certain institutions. He further provided by that clause :

> . . . it is my desire though I impose no legal obligation that it shall be divided equally between Jewish and non-Jewish institutions and in addition to any legacies bequeathed to such institutions by this my will or any codicil hereto.

The testator died on Mar. 12, 1937, and his will was proved on May 31 of the same year. In accordance with the direction contained in the will, the annuitant, George Simpson, received the first quarterly payment of his testamentary annuity in the June quarter of that year. It appears from the evidence that no other annuities were provided by the testator during his lifetime for any of the annuitants named in cl. 9 of the will other than Annie Pickett for whom the testator purchased annuities on Feb. 12, 1918, and July 4, 1924, from the Royal Insurance Company, Ltd. On those facts, and with such guidance as I can obtain from the will, I have to decide whether the annuity of £52 to George Simpson was intended to be in satisfaction of the testator's liability under the covenant of July 6, 1932, to pay to George Simpson during his life the sum thereby covenanted to be paid.

A Counsel for the defendants pressed on me quite rightly that I have to have regard to the whole circumstances of the case. He, doubtless, had in mind what Bowen, L.J. said (39 Ch.D. 147) in *Horlock* v. *Wiggins* (1) in regard to the equitable doctrine of satisfaction—that the court has to look at all the circumstances of the case "for the presumption arises not on the will, but on the circumstances of the case." That is the guide which I propose to follow in attempting a solution of this problem. Counsel for George Simpson B argued that there were sundry reasons why this presumption should not apply to the case now before me. He said that the provision by will is different from the covenanted annuity, and is not only different, but also less advantageous to the person concerned, George Simpson. He said, in the first place, that the annuity under the will is determinable on any attempt being made by the annuitant to alienate it or otherwise to dispose of it, whereas under the deed C of covenant the liability undertaken by the settlor was an express one to pay to the annuitant or his assigns during his life. In that respect, said counsel, the testamentary annuity is a less favourable form of annuity than that to which George Simpson was previously entitled. Another difference pointed out was that the annuity under the deed was payable in advance on the usual quarter days while that bequeathed by the will was payable by quarterly payments in arrear, and that, having regard to the facts of the case and the D provisions of the will, and, in particular, having regard to the fact that the testator died shortly before the March quarter, if the will annuity were to be regarded as a satisfaction of the covenanted annuity, Mr. Simpson would have to wait, as he did wait, before receiving any payment in respect of the annuity, instead of getting a quarter's annuity payable a few days after the testator's death. Counsel referred to *Re Dowse* (2) as showing that that is a consideration to which some importance ought to be attached. Further, he pointed out E that the testator has directed that his debts should be paid out of his residuary estate, and that, having regard to the fact that the covenanted annuity was a debt, that tends to show, and has the support of authority for showing, that no satisfaction was intended. As evidence, extracted from the terms of the will itself, showing or tending to show that no satisfaction was intended, counsel pointed to sub-cl. (*f*) of cl. 9 where the testator provided that any annuity which he made thereafter during his lifetime providing for F any one or more of the annuitants thereinbefore referred to should be applied "*pro tanto* in substitution for the annuity" thereby bequeathed to any such respective annuitant. He said that that shows that the testator had his mind directed to this question of satisfaction and that he intended it to apply, as it would not otherwise apply, to annuities purchased thereafter for any of the annuitants named in the will, and that the result of the application of the G doctrine of *expressio unius* is that he did not intend the doctrine to apply to any annuities which he had undertaken to provide prior to the date of the will. Counsel invites me to say that, having regard to all those considerations, the doctrine of satisfaction should not here be applied.

On the other hand, counsel for the other defendants, those interested in residue, has reminded me, as I have said, that I have to ascertain the intentions of the testator from all the circumstances of the case, and that, if I am left H in doubt whether the testator did or did not intend to give a double benefit, I must apply the presumption to the effect that he did not so intend. He relied also on sub-cl. (*f*) of cl. 9 and said that the testator was careful to provide for difficulties which might thereafter arise and for unexpected incidents which might attach to his dispositions, as shown by cl. 9. He said that the testator must be regarded as knowing that the law itself would attract the doctrine of satisfaction to such annuities as Mr. Simpson's and, therefore, he did not have to deal with that, but he did insert sub-cl. (*f*) and must be taken to have known that but for that provision any annuities subsequently provided would not attract the doctrine at all. He expressly put in this provision so that the doctrine would apply. Counsel rightly conceded that the various matters to which counsel for George Simpson had referred did exist—for example, the difference in the quality of the annuities, one being free from any prohibition against alienation and the other being the differences between the time of payment and the provision as to debts. He said, however, that, taking them together, those differences did not amount to much, and, in particular, no great importance should be attached to the fact that the testator directed the payment of his debts out of residue, because that is the ordinary common form clause. Finally, he said that the testator did what he had not effectively done by the deed, namely, to give George Simpson an annuity tax free which was to that extent more advantageous than the one he had acquired under the covenant.

Taking all the considerations and balancing them to the best of my ability on the one side and the other, I have arrived at a fairly clear conclusion that George Simpson is entitled to both annuities. As I say, he had been in the employment of the testator for many years until he got too old for work, and his faithful services were recognised shortly after his retirement by the deed of covenant. It is inherently likely that, when the testator was making this very wide provision for the people who had been or were in his service, he should give to this old man who had remained with him to the end of his life something over and above what he had bound himself to give him by covenant. That might be challenged as mere speculation, as, indeed, it probably is, and simply on that ground I could not say that George Simpson is entitled to both these annuities, but it is clear that the annuity which he was to get by the will, although admittedly carrying freedom from tax which the settlor failed to achieve, although he tried to achieve it, by the deed of covenant, was in other respects different in quality from the annuity under the covenant, and different in a way that was by no means to the advantage of the annuitant. Under the deed, George Simpson could do what he liked with his annuity. He could sell it, he could charge it, and it would continue to be payable for the whole of his life by the testator so long as the testator lived or by his personal representative if he died. It was pointedly an asset which could be exchanged for a capital asset. Contrasting that with the annuity under the will, if George Simpson had attempted to do anything by way of disposing or charging his testamentary annuity, it would vanish for ever and nothing thereafter could bring it back to him. It seems to me that that is a very significant contrast when one comes to compare the value of the one annuity with the other. There is also the rather subsidiary question of the date of payment. George Simpson would have had to give up, and the testator to be taken to have contemplated that he would give up, his rights under the deed in relation to the dates of payment and accept with all the disadvantages attending to it, during the first year at all events, the payment of the testamentary annuity. He would have to forego his quarter's payment in March and wait till June before he received any payment, a matter of some gravity for a person in his position. Finally, what, to my mind, clinches the matter in favour of George Simpson is sub-cl. (*f*) of cl. 9 which I cannot interpret in the way in which counsel for the defendants other than Simpson has asked me to interpret it, but which seems to me to have the effect contended for by his counsel. It is plain from the sub-clause that the testator did have his mind directed and was applying it to this very question of satisfaction and explicitly said it was to apply in future. The words are "any annuity which I may hereafter during my lifetime provide." I cannot help feeling strongly that, if his intention had been to class together all the annuities, those already provided and those to be provided thereafter, he would have used sufficiently comprehensive language and not left it merely to this equitable doctrine to cover the case of the existing provision as distinct from the provision in future.

Taking all those considerations and adding to them for full measure the direction in the will for the payment of debts, to which I would not have been disposed to attach too great significance if it had stood alone although the covenanted annuity is rightly recognisable as a debt, I hold that George Simpson is entitled to both annuities, and that the testamentary annuity is not to be taken in satisfaction of the testator's liability under the deed of covenant, and I shall make a declaration accordingly.

Declaration accordingly. Costs of all parties as between solicitor and client out of the estate.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the plaintiffs and the defendants other than George Simpson); *Hargreaves & Crowthers* (for George Simpson).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

ELLIOTT AND ANOTHER *v.* PIERSON.

[Chancery Division (Harman, J.), April 9, 12, 13, 14, 30, 1948.]

Vendor and Purchaser—Specific performance—Contract for sale of freehold land and business assets—Vendor only leaseholder—Ability to compel assurance by freeholder.

A private company with a capital of £2,500 in £1 shares purchased a freehold road house, and leased it with its furniture and fittings for 40 years from Nov. 11, 1944, at a rent of £1,200 per annum, to E., who held 2,499 shares in the company, the remaining share being held by his nominee. E. was the company's sole director, an office which under the articles he was to hold for life, and a quorum at a board meeting was one. In 1946 E. decided to sell the business which he carried on at the road house, and signed a document addressed to the defendant in these terms: "Dec. 19, 1946. In the consideration of the sum of £50 paid by you to me (the receipt whereof is hereby acknowledged) I (being collectively the holders of or beneficial owners of freehold of Hilden Manor Road House and Country Club) hereby grant to you the option during the term of one calendar month from the date hereof of purchasing such business, lock, stock and barrel, at the price of £45,000. The option shall be exercisable by notice in writing addressed to me at Hilden Manor Road House and Country Club." On Jan. 17, 1947, the defendant wrote to E.: "I hereby give you notice that I exercise the option on the freehold Manor Country Club contained in the letter dated Dec. 19, 1946, addressed by you to me." After the submission of the formal contract, the defendant declined to proceed owing to E.'s refusal to provide an itemised schedule of fixtures, fittings, stock, etc. In an action for specific performance:

Held: (i) on construction, the two documents constituted a contract for the sale of the freehold property and the goodwill and all the assets (less liabilities) of the business, but the words "lock, stock and barrel" did not extend its meaning to articles not assets of or devoted to the purposes of the business.

(ii) although he was only entitled to a leasehold interest, E. was always able to compel the assurance of the freehold property and the assets of the business to the defendant by virtue of his position *vis-a-vis* the company, and, therefore, the defendant could not repudiate on the ground of E.'s lack of title.

Re Hailes and Hutchinson's Contract ([1920] 1 Ch. 233; 122 L.T. 459), *applied.*

[As to Extent of Vendor's Obligation as to Title, see HALSBURY, Hailsham Edn., Vol. 29, pp. 307, 308, para. 404; and for Cases, see DIGEST, Vol. 40, pp. 134-153, Nos. *1055-1222.*]

Cases referred to:

(1) *Perry* v. *Suffields, Ltd.*, [1916] 2 Ch. 187; 85 L.J.Ch. 460; 115 L.T. 4; 60 Sol. Jo. 494; 40 Digest 15, *31.*

(2) *Bain* v. *Fothergill*, (1874), L.R. 7 H.L. 158; 43 L.J.Ex. 243; 31 L.T. 387; 39 J.P. 228; 23 W.R. 261; *affg.*, (1870) L.R. 6 Exch. 59; 40 Digest 265, *2306.*

(3) *Halkett* v. *Dudley (Earl)*, (1907) 1 Ch. 590; 76 L.J.Ch. 330; 96 L.T. 539; 51 Sol. Jo. 290; 40 Digest 194, *1623.*

(4) *Proctor* v. *Pugh*, [1921] 2 Ch. 256; 91 L.J.Ch. 1; 127 L.T. 126; 40 Digest 265, *2315.*

(5) *Chamberlain* v. *Lee*, (1840), 10 Sim. 444; 59 E.R. 687; 40 Digest 249, *2166*.
(6) *Forrer* v. *Nash*, (1865), 35 Beav. 167; 6 New Rep. 361; 11 Jur. N.S. 789; 14 W.R. 8; 55 E.R. 858; 40 Digest 249, *2168*.
(7) *Re Hailes and Hutchinson's Contract*, [1920] 1 Ch. 233; 89 L.J.Ch. 130; 122 L.T. 459; 64 Sol. Jo. 209; 40 Digest 159, *1282*.

WITNESS ACTION by a vendor to obtain specific performance of a contract for the sale of freehold property and the assets and goodwill of a road house and country club. It was contended, *inter alia*, that the terms of the documents alleged to constitute the contract were too vague, and that, as the vendor had only a leasehold interest, the contract could not be enforced. HARMAN, J., held that the contract was enforceable. The facts appear in the judgment.

Jennings, K.C., and *Denys B. Buckley* for the plaintiffs.
J. G. Strangman for the defendant.

Cur. adv. vult.

Apr. 30. **HARMAN, J.**, read the following judgment. This is an action to enforce a contract alleged to have been concluded on Jan. 17, 1947, for the sale by the first plaintiff, to whom I shall refer as Mr. Elliott, to the defendant of a freehold property situate near Tonbridge in the county of Kent and known as Hilden Manor and of the assets and goodwill of the business there carried on under the style of the Hilden Manor Road House and Country Club. The plaintiff company is joined, not as a party to the alleged contract, but as the owner of the fee simple of the property and of the furniture, fixtures and fittings of the club subject to a lease to Mr. Elliott hereafter to be mentioned. The documents alleged to constitute contract are admitted, but it is denied that they constitute a contract between the parties. Alternatively, the defendant denies that the contract (if made) is enforceable against him on the ground that Mr. Elliott had not up to the date of repudiation by the defendant any title to the freehold nor the right to procure its assurance to him. Reliance is also placed on the Law of Property Act, 1925, s. 40, and on the Sale of Goods Act, 1893, s. 4.

The second plaintiffs, H. Elliott & Co. (Builders), Ltd., was incorporated in 1937 with very wide objects and a capital of £2,500 in shares of £1 of which Mr. Elliott (who is described in the memorandum of association as a builder) subscribed in full for 2,499. The remaining share was subscribed for by an accountant who acquired it as Mr. Elliott's nominee. The shareholding has remained unchanged throughout. The company is a private one, having Table A articles with modifications. By special art. 18 every share carries one vote. By art. 19 Mr. Elliott is appointed first director and is entitled to hold that office for life. He is, and always has been, the sole director, and the quorum of a board meeting is and always has been one (art. 22). The freehold property in question consists of a manor house of some extent (it has 20 bedrooms) and several acres of land abutting on the London-Tonbridge Road. There appear to be considerable outbuildings and Mr. Elliott's predecessors, who carried on a road house business, built on part of the land a house for the manager known as the Concrete House. In 1944, Mr. Elliott agreed to buy the property and also the assets of the road house business, and by a conveyance made Feb. 6, 1945, the freehold was by his direction assured to the plaintiff company which also acquired either then or subsequently certain fixtures, fittings and furniture. From November, 1944, Mr. Elliott conducted on the premises the business of a road house and country club on his own behalf, and subsequently, in order to regularise the position between him and the plaintiff company, the latter, by lease dated Aug. 31, 1946, demised the entire freehold property including the Concrete House and the furniture, fixtures and fittings to Mr. Elliott for a term of 40 years from Nov. 11, 1944, at a rent of £1,200 per annum with a proviso for renewal for a further 21 years. The business was carried on as a proprietary club, and was managed by Mr. Elliott who employed among others his brother as head waiter. It was, apparently, a successful venture, but Mr. Elliott, finding it more arduous than he had supposed and being desirous of going abroad for the sake of his health, was minded in the autumn of 1946 to sell it as a going concern. This intention came to the knowledge of the defendant (who describes himself as a haulage contractor) and on Dec. 19, 1946, at about 6 or 7 p.m. he presented himself at the club accompanied by a young woman called Mrs. Fallowes whom he described as his secretary, but who had no obvious qualifications for that position, being, in fact, the cashier of a business which the defendant controlled.

[HIS LORDSHIP dealt with the evidence of the conversation which then took place between the first plaintiff and the defendant and continued:] Mrs. Fallowes at the defendant's dictation, helped by suggestions from Mr. Elliott, wrote out the document produced and shown to me marked "P.2," which is in the following terms:

> To Richard A. Pierson. Dec. 19, 1946. In the consideration of the sum of £50 paid by you to me (the receipt whereof is hereby acknowledged) I (being collectively the holders of or beneficial owners of Hilden Manor Road House and Country Club) hereby grant to you the option during the term of one calendar month from the date hereof of purchasing such business, lock, stock and barrel, at the price of £45,000. The option shall be exercisable by notice in writing addressed to me at Hilden Manor Road House and Country Club. Harold Elliott.

The words: "I (being collectively the holders of or beneficial owners . . .)" are written in above the line and were so written, as Mr. Elliott said and as I hold, because he informed the defendant that the plaintiff company had an interest in the property and that he could procure its concurrence by his control of it. The defendant denied that he heard of the existence of any company, but he offered no explanation of the interpolation, although he remembered its insertion. I do not believe he would have accepted the insertion of these words without an explanation and none was suggested except that put forward by Mr. Elliott.

After this first attempt Mrs. Fallowes wrote out a further document which is exhibit "P.1" and is in the same terms as "P.2" with the following exceptions. As first drawn, "P.1" expressed the consideration for the option as being £1 and its duration three months. These were altered to £50 and one month by Mr. Elliott and in his handwriting. In addition Mr. Elliott was asked whether the property was freehold and he said it was and added the words "freehold of" which appear in "P.1," so that it reads as follows:

> To Richard A. Pierson. Dec. 19, 1946. In the consideration of the sum of £50 paid by you to me (the receipt whereof is hereby acknowledged) I (being collectively the holders of or beneficial owners of freehold of Hilden Manor Road House and Country Club) hereby grant to you the option during the term of one calendar month from the date hereof of purchasing such business, lock, stock and barrel, at the price of £45,000. The option shall be exercisable by notice in writing addressed to me at Hilden Manor Road House and Country Club.

To this document three 2*d.* stamps were affixed and Mr. Elliott signed it and initialled his alterations and it was witnessed by Mrs. Fallowes, giving her address as "30 Westbrook Road, Thornton Heath" and describing herself as "cashier." The consideration of £50 was paid over to Mr. Elliott in cash.

On Jan. 17, 1947, the defendant wrote a letter to Mr. Elliott in the following terms:

> Dear Sir, I hereby give you notice that I exercise the option on the freehold Manor Country Club contained in the letter dated Dec. 19, 1946, addressed by you to me. My solicitors are Messrs. Mawby, Barrie & Letts, 62 Moorgate, London, E.C.2. Will you please put your solicitors in touch with them. Yours faithfully, Richard A. Pierson.

That letter is addressed to: "H. Elliott, Esq., Hilden Manor Country Club, Tonbridge." This letter, in conjunction with "P.1," constitutes the alleged contract. On Jan. 28, 1947, the plaintiffs' solicitors forwarded to the defendant's solicitors a draft of a proposed formal contract of sale. This document contained stipulations as to covenants and as to the payment of a deposit which, admittedly, form no part of the contract (if any). It also contains in a second schedule a list of chattels physically on the property, but which Mr. Elliott claimed to exclude from the sale. In the draft the vendor was expressed to be the plaintiff company, so that its interest in the property was at this date (if not earlier, as I have held, namely, on Dec. 19, 1946) made clear to the defendant. The draft reached the defendant before the end of January and no demur was made by him or on his behalf at that time either to a conveyance by the company or to the exclusion of the assets in the second schedule. On Feb. 5, 1947, the defendant's solicitors demanded that the sale should "include everything," though not specifically claiming the items in the second schedule, and that a stocktaking and valuation should be proceeded with. On Feb. 13, 1947, the defendant's solicitors insisted on an itemised schedule, but this the plaintiffs were unwilling to concede unless a contract was first signed. On Mar. 24, 1947, the defendant declined to proceed on the ground that " the parties interested," by which he meant persons to whom he was trying to sub-sell, would not proceed without a schedule, and, therefore, he would not proceed. The writ was issued on Apr. 25, 1947.

The first defence is that the two documents in question did not constitute a contract and by this I understand to be meant that they are too vague for the court to enforce. In my judgment, these two documents, as a matter of construction, do constitute a contract for the sale of the freehold property and the goodwill and all the assets (less the liabilities) of the business of a road house and country club carried on upon it. The words " lock, stock and barrel " do not, in my opinion, extend the meaning to assets which, though physically on the property, were not assets of or devoted to the purposes of the business. It was submitted on the defendant's behalf that, as there were no documents to identify the chattel assets sold, the contract was unenforceable either because it was too vague or by reason of the Sale of Goods Act. I find nothing vague about this contract. It is well settled that details may be identified, if necessary, by parol evidence, and SARGANT, J., (who was affirmed by the Court of Appeal) felt no difficulty on this score in *Perry* v. *Suffields, Ltd.* (1). In that case the contract was for the sale of freehold licensed premises and was contained in two letters, one an offer for " freehold premises goodwill and possession," and the other an acceptance of " your offer." The judge made a decree for specific performance in common form. At the trial no point was made under the Law of Property Act, 1925, s. 40, or the Sale of Goods Act, 1893, s. 4. I confess I cannot follow the point taken under ss. 52 and 62 of the Sale of Goods Act, 1893. The argument is that under the former section specific performance can only be decreed where the chattels are specific goods within the latter, but, as I read s. 52, it is a section for the benefit of a vendor and has no application as a defence to a purchaser. Anyhow, this point would not go to damages. I hold that this defence fails.

Secondly, it is said that the contract cannot be enforced because it was made by Mr. Elliott and because he had nothing himself but a leasehold interest and no legal right as against the company, though it is conceded that he in fact had the power to oblige it to join him in the necessary assurance. In my judgment, this defence is misconceived. At law A may contract to sell to B any defined subject-matter and can enforce the contract if by the time when he is obliged to do so he has obtained a sufficient interest or can compel other interested parties to concur in the sale. It matters not at all that at the date of the contract A had no interest if he obtains it in time to fulfil the bargain. To this doctrine equity made a qualification in cases of specific performance of contracts for the sale of land. The exception arises, I think, out of the peculiar difficulty of making a title to land in England which is also recognised in the rule as to damages on failure to make a good title (known as the rule in *Bain* v. *Fothergill* (2)). The rule is that if after contract the purchaser discovers that the vendor has no sufficient title he need not wait to see if he can obtain one before the completion date but may repudiate. This matter is best discussed by PARKER, J., in *Halkett* v. *Dudley* (3). This case came in for sharp criticism by MR. CYPRIAN WILLIAMS in his book on VENDOR AND PURCHASER. SARGANT, J., however, in *Proctor* v. *Pugh* (4) returned MR. WILLIAMS' fire and followed PARKER, J. MR. WILLIAMS in his latest edition counter-attacked, but, in my judgment, the field remains in possession of the judiciary. Even if I should be wrong in this and the true doctrine be that the court will not aid a man who had no interest in the property when he contracted to sell it (*cf. Chamberlain* v. *Lee* (5)), that does not apply here for Mr. Elliott clearly had a substantial term of years and only the reversion remained to be got in. Moreover, all the cases show that, if a purchaser is to be allowed to repudiate on this ground it is essential that he do so at once : see, for instance, *Halkett* v. *Dudley* (3). If he begins to seek for explanations or to demand the getting in of outstanding interests he will be deemed to have waived the point. If, however, he acts promptly he may say " I will have nothing to do with it " : see *per* ROMILLY, M.R., in *Forrer* v. *Nash* (6) (35 Beav. 171).

Applying these principles to the present case, I hold that, if the defendant could ever repudiate on this ground, the latest moment at which he could have done so was when he became aware of the plaintiff company's interest. This was at the latest at the end of January, 1947, and he did not then repudiate. On the contrary, he continued to affirm the contract until at least Mar. 6, 1947, when he registered an estate contract under the Land Charges Act, 1925. He had by this time lost any right he may have had, but I go further and hold that he never had such a right. The law is that a vendor who has or can compel the assurance of all necessary interests in the subject-matter of the sale may enforce the contract: see, for instance, the decision of ASTBURY, J., in *Re Hailes and Hutchinson's Contract* (7), where the cases are collected; and, having regard to Mr. Elliott's position *vis-a-vis* the plaintiff company, I hold that he was always in that position notwithstanding the fact that there was no resolution in the minutes of the company nor any contract under the company's seal agreeing to concur in the sale. It was objected that, as things stood, Mr. Elliott had no interest in the freehold by virtue of which he could compel the concurrence of the company, but I do not feel the force of this. It seems to me to be enough that he was in a position, either by exercising his power as sole director or, if necessary, by winding-up the company, to procure it to act as he chose.

I have already held that no date was fixed for completion, and the assets must, therefore, be taken over as they stood on Dec. 19, 1946, the date of the option document. I have had some hesitation whether this is a proper case for an order for specific performance or whether I should leave the plaintiffs to their remedy in damages, but on the whole I see no sufficient reason to withhold the former remedy, which I decree.

Order accordingly, with costs for the plaintiffs.

Solicitors: *George C. Carter & Co.* (for the plaintiffs); *Mawby, Barrie & Letts* (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

JOHN LAING AND SON, LTD. *v.* KINGSWOOD ASSESSMENT COMMITTEE AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 29, 1948.]

Rating—Beneficial occupation—Structures erected for purpose of carrying out works contract—Temporary structures erected, and used, by contractors on site of aerodrome under construction—Rating and Valuation Act, 1925 (c. 90), *s.* 37 (10).

Contractors engaged on the construction of an aerodrome erected on a part of the site a number of buildings and other structures for the purpose of carrying out the contract. The structures comprised office accommodation for a supervisory staff of 75-100 persons and a workmen's canteen (erected in compliance with the requirements of the contract), garages, carpenters' shop, transport and weigh-bridge huts and concrete mixing plants. The construction of the aerodrome started in June, 1946, and was not expected to be finished before March, 1948, and it had not yet come into occupation. The structures in question were erected in June to October, 1946, and were in use.

HELD: the structures constituted a new hereditament which had come into occupation by the contractors; that that occupation was beneficial occupation since the contractors were occupying the site as licensees to enable them to carry out the contract; and, therefore, that they were in rateable occupation of the hereditament.

Observations of LORD RUSSELL OF KILLOWEN in *Westminster Corpn.* v. *Southern Railway Co., Railway Assessment Authority and W. H. Smith & Son, Ltd.* ([1936] 2 All E.R. 322, 329), *applied.*

[AS TO RATEABLE OCCUPATION, see HALSBURY, Hailsham Edn., Vol. 27, pp. 351-353, para. 782; and FOR CASES, see DIGEST, Vol. 38, pp. 426-450, Nos. *10-173.*]

Cases referred to:

(1) *Smith* v. *Lambeth Assessment Committee*, (1882), 10 Q.B.D. 327; 52 L.J.M.C. 1; 48 L.T. 57; 47 J.P. 244; 38 Digest 446, *157*.

(2) *Westminster Corpn.* v. *Southern Ry. Co., Railway Assessment Authority and Smith & Son, Ltd., Westminster Corpn. and Kent Valuation Committee* v. *Southern Ry. Co., Railway Assessment Authority and Pullman Car Co., Ltd.*, [1936] 2 All E.R. 322; [1936] A.C. 511; 105 L.J.K.B. 537; *sub nom. Re Southern Ry. Co.'s Appeals*, 155 L.T. 33; 100 J.P. 327; Digest Supp.

(3) *Mitchell Bros.* v. *Worksop*, (1904), 69 J.P. 53.

(4) *Cleveland Bridge & Engineering Co., Ltd.* v. *Darlington Union*, (1923), 21 L.G.R. 511.

CASE STATED by Gloucestershire Quarter Sessions.

On Feb. 21, 1947, Thornbury Rural District Council, as rating authority for their area, made a proposal for the amendment of the valuation list by adding a hereditament described as "contractors' offices, canteens, huts, structures, land, etc.," to be assessed at £484 gross and £400 rateable value. The ratepayers, who were the contractors referred to, objected to the proposal, and on Mar. 21, 1947, Kingswood Assessment Committee considered the proposal and the objection and allowed the amendment to the valuation list. The contractors appealed to quarter sessions who, by consent of the parties and by order of BIRKETT, J., dated Mar. 5, 1948, stated a Case under the Quarter Sessions Act, 1849, s. 11.

By a written contract, dated June 21, 1946, between the ratepayers and the Secretary of State for Air, the ratepayers undertook to execute works involving the strengthening, widening and lengthening of a runway, the preparation of the landing ground, and the demolition of buildings at Filton Aerodrome, Gloucestershire. The contract sum was, approximately, £1,250,000, and the work needed involved 850,000 cubic yards of excavation, 500,000 cubic yards of hardcore filling, 180,000 cubic yards of concrete paving, demolition of 24 separate properties, the preparation of 235 acres of landing ground, and the laying of 9 miles of storm water drainage. On June 26, 1946, a part of the site was handed over to the contractors for the assembly of plant and offices, and the remainder of the site, on which constructional work was to be carried out, was handed over in sections as it became available. The contract date for completion was May 26, 1947, but circumstances had arisen which entitled the contractors to an extension of time and it was not expected that the works would be completed before the end of March, 1948, though sections might be handed over to the Secretary of State before then. The hereditament comprised the following structures: (*a*) office accommodation for a supervisory staff of 75-100 persons; (*b*) garages, erected in October, 1946, of tubular steel frame let into the ground; (*c*) weigh-bridge huts; (*d*) workmen's canteen; (*e*) carpenters' shop; (*f*) transport hut; and (*g*) concrete mixing plant. The office accommodation, which was provided for in the contract, included (*a*) a main building which had been requisitioned and handed over to the contractors, and which was constructed of 8in. cavity walls, asbestos roof, and concrete floors, with water, electric lighting, main drainage and central heating, and (*b*) offices, erected by the contractors in August and September, 1946, of sectional wood frame bolted together, with concrete floors, electric light and stove heating. The workmen's canteen, also provided for in the contract, and erected by the contractors in July and August, 1946, was a temporary building in sectional form with electricity and water laid on and heating by coke stoves. The contractors were obliged to carry out and complete the execution of the work to the satisfaction of the superintending officer of the Secretary of State for Air who was empowered from time to time to issue further instructions in regard (*inter alia*) to (*a*) the addition, omission or substitution of any work, (*b*) the removal or re-execution of any work, (*c*) removal from the site of any materials brought there by the contractors, (*d*) order of the execution of the work, (*e*) hours of work, (*f*) suspension of work, and (*g*) dismissal of any foreman or workman of lower grade. The Secretary of State for Air had not used any part of the site handed over to the contractors for any purpose except the execution of works by the contractors.

The question for the opinion of the Divisional Court was whether or not the contractors were in rateable occupation of all or any of the structures comprised in the hereditament. The contractors contended (i) that they were not the occupiers of the premises in that their use thereof was subject to the control and directions of the superintending officer and they had not paramount occupation; (ii) that, if they were the occupiers, the occupation was not beneficial because (*a*) land forming part of a site on which building and engineering works were being carried out was struck with sterility, (*b*) no benefit was derived from the occupation of the land for the purpose of carrying out such works, (*c*) payments received by the contractors in respect of carrying out of works A were not a benefit derived from the occupation of the land, and (*d*) the premises were not capable of separate occupation apart from the carrying out of the works under the contract. The Divisional Court now held that the contractors were in rateable occupation.

Scott Henderson, K.C., and *Stewart-Brown* for the ratepayers.

Rowe, K.C., and *Squibb* for the assessment committee, the rating authority, B and Gloucestershire County Valuation Committee.

LORD GODDARD, C.J.: This is a Special Case stated under the Quarter Sessions Act, 1849, s. 11, and it raises an interesting question which has never come before the court, I think, in exactly the way in which it does in this case. The question that has to be determined is whether contractors who are working on a site for the construction of large public works—in this case an aerodrome—are liable to be rated, not, of course, in respect of the aerodrome, but in respect C of buildings which they have themselves constructed for the purpose of the works which they have to carry out. In substance, the position is this. The ratepayers, Messrs. John Laing & Son, Ltd., who are public works contractors, have undertaken a contract with the Secretary of State for Air for the construction of a runway, landing ground and other works at Filton aerodrome. The provisions of the contract require them to do certain things which necessitate D the putting up of buildings. Whether these are huts, or whether they are made of breeze or brick, seems to me to be immaterial. No one suggests that the buildings are likely to be permanent, in the sense that they will remain after the work of construction has been done. The contract provides that at the end of the work of construction these buildings and other erections, some of which are foundations for mounting heavy machinery, are to be taken away, and, indeed, the supervising officer, who is in the service of the Crown, can order E them to be taken away at any minute. Counsel for the contractors has told us that this case is brought to test whether contractors who undertake this class of work are rateable in respect of the land occupied by their buildings and erections, and no point is taken that the work is being done on Crown land, or for the Crown, or whether or not the hereditament is an industrial hereditament. Nor are we concerned with regard to any question of values or figures. The hereditament which is rated comprises offices, garages, huts, F canteen, carpenters' shop, and the bases or foundations for the mixers and other heavy pieces of machinery which, if the contractors are rateable, fall within class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O., 1927, No. 480) as "plant or a combination of plant and machinery," and are rateable under that Order.

The argument of counsel for the contractors has largely been based on the G Rating and Valuation Act, 1925, s. 37 (10), which provides:

> Subject as hereinafter provided, an amendment made in the valuation list in pursuance of this section shall, in relation to any rate current at the date when the proposal in pursuance of which the amendment was made was served on the rating authority, or, where notice of the proposal was given to the occupier or owner, as the case may be, of the hereditament affected, current at the date when the notice was so given, be deemed to have had effect as from the commencement of the period in respect of which the rate was made . . . Provided that, in the case of an amend- H ment consisting of the inclusion in the valuation list either of a newly-erected or newly-constructed hereditament or an altered hereditament which has been out of occupation on account of structural alterations, or of the alteration in the valuation list of the value of any hereditament, where the value thereof has been affected by the making of structural alterations or by the total or partial destruction of any building . . . the amendment shall have effect only as from the date when the new or altered hereditament comes into occupation . . .

Counsel for the contractors says that, as this aerodrome is in course of erection and has not yet come into occupation, the contractors' buildings must be in the same position. Speaking for myself, I cannot see that that argument is sound or that that conclusion can be drawn from the words of the proviso to s. 37 (10), because that which the rating authority here seek to rate has been constructed and has come into occupation. Take, for instance, the workmen's canteen, which seems to me to be an apt illustration of the buildings in question. The contract obliged the contractors to provide a canteen for the workmen who are on the premises, and this meant that the contractors had to erect a building of some material, it matters not what, for the cooks to prepare the meals and for the men to sit in and eat them. That building has been erected and occupied and is in daily use. Therefore, it seems to me that in respect of that building the contractors cannot avail themselves of the proviso to s. 37 (10). It is true that the building is in one sense ancillary to the main undertaking, the aerodrome, but only in the sense that, if the aerodrome was not being constructed, the building would not be there. Besides the mess canteen, the other portions of the hereditament which it is sought to rate here have all been erected to enable the contractors to carry on their business of constructing this aerodrome. It is not the whole of their business, no doubt, because they may be doing work in other parts of England at the same time, but they have to find a place on which to store the material and erect their mixers, and do a variety of other things connected with the construction of this aerodrome. Counsel for the contractors concedes that these structures would at once become rateable if they were put on a field or a site which did not belong to the owners of the aerodrome. They would become rateable because they were occupied. They are occupied here.

The argument of counsel for the contractors would be stronger, I think, if *Smith* v. *Lambeth Assessment Committee* (1) were still law, but that case has been overruled by *Westminster Corpn.* v. *Southern Ry. Co., Railway Assessment Authority and Smith & Son, Ltd.* (2). It is there laid down [*per* Lord Russell of Killowen ([1936] 2 All E.R. 322, 329)]—and the House of Lords has now established for all time, unless and until it is reversed by legislation—that :

> . . . the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement.

In this case the title is attributable to a licence, because, if the building owner allows the contractor to come on his land and erect buildings for the purpose of carrying out the contract and allows his land to be occupied for the storage, not merely of a bucket or half a dozen scaffolding poles, but of hundreds of tons of cement and other material which it would be inconvenient to bring on day by day and which is, therefore, kept in a "dump" on the site, he has certainly given the contractor a licence. It seems to me that the contractor is occupying that land as a licensee to carry on his business, and so has a beneficial occupation. He is enabled, by reason of his occupation, to carry out the contract which he has undertaken. If he did not occupy that land, he would have to occupy some other land, of which he would have a beneficial occupation.

If this case goes on appeal and our decision is upheld, it may be that rating authorities will claim to include in their valuation lists hereditaments which hitherto have not been included, on the ground that there is an occupation by building contractors, or builders, of the land on which buildings are being constructed, but it must always be borne in mind that the occupation must be something more than a mere transient or purely temporary occupation. An illustration was given of the showman's van which comes on land for a short period of a day or two, or a week, and it was said that it would be absurd to make the showman responsible for maintaining the poor in the parish for six months when he only entertains the poor in the parish for, perhaps, two nights. The rating authorities would, probably, not be entitled to rate a man who is building a small house, and, for the purpose of convenience, puts a load of sand or gravel on the land on which he is going to build. Each case must depend on its own facts, but in this case the building is occupying a considerable period.

Applying the principles which I find laid down very clearly in the judgment of Lord Russell of Killowen in the *Westminster* case (2), I feel bound to answer the question raised in the Special Case, *viz.*, whether the contractors are in rateable occupation of all or any of the structures comprised in the hereditament, in the affirmative and to say that they are.

HUMPHREYS, J.: I agree with the judgment of my Lord. For my part, I always approach these difficult and complicated questions of rating with great diffidence and I like to be able to found my judgment on what I regard as the plain language of a statute. I think it is possible to do so here, because I find in s. 37 (10) of the Rating and Valuation Act, 1925, a provision that:

> . . . in the case of an amendment consisting of the inclusion in the valuation list . . . of a newly-erected or newly-constructed hereditament . . . the amendment shall have effect only as from the date when the new . . . hereditament comes into occupation . . .

That is a very plain direction that, if a new building is added to other buildings already on the land, the new building shall not be rated until it comes into occupation, but shall then be rated like any other building. Here the Case states that there was a proposal by the rating authority to amend the current valuation list by adding thereto a hereditament situate near Charlton Runway described as "contractors' offices, canteens, huts, structures, land, etc." As I understand it, these are completed structures, and the Case states that they are being used by the contractors for the purpose of their business. I assume that they are all necessary for the business. Some of them (*e.g.*, the offices and canteen for the use of the men employed in the construction) were required by the building owner, who is the Crown, and the contractors were obliged to provide them under the contract. That being so, I ask myself: Why should not these new buildings, now that they have come into occupation, be rated? The answer of counsel for the contractors is that had they been in the occupation of the building owner and not been the subject of a building contract, the owner would not have been liable because they were only temporary and comparatively unimportant parts of a great work (*viz.*, an aerodrome which was being constructed), and would be pulled down and taken away when the work was completed. I do not think that that is a correct proposition. We are dealing, not with a building owner who is himself constructing a large number of buildings, but with a contractor who has built and completed a large number of buildings. I fail to appreciate the argument that, because he is a building contractor and still has a great deal of work to do in other parts of the land which is the subject of the building, he should escape having to pay rates in respect of those buildings which he has completed. On that short ground I base my judgment in this case, and I agree with the result proposed by my Lord.

PRITCHARD, J.: I only desire to say that, for the reasons which have already been given, I think that the answer to the question which we are asked to answer is that the contractors are in rateable occupation of the hereditament particularised in the Case.

Case remitted with opinion of court.

Solicitors: *R. L. Mason* (for the contractors); *Gregory, Rowcliffe & Co.*, agents for *Crossman & Co.*, Thornbury (for the assessment committee and the rating authority); *Field, Roscoe & Co.*, agents for Guy H. Davis, Gloucester (for the valuation committee).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

R. *v.* BEAMON.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Pritchard, JJ.), April 26, 1948.]

Criminal Law—Sentence—Borstal detention—Consecutive sentences—Undesirability—Prevention of Crime Act, 1908 (*c.* 59), *s.* 5 (1).

It is undesirable, in the interests of the Borstal training scheme, to pass consecutive sentences of Borstal detention.

[AS TO DETENTION IN BORSTAL INSTITUTIONS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 243-247, paras. 343-348; and FOR CASES, see DIGEST, Vol. 14, pp. 480, 481, Nos. *5238-5252.*

AS TO CONSECUTIVE AND CONCURRENT SENTENCES, see HALSBURY, Hailsham Edn., Vol. 9, p. 228, para. 321; and FOR CASES, see DIGEST, Vol. 14, pp. 476, 477, Nos. *5171-5192.*]

Appeal against sentence to consecutive periods of Borstal detention. The appeal was allowed on the ground that the practice was undesirable.

Garrard for the appellant.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was before the recorder of Stoke-on-Trent on three charges of housebreaking and shopbreaking. He asked for fourteen other offences to be taken into account. According to the record of his criminal career, at 16 years of age he had been before the courts on various occasions in respect of one A hundred and two offences. The recorder confessed that he had had the greatest difficulty in knowing what to do with this boy. He has been a persistent absconder from schools where he had been put and nobody has a good word to say for him. It is one of those difficult cases in which it is almost impossible to hope that, whatever one does, the boy will reform. This, however, is the first time he has been sent to Borstal detention, and the learned recorder, thinking B it a serious case, passed consecutive sentences of 3 years each on each of the three charges. The court does not find it necessary to pronounce definitely whether those consecutive sentences are bad in law, but we have no doubt that they are undesirable because they make the scheme of Borstal training unworkable.

The Prevention of Crime Act, 1908, s. 5 (1), provides:

> Subject to regulations by the Secretary of State, the Prison Commissioners may at C any time after the expiration of six months, or, in the case of a female, three months, from the commencement of the term of detention, if satisfied that there is a reasonable probability that the offender will abstain from crime and lead a useful and industrious life, by licence permit him to be discharged from the Borstal Institution on condition that he be placed under the supervision or authority of any society or person named in the licence who may be willing to take charge of the case.

Then there are provisions for the licence being revoked. It appears, therefore, D that at the end of six months the Prison Commissioners will have to consider whether the appellant may be released on licence. Supposing they think fit to keep him for 18 months and then release him, what is to become of the other sentences? If the recorder had come to the conclusion that the appellant was so hardened and intractable a person that he was not likely to profit by instruction and discipline at Borstal and might have a bad influence on others, he could have sent him to prison, and it does not follow the court would have E interfered. In the circumstances, we express the opinion that it is not the right practice to pass consecutive sentences of Borstal detention, and in this case the sentences will be concurrent and not consecutive. *Appeal allowed.*

Solicitor: *W. T. Beswick*, Hanley (for the appellant.

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

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CONGREVE AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS.

[House of Lords (Viscount Simon, Lord Porter, Lord Simonds, Lord Normand and Lord Oaksey), April 14, 15, 16, May 13, 1948.]

Income Tax—Sur-tax—Avoidance of tax—Transfer by company the greater G *part of the share capital in which is held by taxpayer—Transfer to company resident in United Kingdom which subsequently moves abroad—"Associated operation"—Finance Act,* 1936 (*c.* 34), *s.* 18.

An individual can, within the meaning of s. 18 of the Finance Act, 1936, be said to acquire rights "by means of" a transfer of assets though the transfer is effected neither by the individual nor by his agent, but by a company, the whole or greater part of the share capital of which is held by or on behalf H of that individual.

A transfer of assets to a company, which, at the time of transfer, is neither resident nor domiciled out of the United Kingdom, but which thereafter becomes resident out of the United Kingdom and receives income from the transferred assets is, within the meaning of the same section, a transfer "by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to" a person resident out of the United Kingdom.

Alternatively, the removal abroad of one of the companies concerned is an operation in relation to the assets of each company, and, therefore, an associated operation within the section. On either ground the assessments were rightly made.

Decision of the Court of Appeal ([1947] 1 All E.R. 168), *affirmed.*

[For the Finance Act, 1936, s. 18, see HALSBURY'S STATUTES, Vol. 29, p. 230.]

Case referred to :

(1) *Howard de Walden* (*Lord*) v. *Inland Revenue Comrs.*, [1942] 1 All E.R. 287 ; [1942] 1 K.B. 389 ; 111 L.J.K.B. 273 ; 25 Tax Cas. 121 ; 2nd Digest Supp.

Appeal by the taxpayers from an order of the Court of Appeal (Scott, Tucker and Cohen, L.JJ.), dated Dec. 9, 1946, and reported [1947] 1 All E.R. 168.

Assessments to tax under the Finance Act, 1936, s. 18, as amended by the Finance Act, 1938, were made on a husband and wife, who were ordinarily resident in the United Kingdom, but domiciled abroad, in respect of income arising out of a series of tax-evading transfers between English companies and companies abroad, which resulted in the transfer of income to persons resident abroad. The transactions were entered into in order that the wife, who had a controlling interest in the companies, might escape the incidence of income tax and surtax. The Special Commissioners of Income Tax found that the wife was an individual who had by means of a transfer in conjunction with associated operations, acquired rights by virtue of which she had, within the meaning of s. 18 of the Act of 1936, power to enjoy the income covered by the assessments, which was income payable to persons resident or domiciled abroad. On appeal by way of Case Stated, Wrottesley, J., by an order dated May 16, 1946, and reported [1946] 2 All E.R. 170, where the Case Stated is set out, held (i) that it was a condition precedent to the application of the section that the transfer be made by the person striving to avoid liability to tax, and (ii) that the section did not apply to cases where the transfer was made to a company in the United Kingdom which, after the transfer, removed abroad. Wrottesley, J., therefore, allowed the appeal and remitted the Case to the commissioners to deal with it in accordance with his judgment. From this order the Crown appealed and the taxpayers cross-appealed, asking that the decision of the commissioners be reversed on all points. The Court of Appeal allowed the Crown's appeal and dismissed the taxpayers' cross-appeal and affirmed the decision of the commissioners. The House of Lords, on appeal by the taxpayers, now affirm the decision of the Court of Appeal.

Millard Tucker, K.C., and *Heyworth Talbot* for the taxpayers.

The Solicitor General (*Sir Frank Soskice, K.C.*), *J. H. Stamp* and *R. P. Hills* for the Crown.

The House took time for consideration.

May 13. **VISCOUNT SIMON :** My Lords, I have had the advantage of studying the draft of the speech which my noble and learned friend Lord Simonds is about to deliver as expressing his opinion in this complicated case. Agreeing with him as I do in the conclusion at which he arrives and in the course of reasoning which leads to this conclusion, I find myself happily relieved from expressing my own opinion independently and at much greater length. I move that the appeal be dismissed, with costs.

LORD PORTER : My Lords, I also have had an opportunity of reading the speech about to be delivered by my noble and learned friend Lord Simonds. Finding myself in complete agreement with the reasoning and the result, I have not thought it necessary to express an opinion of my own.

LORD SIMONDS : My Lords, the questions of law which your Lordships have to decide on this appeal are not difficult to state nor, as I think, are they difficult to answer, but the facts which give rise to them are of great complexity. I propose to refer only to such of them as are necessary to make intelligible the problems that have to be discussed. The whole of the facts will be found in the Case stated by the Commissioners for the Special Purposes of the Income Tax Acts on which this appeal arises.*

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* See [1946] 2 All E.R. 171.

I find it convenient, then, first to state the questions of law and I take them substantially as stated in the formal case of the taxpayers. They are concerned wholly with the true construction of s. 18 of the Finance Act, 1936, which I will next state, and they are as follows :—(1) Whether an individual can, within the meaning of that section, be said to acquire rights " by means of " a transfer of assets if the transfer is effected neither by the individual nor by his or her agent, but by a company, the whole or the greater part of the share capital of which, is held by or on behalf of that individual. In this question the stress is on the expression " by means of." (2) Whether a transfer of assets to a company, which, at the time of transfer, is neither resident nor domiciled out of the United Kingdom, but which thereafter becomes resident out of the United Kingdom and receives income from the transferred assets, is within the meaning of the same section, a transfer " by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to " a person resident out of the United Kingdom. In this question the stress is on the expression " at the time of transfer." (3) Whether the liability to tax under s. 18 in a case where assets have been transferred to a company resident out of the United Kingdom in such circumstances as to make tax exigible is measurable by reference to the whole income of that company from whatever source derived, or by reference only to the income arising from the assets transferred or from other assets representing those assets. On the first and second of these questions it is necessary to express an opinion. On the third there is, in my view, no such necessity, for in this case, with which alone your Lordships are concerned, the result is the same to the taxpayers.

These being the questions, I now state the relevant parts of the section [as amended by s. 28 (3) of the Finance Act, 1938]:

> 18. For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows :—(1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts : Provided that this subsection shall not apply if the individual shows in writing or otherwise to the satisfaction of the Special Commissioners that the transfer and any associated operations were effected mainly for some purpose other than the purpose of avoiding liability to taxation. (2) For the purposes of this section an associated operation means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets. (3) An individual shall, for the purposes of this section, be deemed to have power to enjoy income of a person resident or domiciled out of the United Kingdom if—(*a*) the income is in fact so dealt with by any person as to be calculated, at some point of time, and whether in the form of income or not, to inure for the benefit of the individual ; or (*b*) the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit ; or (*c*) the individual receives or is entitled to receive, at any time, any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income ; or (*d*) the individual has power, by means of the exercise of any power of appointment or power of revocation or otherwise, to obtain for himself, whether with or without the consent of any other person, the beneficial enjoyment of the income ; (or may, in the event of the exercise of any power vested in any other person, become entitled to the beneficial enjoyment of the income) ; or (*e*) the individual is able in any manner whatsoever, and whether directly or indirectly, to control the application of the income . . . (5) for the purposes of this section— . . . (*e*) references to assets representing any assets, income or accumulations of income include references to shares in or obligations of any company to which, or obligations of any other person to whom, those assets,

that income or those accumulations are or have been transferred . . . (7) The provisions of this section shall apply for the purposes of assessment to income tax for the year 1935-36 and subsequent years, and shall apply in relation to transfers of assets and associated operations whether carried out before or after the commencement of this Act: Provided that, for the year 1935-36, no income shall be charged to tax at the standard rate by virtue of the provisions of this section, but sur-tax shall be assessed and charged as if any income which would, but for this proviso, have been charged as aforesaid had in fact been so charged.

The proviso to sub-s. (1) has been amended by s. 28 of the Finance Act, 1938, but it is not necessary to refer to the amendment. So far as this appeal is concerned, the result is the same. It is a fact, found by the Special Commissioners and no longer disputed by the taxpayers, that the transactions to which I shall refer constituted one inter-connected series and that the avoidance of liability to taxation was the purpose or one of the purposes of the transactions within the meaning of the section.

I now turn to the relevant facts, and, before doing so, recall to your Lordships that in the preamble occurs the expression "by means of transfers of assets" and in the first line of sub-s. (1) the expression "by means of any such transfer." It is on the meaning and effect to be given to those words that the answer to the first question hangs.

The appellant taxpayers are a Mr. and Mrs. Congreve, who were married on July 30, 1935. Both of them have at all material times been ordinarily resident in England, though it appears that he is domiciled in Eire. She is the only child of Mr. A. G. Glasgow, a citizen of the United States of America, who resided in England from 1892 to 1939, when he gave up his residence in England and returned to America. She, though born in England, on coming of age confirmed, and has since retained, her American citizenship. The subject of this appeal is certain assessments to tax, in the case of Mrs. Congreve an assessment to sur-tax for the year ending Apr. 5, 1936, and in the case of Mr. Congreve assessments to sur-tax for the years ending Apr. 5, 1936, to Apr. 5, 1941, and to income tax for the years ending Apr. 5, 1937, to Apr. 5, 1941. The sums involved are very large and in every case the income assessed is income payable to companies resident out of the United Kingdom which is, according to the contention of the Crown, to be deemed, under s. 18 of the Finance Act, 1936, to be income of the taxpayers. The companies in question, with their place and date of incorporation and the short names by which they have been called in these proceedings, are tabulated below and it is convenient here to add, since it is relevant to the second question in this appeal, that Margreve, which was incorporated and at first resident in England, became a company resident out of the United Kingdom, in or about the month of October, 1937, and so also a little later did Seventy Three and Glow.

Name	Place of Incorporation	Date of Incorporation	Short Designation
Humphreys & Glasgow (Canada), Limited	Canada ..	Apr. 21, 1932	"Humphreys & Glasgow (Canada)."
Rockbridge, Limited	Canada ..	May 5, 1932	"Rockbridge."
Humglas, Limited	Canada ..	Nov. 29, 1933	"Humglas."
Margreve, Limited	England ..	Nov. 18, 1936	"Margreve."
73 Investment Trust Limited	England ..	Oct. 15, 1937	"Seventy Three"
Marglas, Limited	England ..	Oct. 18, 1937	"Marglas."
Glow Investment Trust, Limited	England ..	Nov. 29, 1937	"Glow."

It is not disputed by the taxpayers that one condition at least of liability to tax under the section is satisfied, *viz.*, that Mrs. Congreve acquired rights by virtue of which she had, within the meaning of the section, power to enjoy income payable to the companies in question. It is, to use a neutral word, the way in which she acquired those rights that is important, and I will by reference to a single case test the first question that I have stated—whether the transfer of assets, on which either alone or in conjunction with associated operations the liability is founded, must be (as the taxpayers contend) a transfer effected by Mrs. Congreve or her agent, or may be (as the Crown contends) effected by anyone, father, friend, or company in which she has an interest great or small, so long as the result is reached that she has power to enjoy the relevant income. In 1927 Mr. Glasgow, being the beneficial holder of rather more than 93,000 out of a total issued capital of 100,000 shares of £1 each in Humphreys & Glasgow, Ltd., a company incorporated in England, which I will call "Humphreys & Glasgow (England)," transferred to the International Gas Processes Corporation, a company incorporated in the State of Delaware, 60,000 of these shares in consideration of 11,116 of $100 each in the latter company, which I will call "International Gas." Shortly after he transferred 5,000 of his remaining shares in Humphreys & Glasgow (England) to Mrs. Congreve as a gift, and on Apr. 18, 1932, he transferred to her, again as a gift, his 11,116 shares in International Gas, which were, in fact, the whole of its issued capital.

I pause in the narrative to observe that at this stage the significant facts had already occurred and, had the provisions of the Finance Act, 1936, then been in force, the question now before the House would at once have become a live one. For it was Mr. Glasgow who transferred assets to what I will, for brevity, call a foreign company, and it was Mrs. Congreve who had power to enjoy the income of that company, but some years had to pass and many complicated transactions take place before the question could be raised.

As appears from the table that I have set out Humphreys & Glasgow (Canada) was incorporated in Canada on Apr. 21, 1932. Immediately after its incorporation it purchased from International Gas the 60,000 shares of Humphreys & Glasgow (England) in exchange for 995 of its 1,000 shares of no par value and £212,000 debentures. On Apr. 27, 1932, International Gas went into liquidation and distributed its assets in specie so that Mrs. Congreve became possessed of the 995 shares and £212,000 debentures of Humphreys & Glasgow (Canada). On May 1, 1932, she sold to that company her holding of 5,000 shares in Humphreys & Glasgow (England) in exchange for a further £18,000 debentures. On Mar. 23, 1936, Humphreys & Glasgow (Canada) purchased from Mr. Glasgow 28,000 shares in Humphreys & Glasgow (England). The effect of these transactions was that Humphreys & Glasgow (Canada) became the owner of 93,000 out of the 100,000 issued shares of Humphreys & Glasgow (England), while Mrs. Congreve was the beneficial owner of practically the whole of the issued share capital of Humphreys & Glasgow (Canada). On July 16, 1936, s. 18 of the Finance Act, 1936, became law. In November, 1936, Humphreys & Glasgow (Canada) applied for a surrender of its charter, and its liquidation, which then began, was completed in October, 1937, but this was but one of a further series of transactions which I need not at present discuss, for your Lordships now have all the material necessary for the determination of the first question. The income payable to Humphreys & Glasgow (Canada) during the year of assessment 1935-36 was income that Mrs. Congreve had power to enjoy. Can she escape liability on the ground that her rights did not wholly or mainly spring from a transfer of assets effected by her? She had herself transferred no more than 5,000 shares of Humphreys & Glasgow (England) to Humphreys & Glasgow (Canada), but, as the result of transfers by others and of the other operations that I have mentioned, she had power to enjoy the whole of the income of that company.

My Lords, on this question I agree at all points with the unanimous judgment of the Court of Appeal which was delivered by COHEN, L.J. The preamble or introductory words of the section which state its purpose do not, in my view, assist the contention, which was developed on its operative words, that the avoidance by an individual of liability to tax must be achieved by means of a transfer of assets effected by that individual. They are, on the contrary, in the widest possible terms, and I do not know what better words could be used if the legislature intended to define its purpose as covering a transfer of assets by A, by means of which B avoided liability to tax. When I turn to the operative words, I cannot reach any other conclusion. It was urged that in their context the words "by means of any such transfer" can mean only a transfer effected by the individual who avoids tax liability. It was said that they do not mean the same as "as a result of" or "by virtue or in consequence of " and the immediate proximity of the latter phrase was referred to as pointing the contrast. My Lords, this is altogether too fine a distinction. The difference of language is sufficiently explained by the wish of the draftsman not to use the same expression twice, but it is to my mind clear, first, that in their ordinary grammatical sense the words " by means of " do not connote any personal activity on the part of the person who is said to enjoy or suffer something by those means, and, secondly, that in their present context it is not necessary or legitimate, in order to give a limiting sense to the words, to read them as if they were followed by such words as " effected by him." It was suggested in the course of the argument that other limiting words should be written in, such as " effected by him or by his procurement," for it was reasonably apprehended that to read the section as excluding a case where an individual did not himself transfer assets but procured their transfer by another would be to ignore the substance of the legislature's intention, but I see no reason for any limiting words. The language of the section is plain. If there has been such a transfer as is mentioned in the introductory words, and if an individual has by means of such transfer (either alone or in conjunction with associated operations) acquired the rights referred to in the section, then the prescribed consequences follow. In the present case such a transfer was made, though not by Mrs. Congreve personally. She did acquire the rights in question. The assessment was, therefore, correctly made first on her and then on Mr. Congreve in her right.

I now turn to the second question, *viz.*, whether the transfer of assets, on which the liability to tax is founded, must (as the taxpayers contend) be to a person resident or domiciled out of the United Kingdom at the time of transfer or whether (as the Crown contends) it is sufficient that there should be (*a*) a transfer of assets to a person then resident within the United Kingdom and (*b*) the removal of that person to a place outside the United Kingdom and the subsequent receipt by him of income which (to put it shortly) the taxpayer has, within the meaning of the section, power to enjoy. Again I shall be selective and state no more of the facts than is necessary to illustrate this problem. It will be remembered that one among several companies which, having been incorporated and resident within the United Kingdom, afterwards became resident outside it, was Margreve, and I will take the case of this company as my text. Margreve, which was incorporated on Nov. 18, 1936, with a capital of £1,100 divided into 1,000 3 per cent. preference shares and 100 ordinary shares of £1 each, on Nov. 23, 1936, purchased from Humphreys & Glasgow (Canada) 28,000 shares in Humphreys & Glasgow (England) which it had acquired from Mr. Glasgow some months earlier. The purchase price was £93,333 6*s.* 8*d.* Thereupon Humphreys & Glasgow (Canada) went into liquidation and by way of distribution of its assets in specie transferred its remaining 65,000 shares in Humphreys & Glasgow (England) to Mrs. Congreve. She then sold 17,000 of these shares to Margreve for £56,666 13*s.* 4*d.* payable in cash and she also sold to Margreve substantial holdings of foreign investments for £232,283. On Nov. 23, 1936, the capital of Margreve was increased to £100,100 by the creation of a further 99,000 preference shares, and on Dec. 18, 1936, to £105,000 by the creation of a further 4,900 ordinary shares. Mrs. Congreve had, by Apr. 14, 1937, acquired in various amounts and at various times the whole of the preference shares of Margreve, paying a premium of £4 per share, except the two signatory shares which were held for her. She became, too, in October, 1937, the beneficial owner of 50 ordinary shares of the company. No other ordinary shares were issued. She was thus the beneficial owner of all the issued capital of the company at the date of the operations next referred to. In October, 1937, pursuant to resolutions of the company or its board of directors, as the case might be, (1) 70 debentures of £5,000 each were created, (2) the special rights and privileges of the preference shares were cancelled and such shares were converted into ordinary shares, (3) £350,000 standing to the credit of the company's share premium reserve was capitalised and a bonus of £350,000 declared and applied on behalf of Mrs. Congreve as the holder of the ordinary shares of the company in paying in full for the £350,000 debentures, certain of which she renounced in favour of a company which has been called " Seventy Three." At about the same time Margreve sold its 45,000 shares of Humphreys & Glasgow (England) to Marglas. It was thus left with no other assets than foreign shares and securities and the time was ripe for the next move. At an extraordinary general meeting of Margreve held on Oct. 25, 1937, a special resolution was passed whereby new articles of association were adopted in substitution for the existing ones, the purport and effect of which was to remove the residence of the company outside the United Kingdom. I do not pursue its history further except to say that thereafter, first in the Channel Islands, and later in the Isle of Man, it had its residence outside the United Kingdom and there received income which Mrs. Congreve had power to enjoy. It is in respect of such income that assessments have been made which are in dispute in this case.

I have already indicated what is the question that arises here. It was decided by WROTTESLEY, J., in favour of the taxpayers, but by the Court of Appeal in favour of the Crown, who support their case by two contentions, (*a*) that the section on its true construction comes into operation if and when "income arises to a person who has become resident or domiciled out of the United Kingdom after a transfer to him of assets," and (*b*) that the "removal abroad of Margreve [and other companies] was an operation in relation to the assets of each company, and, therefore, was an associated operation within the section." I take these contentions from their formal reasons. My Lords, I agree with the Court of Appeal in thinking that the Crown are clearly right in their first contention. The transfer of assets aimed at by the section is not expressed to be a transfer to a person resident or domiciled out of the United Kingdom. I should suppose that it is deliberately not so expressed, for I cannot think that so simple an expedient as the transfer of assets to a company resident in the United Kingdom and the immediate removal of that company outside it would not occur to the draftsman. For this reason the words "to persons resident or domiciled out of the United Kingdom" do not occur immediately after "transfers of assets" in the introductory words or after "any such transfer" in the operative words, but at a later stage when, the transfer having been made and other associated operations, it may be, having taken place, the question arises, in regard to any particular income, whether the taxpayer has the power to enjoy income payable to persons resident out of the United Kingdom. In my opinion, therefore, the strict grammatical meaning of the section conforms to what I should assume to be its general purpose, and I hold that in the case of Margreve, which I take as typical of those cases in which transfers were made to companies then resident in the United Kingdom, the assessments were rightly made. On this question I would add that, even if the Crown are wrong in their first contention, they are entitled to succeed on their second. For the wider scope of the definition of "associated operation" in s. 18 (2) coupled with the provisions of s. 18 (5) (*e*) satisfies me that the removal of Margreve outside the United Kingdom is an associated operation within the section.

I come to the third and last question. Here there is some confusion. The undisputed fact is that the whole of the income which has been assessed to tax and sur-tax in this case arises from assets which were transferred either by Mrs. Congreve or her father or companies which she controlled or from assets which represented those assets. Nor is it disputed by counsel for the taxpayers that, if they fail on the other questions, on this income, at least, tax is exigible. If so, that is the end of the matter, for your Lordships are concerned, not with any abstract question of law, but with the question whether particular assessments were rightly made. If and so far as the Court of Appeal has decided that the income payable to a person resident outside the United Kingdom is to be deemed to be the income of the resident taxpayer though it cannot be traced to any transferred assets, I do not think it necessary to express any view on the decision. In *Howard de Walden* v. *Inland Revenue Comrs.* (1), where the same point was discussed, the Court of Appeal expressly refrained from deciding it, saying ([1942] 1 All E.R. 287, 289): "In the present case, it is sufficient to say that the appellant is, in our opinion, chargeable in respect of the entire income of the Canadian companies, the whole of which is to be traced to the assets originally transferred to them." I say the same of the case now before the House and must decline to embark on the consideration of what appears to be at once a very difficult and an unnecessary question. It follows from the answers that I make in regard to assessments of tax in relation to typical cases that I have selected that the Court of Appeal were, in my opinion, right in varying the order of WROTTESLEY, J., and affirming the determination of the Commissioners for the Special Purposes of the Income Tax Acts. I would dismiss the appeal accordingly.

LORD NORMAND: My Lords, I concur in the opinion which has just been delivered by my noble and learned friend LORD SIMONDS.

LORD OAKSEY: My Lords, I concur.

Appeal dismissed with costs.

Solicitors: *Slaughter & May* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

OLLEY *v.* MARLBOROUGH COURT, LTD.

[KING'S BENCH DIVISION (Oliver, J.), May 5, 1948.]

Negligence—Bailee—Hotel—Residential hotel—Theft of resident's clothing from room—Key left on board in office during absence—No proper system of control.

A notice posted in all bedrooms of a residential hotel contained the following clause: "The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody. Valuables should be deposited for safe custody in a sealed package and a receipt obtained." A resident left the hotel for a few hours, and following the custom usual in the hotel, she deposited her key on a key-board in the hotel office. During her absence an unauthorised person entered the hotel, took her key, and stole several articles of clothing from her room. In an action for damages against the proprietors:—

HELD: (i) the notice, read as a whole, must be construed as referring to valuables, such as jewellery, and not to ordinary clothes.

(ii) there was clear evidence of negligence on the part of the proprietors in failing to ensure that no unauthorised person would be able to obtain possession of the key, and there was neither acceptance of the risk nor negligence on the resident's part in acquiescing in the system, and, therefore, the resident was entitled to succeed.

[AS TO WHAT IS A COMMON INN, see HALSBURY, Hailsham Edn., Vol. 18, p. 136, para. 197; and FOR CASES, see DIGEST, Vol. 29, pp. 2-4, Nos. *1-20*.]

Case referred to:

(1) *Calye's Case*, (1584), 8 Co. Rep. 32a; *sub nom. Windham & Mead's Case*, 4 Leon. 96; 29 Digest 2, *1*.

ACTION by a resident against the proprietors of a residential hotel for loss of clothing stolen from her room during her absence. The proprietors were held liable. The facts appear in the judgment.

G. G. Baker for the plaintiff.
Quass for the defendants.

OLIVER, J.: The plaintiff was a resident in the defendants' hotel from May, 1945, to February, 1947. It was what is usually known as a residential hotel, consisting of about 100 rooms. The plaintiff went out one day at about 11 a.m., and, following the usual custom in the hotel, hung up her key on a key-board in the office. On her return at about 3.30 p.m. she found that the key was not on the board and that certain articles of clothing were missing from her room. A glance at the plan of the ground floor of the hotel shows that it would be simple for anybody to walk in from the street, take a key from the key-board, go to the appropriate room, and help themselves. I am satisfied on the evidence before me that that is what happened in this case, and I find as a fact that this key was taken by an unauthorised person, a complete stranger in the hotel, and used to open the plaintiff's door and steal her possessions.

The first point I have to consider is: Is this place an inn? I have looked at the authorities, including *Calye's* case (1). The question whether a place is a common inn or not is a question of fact, and, on the facts of this case, I hold that this was not an inn within the meaning of the Innkeepers' Liability Act, 1863, s. 4. Therefore, no question arises of limitation of liability under s. 1 of that Act. The real question is: Were the defendants, who are undoubtedly under some duty to the guests at the hotel with regard to the guests' property apart from the Innkeepers' Act, bailees of her property? Have they, in the circumstances of this case, been guilty of negligence, and, if so, did that negligence bring about the loss of the plaintiff's property?

It is necessary, in the first place, to interpret cl. 1 of a notice which was affixed to the door of the plaintiff's bedroom. It is the defendants' document, and, if the meaning is in any way ambiguous, it should be interpreted against them. So far as it is material, I shall hold that to put it in a place like that was a reasonable introduction of the notice to the plaintiff and, if she did not choose to read it, that would not enable her to escape from her liability if the language of the notice applies to the present case. Clause 1 begins thus: "The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody." The word "articles," is there used in connection with the notion of handing them to the manageress for safe custody. A packet of pins, a lead pencil, a pair of pyjamas, and numerous other things are articles, but one would not expect such things to be carried down every time a guest went out to shop and handed to the management. The clause proceeds: "Valuables should be deposited for safe custody in a sealed packet and a receipt obtained." Anything more ludicrous than to apply a phrase of that sort to the articles I have mentioned would be difficult to imagine. In my view, the clause must be read as a whole, and must refer to things like diamond necklaces and not to the clothes one normally wears.

The question then arises: Has the plaintiff shown the defendants to be negligent? In my view, she has. In the case of a hotel of this nature it is clearly a bad system to have a rack of keys within easy access by anyone coming into the premises. The only safe way is to arrange for the key to be in the custody and under the protection of some trusted servant who is behind a counter and out of the reach of people coming in. Counsel for the defendants says: "That is all very well, but this lady knew all about the position of the keys, and, if it was negligent on the part of the hotel company, she was negligent in that she acquiesced in it." Whether it is put on the ground of *volenti* or plain negligence, I do not take that view. Counsel for the plaintiff gave the answer. He said: "She is a resident, and she knows that nine out of ten people there are also residents. When she accepts the invitation of the defendants to hang up her key, she does it with the impression that no one will be allowed to take it off the hook unless that person is known to some responsible servant in the hotel, a porter or receptionist who looks after the keys. She does not anticipate that a complete stranger will be allowed to come in out of the street, go into the office, take her key and pillage her room." If this matter had been properly considered it would not have been permitted, and on that ground I hold it to be negligence in law, and that that negligence brought about the loss to the plaintiff.

Judgment for the plaintiff with costs.

Solicitors: *Gardiner & Co.* (for the plaintiff); *Hair & Co.* (for the defendants).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

END OF VOLUME ONE.

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